



**BERKELEY CITY COUNCIL LAND USE, HOUSING, & ECONOMIC  
DEVELOPMENT COMMITTEE  
REGULAR MEETING**

**Thursday, February 6, 2020  
10:30 AM**

2180 Milvia Street, 6th Floor – Redwood Room

Committee Members:  
Councilmembers Ben Bartlett, Kate Harrison, and Lori Droste  
Alternate: Mayor Jesse Arreguin

**AGENDA**

**Roll Call**

**Public Comment on Non-Agenda Matters**

**Minutes for Approval**

*Draft minutes for the Committee's consideration and approval.*

**1. Minutes - November 21, 2019**

**Committee Action Items**

*The public may comment on each item listed on the agenda for action as the item is taken up. The Chair will determine the number of persons interested in speaking on each item. Up to ten (10) speakers may speak for two minutes. If there are more than ten persons interested in speaking, the Chair may limit the public comment for all speakers to one minute per speaker. Speakers are permitted to yield their time to one other speaker, however no one speaker shall have more than four minutes.*

*Following review and discussion of the items listed below, the Committee may continue an item to a future committee meeting, or refer the item to the City Council.*

**2. Election of Chairperson**

## Committee Action Items

**3. Inclusionary Units in Qualified Opportunity Zones** *(Item contains revised material)*

**From: Councilmembers Harrison, Bartlett, Davila, and Hahn**

**Referred: October 15, 2019**

**Due: March 24, 2020**

**Recommendation:**

1. Adopt an ordinance amending Berkeley Municipal Code chapter 23C.12.035 requiring onsite inclusionary units in owner-occupied developments in Qualified Opportunity Zones (QOZs).

2. Adopt a resolution establishing a similar practice for rental housing projects.

3. Refer to the Adeline Corridor Subcommittee of the Planning Commission to incorporate such a requirement into the Adeline Corridor Plan.

**Financial Implications:** See report

Contact: Kate Harrison, Councilmember, District 4, (510) 981-7140

**4. Proposed Formula Retail (Chain Store) Regulations** *(Item contains revised materials)*

**From: Councilmembers Hahn and Harrison**

**Referred: October 29, 2019**

**Due: April 7, 2020**

**Recommendation:**

1. Refer to the City Manager and Planning Commission to finalize and return to the City Council for adoption an Ordinance and related amendments to the Berkeley Municipal Code, if any, based on the Draft Formula Retail Ordinance attached hereto, to establish Formula Retail regulations for Commercial and Manufacturing Districts in the City of Berkeley.

2. Refer to the City Manager and Planning Commission to: (a) Recommend establishment of Business District boundaries and names, as provided for in Section 23E.18.030(B) of the proposed Formula Retail Ordinance, and (b) Through a process that includes public notice and input, as described in the proposed Formula Retail Ordinance, recommend for each Business District whether to allow unlimited Formula Retail, limited Formula Retail (some or all use categories allowed with a Use Permit, Neighborhood Notice, Design Review and findings) or to prohibit Formula Retail.

**Financial Implications:** See report

Contact: Sophie Hahn, Councilmember, District 5, (510) 981-7150

## Committee Action Items

5. **Discussion regarding scheduling future Small Business Listening Sessions**
  
6. **Amending B.M.C. Chapter 13.78 to Prohibit Additional Fees for Roommate Replacements and Lease Renewals and Terminations**  
**From: Mayor Arreguin and Councilmembers Harrison, Hahn, and Robinson**  
**Referred: January 27, 2020**  
**Due: June 15, 2020**  
**Recommendation:** Adopt first reading of an Ordinance to amend Berkeley Municipal Code (B.M.C.) Chapter 13.78 (Tenant Screening Fees Ordinance) to prohibit property owners from assessing additional fees on roommate replacements, lease renewals and terminations.  
**Financial Implications:** None  
Contact: Jesse Arreguin, Mayor, (510) 981-7100

## Unscheduled Items

*These items are not scheduled for discussion or action at this meeting. The Committee may schedule these items to the Action Calendar of a future Committee meeting.*

- **None**

## Items for Future Agendas

- **Discussion of items to be added to future agendas**

## Adjournment

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*Written communications addressed to the Land Use, Housing & Economic Development Committee and submitted to the City Clerk Department will be distributed to the Committee prior to the meeting.*

*This meeting will be conducted in accordance with the Brown Act, Government Code Section 54953. Members of the City Council who are not members of the standing committee may attend a standing committee meeting even if it results in a quorum being present, provided that the non-members only act as observers and do not participate in the meeting. If only one member of the Council who is not a member of the committee is present for the meeting, the member may participate in the meeting because less than a quorum of the full Council is present. Any member of the public may attend this meeting. Questions regarding this matter may be addressed to Mark Numainville, City Clerk, (510) 981-6900.*



### COMMUNICATION ACCESS INFORMATION:

This meeting is being held in a wheelchair accessible location. To request a disability-related accommodation(s) to participate in the meeting, including auxiliary aids or services, please contact the Disability Services specialist at (510) 981-6418 (V) or (510) 981-6347 (TDD) at least three business days before the meeting date. Attendees at public meetings are reminded that other attendees may be sensitive to various scents, whether natural or manufactured, in products and materials. Please help the City respect these needs.  
~~~~~

I hereby certify that the agenda for this special meeting of the Berkeley City Council was posted at the display case located near the walkway in front of the Maudelle Shirek Building, 2134 Martin Luther King Jr. Way, as well as on the City's website, on January 30, 2020.



Mark Numainville, City Clerk

## **Communications**

*Communications submitted to City Council Policy Committees are on file in the City Clerk Department at 2180 Milvia Street, 1st Floor, Berkeley, CA.*

**BERKELEY CITY COUNCIL LAND USE, HOUSING, & ECONOMIC  
DEVELOPMENT COMMITTEE  
REGULAR MEETING MINUTES**

**Thursday, November 21, 2019  
10:30 AM**

2180 Milvia Street, 1st Floor – Cypress Room

Committee Members:

Councilmembers Lori Droste, Sophie Hahn, and Ben Bartlett

**Roll Call:** 10:34 a.m. All Present

**Public Comment on Non-Agenda Matters – 2 speakers**

**Election of Chair:** Councilmember Bartlett nominated to serve as Chair.

**Action:** M/S/C (Hahn/Droste) to elect Councilmember Bartlett as Chair of the Land Use, Housing, & Economic Development Committee.

**Vote:** All Ayes.

## **Minutes for Approval**

*Draft minutes for the Committee's consideration and approval.*

### **1. Minutes - November 7, 2019**

**Action:** M/S/C (Droste/Hahn) to approve the minutes of November 7, 2019.

**Vote:** Ayes – Droste, Hahn; Noes – None; Abstain – Bartlett; Absent – None.

## **Committee Action Items**

*The public may comment on each item listed on the agenda for action as the item is taken up. The Chair will determine the number of persons interested in speaking on each item. Up to ten (10) speakers may speak for two minutes. If there are more than ten persons interested in speaking, the Chair may limit the public comment for all speakers to one minute per speaker. Speakers are permitted to yield their time to one other speaker, however no one speaker shall have more than four minutes.*

*Following review and discussion of the items listed below, the Committee may continue an item to a future committee meeting, or refer the item to the City Council.*

## Committee Action Items

2. **Spring 2019 Bi-Annual Report on Funding for Housing Programs** (*Item contains supplemental material*)

**From: Housing Advisory Commission**

**Referred: September 10, 2019**

**Due: February 18, 2020**

**Recommendation:** Accept the Housing Advisory Commission's (HAC) recommendations for the allocation of U1 General Fund revenues to increase the supply of affordable housing and protect residents of Berkeley from homelessness.

**Financial Implications:** See report

Contact: Mike Uberti, Commission Secretary, (510) 981-7400

**Action:** 3 speakers. Discussion held. The committee requested the following information from staff:

1. What are the outreach efforts of funded agencies working on anti-displacement activities?
2. Add language to contracts that requests agencies quantify and report their anti-displacement efforts and outcomes.

M/S/C (Hahn/Droste) to move the item with a positive recommendation to accept the Housing Advisory Commission's (HAC) recommendations for the allocation of U1 General Fund revenues in the format that staff presented in the Measure U1 Budget draft projections table including the following amendments: 1. Allocation of \$1M for small sites; 2. Addition of \$100K in FY 2022 and FY 2023 in organizational capacity building (BACLT); 3. Add \$150K in 2021-2023 for new programs under the category of development of new housing programs; 4. Allocate \$2.5M in 2023 for the Housing Trust Fund.

**Vote:** All Ayes.

## Committee Action Items

### 3. Disposition of City-Owned, Former Redevelopment Agency Properties at 1631 Fifth Street and 1654 Fifth Street

**From: City Manager**

**Referred: October 1, 2019**

**Due: March 10, 2020**

**Recommendation:**

1. Adopt first reading of an Ordinance authorizing the sale of two City-owned, former Redevelopment Agency properties at 1631 Fifth Street and 1654 Fifth Street at market rate and deposit the proceeds in the City's Housing Trust Fund (HTF).
2. Direct the City Manager to issue a Request for Proposals to select a real estate broker to manage the sale.

**Financial Implications:** See report

**Note:** *At the June 11, 2019 meeting, Council approved a recommendation directing the City Manager to issue a Request for Proposals to select a qualified organization to purchase the single family home at 1654 Fifth Street to operate as housing for the homeless.*

Contact: Kelly Wallace, Housing and Community Services, 981-5400

**Action:** 3 speakers. Discussion held.

M/S/C (Hahn/Droste) to move the item with a positive recommendation authorizing the sale of 1631 Fifth Street.

**Vote:** All Ayes.

### 4. Inclusionary Units in Qualified Opportunity Zones *(Item contains revised material)*

**From: Councilmembers Harrison, Bartlett, Davila, and Hahn**

**Referred: October 15, 2019**

**Due: March 24, 2020**

**Recommendation:**

1. Adopt an ordinance amending Berkeley Municipal Code chapter 23C.12.035 requiring onsite inclusionary units in owner-occupied developments in Qualified Opportunity Zones (QOZs).
2. Adopt a resolution establishing a similar practice for rental housing projects.
3. Refer to the Adeline Corridor Subcommittee of the Planning Commission to incorporate such a requirement into the Adeline Corridor Plan.

**Financial Implications:** See report

Contact: Kate Harrison, Councilmember, District 4, (510) 981-7140

Item continued to next meeting on December 5, 2019.

## Committee Action Items

**5. Proposed Formula Retail (Chain Store) Regulations** *(Item contains revised materials)*

**From: Councilmembers Hahn and Harrison**

**Referred: October 29, 2019**

**Due: April 7, 2020**

**Recommendation:**

1. Refer to the City Manager and Planning Commission to finalize and return to the City Council for adoption an Ordinance and related amendments to the Berkeley Municipal Code, if any, based on the Draft Formula Retail Ordinance attached hereto, to establish Formula Retail regulations for Commercial and Manufacturing Districts in the City of Berkeley.

2. Refer to the City Manager and Planning Commission to: (a) Recommend establishment of Business District boundaries and names, as provided for in Section 23E.18.030(B) of the proposed Formula Retail Ordinance, and (b) Through a process that includes public notice and input, as described in the proposed Formula Retail Ordinance, recommend for each Business District whether to allow unlimited Formula Retail, limited Formula Retail (some or all use categories allowed with a Use Permit, Neighborhood Notice, Design Review and findings) or to prohibit Formula Retail.

**Financial Implications:** See report

Contact: Sophie Hahn, Councilmember, District 5, (510) 981-7150

Item continued to a future meeting. Councilmember Hahn asked that the item be moved to Unscheduled until she can meet with retailers.

## Unscheduled Items

*These items are not scheduled for discussion or action at this meeting. The Committee may schedule these items to the Action Calendar of a future Committee meeting.*

- **None**

## Items for Future Agendas

- **Discussion of items to be added to future agendas**

## Adjournment

**Action:** M/S/C (Bartlett/Droste) to adjourn the meeting.

**Vote:** All Ayes.

Adjourned at 12:31 p.m.



I hereby certify that this is a true and correct record of the Land Use, Housing, & Economic Development Committee meeting held on November 21, 2019.

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April Richardson, Assistant City Clerk

### **Communications**

*Communications submitted to City Council Policy Committees are on file in the City Clerk Department at 2180 Milvia Street, 1st Floor, Berkeley, CA.*





There is no material for this item.

**City Clerk Department**  
2180 Milvia Street  
Berkeley, CA 94704  
(510) 981-6900

**The City of Berkeley Land Use, Housing, & Economic Development Policy Committee  
Webpage:**

[https://www.cityofberkeley.info/Clerk/Home/  
Policy\\_Committee\\_Land\\_Use,\\_Housing\\_Economic\\_Development.aspx](https://www.cityofberkeley.info/Clerk/Home/Policy_Committee_Land_Use,_Housing_Economic_Development.aspx)





Kate Harrison  
Councilmember District 4

ACTION CALENDAR  
October 29, 2019

To: Honorable Mayor and Members of the City Council  
 From: Councilmembers [Kate Harrison](#), [Bartlett, Davila, and Hahn](#)  
 Subject: Inclusionary Units in Qualified Opportunity Zones

RECOMMENDATION

1. Adopt an ordinance amending Berkeley Municipal Code chapter 23C.12.035 requiring onsite inclusionary units in [owner-occupied](#) developments in Qualified Opportunity Zones (QOZs)
2. [Adopt a resolution establishing a similar practice for rental housing projects.](#)
- 4-3. ~~Refer to the Adeline Corridor Subcommittee of the Planning Commission to~~ [consider how incorporate](#) such a requirement ~~would affect into~~ the Adeline Corridor Plan.

BACKGROUND

Qualified Opportunity Zones are urban areas associated with the 2017 Trump tax cuts.<sup>1</sup> The stated goal of QOZs is to incentivize investment in under-resourced urban areas by delaying capital gains taxes and circumventing altogether federal taxes on profits made in QOZs.<sup>2</sup> Ten years after an initial investment into a QOZ, the investor can sell the real estate and not owe any taxes on the profits. Investments in Qualified Opportunity Zones can increase an investor's returns by 70%, according to the Congressional Research Service.<sup>3</sup> Though touted as a way to invest in under-resourced communities, many of the QOZs are in rapidly growing areas, with 75% of the tracts experiencing significant economic growth between 2001 and 2015<sup>4</sup> and 64% of tracts seeing a significant increase in new businesses during the same period.<sup>5</sup> Also, in the Bay Area, QOZs are often in gentrifying areas, reflecting a national pattern: almost 70% of all neighborhoods

<sup>1</sup> <https://www.nytimes.com/2019/08/31/business/tax-opportunity-zones.html>

<sup>2</sup> *Ibid.*

<sup>3</sup> [https://www.novoco.com/sites/default/files/atoms/files/crs\\_tax\\_incentives\\_for\\_ozs\\_112018.pdf](https://www.novoco.com/sites/default/files/atoms/files/crs_tax_incentives_for_ozs_112018.pdf)

<sup>4</sup> <https://www.opportunityzonelaw.com/single-post/2018/07/03/Five-Keys-from-the-Novogradac-2018-Opportunity-Zones-Workshop>

<sup>5</sup> *Ibid.*

in America that gentrified between 2000 and 2017 either are in a Qualified Opportunity Zone or are adjacent to one.<sup>6</sup>

Five census tracts in Berkeley have been designated as Qualified Opportunity Zones, including Downtown, the Adeline Corridor and South Shattuck, South Berkeley between Sacramento and Shattuck, and part of West Berkeley between University and Dwight, San Pablo and 5<sup>th</sup> Street.<sup>7</sup> The five census tracts<sup>8</sup> in Berkeley are almost all low-income and predominantly Black communities and communities of color. They are as follows:

### Berkeley Opportunity Zone Demographics

Tract Number	Bordering Streets	Poverty Rate	Average Income
4232	West Berkeley between University and Dwight; San Pablo and 5 <sup>th</sup> St	19.2%	\$81,453
4229	Downtown Berkeley between University and Dwight; Oxford and MLK	47.3%	\$52,250
4235	South Berkeley between Dwight and Ashby; Fulton and MLK	20.9%	\$62,386
4239.01	Southern end of Adeline Corridor	13.9% <sup>9</sup>	\$90,882
4240.01	Southern Berkeley between Ashby and City Limits; Sacramento and Adeline	18.1%	\$60,809

### Inclusionary Housing in Berkeley

The Berkeley Housing Trust Fund (HFT) was established in 1990 to pool money from a variety of sources (including developer in-lieu fees) into a single pot for the purpose of constructing affordable housing.<sup>10</sup> From 2009<sup>11</sup> to 2017, localities were required by state law to offer project applicants the option of either building affordable units onsite or paying

<sup>6</sup> <https://ncrc.org/oz/>

<sup>7</sup> <https://opzones.ca.gov/oz-map/>

<sup>8</sup> <https://www.arcgis.com/home/item.html?id=92e085b0953348a2857d3d3dac930337#visualize>

<sup>9</sup> Please note that this poverty rate is too low to be considered a “low income census tract.”

<sup>10</sup> <https://www.cityofberkeley.info/ContentDisplay.aspx?id=6532>

<sup>11</sup> [http://www.reubenlaw.com/palmer\\_case\\_shakes\\_up\\_inclusionary\\_housing\\_rules\\_for\\_rental\\_projects/](http://www.reubenlaw.com/palmer_case_shakes_up_inclusionary_housing_rules_for_rental_projects/)

the in-lieu fee. Thus, pursuant to BMC 23C.12, all owner-occupied new projects in Berkeley with five or more units are currently required to *either* set aside 20% of their units as affordable, pay an in-lieu fee to the HFT, or some combination of both. [BMC 22.20 has similar provisions for rental housing.](#)

[This ordinance will apply only to developments with 10 or more units, which would have two or more affordable units. Managing a single affordable unit in a project is an administrative burden to City administration, and thus small projects will not be required to build the onsite unit. Small projects will still have the option to either include onsite affordable housing or pay the in-lieu fee.](#)

AB 2502 (known as the “Palmer Fix”) passed in 2017 and gives jurisdictions the authority to require onsite units instead of giving developers the option to pay an in-lieu fee. The decision to charge in-lieu fees, require inclusionary units, or leave the decision to developers is now set according to prevailing market forces and the desires of local policymakers.<sup>12</sup> [The California Supreme Court has upheld requiring affordable units as an extension of a municipality’s police powers](#)<sup>13</sup> Berkeley traditionally incentivized paying in-lieu fees, because the HTF was under-resourced and other funding sources were not available. This approach allowed construction of entirely affordable buildings by non-profits but had several drawbacks:

- Constructing affordable housing projects using in-lieu fees requires capital to be accrued over many years and results in delays in production that market-rate developers may not face.
- Building affordable units in primarily market-rate developments promotes integration of housing throughout the City.
- The state density bonus requires projects to set aside 10% of units for very low income households (at 30-50% the area median income), but there are not comparable state incentives for units affordable to low income households (earning from 50%-80% of area median income). Thus, the majority of project applicants who invoke the state density bonus build 10% of their units to be affordable to very low income households and then pay the in-lieu fee for the remaining local obligation, which would otherwise be required to be built for low-income households. According to the 2019 Housing Pipeline Report, of the 56 market-rate developments currently in the pipeline, 24 elected to utilize the density bonus and pay fees in lieu of the other 10% of affordable units and an additional 21 did not take advantage of the state density bonus and paid in-lieu fees for all or substantial proportion of the requirement. In contrast, 11 projects provided all 20% affordable units onsite. Thus, 80% (24 plus 21 out of 56) paid fees in lieu of some of the required units. Of the 23 projects listed that are now in a Qualified Opportunity Zone, 11 had no onsite affordable units, and seven took advantage of the state density bonus (see attachment 2).

<sup>12</sup> <http://inclusionaryhousing.org/designing-a-policy/off-site-development/in-lieu-fees/>

<sup>13</sup> <https://harvardlawreview.org/2016/03/california-building-industry-assn-v-city-of-san-jose/>

- As a result of these mismatched incentives, Berkeley has achieved only 15% of its low income housing target<sup>14</sup> and 65% of the target set for very low income housing.<sup>15</sup>
- Since the passage of Measure O, much more funding for non-profit built affordable housing is available. It is critical, given the displacement occurring in Berkeley, to consider requiring some on-site units instead of providing the option of in-lieu fees.

Qualified Opportunity Zones are an ideal place to begin to require inclusionary on-site units. QOZs are intended to revitalize low-income communities, and requiring units affordable to lower-income households in these zones will prevent low-income individuals from being priced out of their own communities. Developers are given significant financial benefits under Opportunity Zones, and thus can include on-site units and still realize a profit.

#### FINANCIAL IMPLICATIONS

Will reduce contributions to the Affordable Housing Trust Fund.

#### ENVIRONMENTAL SUSTAINABILITY

The Qualified Opportunity Zones in Berkeley are along major transit corridors (Shattuck, Adeline, and San Pablo). Last year, Berkeley researchers concluded that infill housing along transit corridors is one of the most impactful policies municipalities can adopt to combat climate change.<sup>16</sup>

#### CONTACT PERSON

Councilmember Kate Harrison, Council District 4, (510) 981-7140

#### ATTACHMENTS

1: [Ordinance Berkeley Municipal Code 23C.12.035](#)

2: [Resolution](#)

3: 2019 Housing Pipeline Report, highlighted with projects that are in Qualified Opportunity Zones as currently defined.

<sup>14</sup> <https://abag.ca.gov/our-work/housing/rhna-regional-housing-need-allocation>

<sup>15</sup> We see in the 2019 Housing Pipeline Report that Berkeley has achieved 65% of its Very Low Income housing goals, 15% of its Low Income housing goals, and 0% of both Extremely Low and Moderate Income goals.

<sup>16</sup> <https://rael.berkeley.edu/wp-content/uploads/2018/04/Jones-Wheeler-Kammen-700-California-Cities-Carbon-Footprint-2018.pdf>



AMENDING CHAPTER 23C.12.035 OF THE BERKELEY MUNICIPAL CODE TO  
REQUIRE ON-SITE INCLUSIONARY HOUSING UNITS IN QUALIFIED  
OPPORTUNITY ZONES

BE IT ORDAINED by the Council of the City of Berkeley as follows:

Section 1. That Berkeley Municipal Code Section 23C.12.035 is hereby amended to read as follows:

**23C.12.035 Payment of In-Lieu Fees as an Alternative to Providing Inclusionary Units within a Project**

A.

1. Applicability. As an alternative to providing inclusionary units required in an ownership project, the applicant may elect to enter in an agreement with the City to pay fees as set forth in this section, in-lieu of providing units that are not required to be provided at below market prices pursuant to Government Code Section 65915.

2. [The contents of Section 23C.12.035 are not applicable to residential housing projects of greater than 10 units in Qualified Opportunity Zones.](#)

B. Purpose. The fee shall be deposited in the City's Housing Trust Fund.

C. Amount of Fee.

1. The in-lieu fee shall be sixty two and a half percent (62.5%) of the difference between the permitted sale price for inclusionary units and the amounts for which those units are actually sold by the applicant.

2. This fee shall be calculated and collected based on the sales prices of all of the units in a project to which the inclusionary requirement applies, such that the fee as charged shall be a percentage of the difference between the actual sales price for each unit, and the sales price that would have been permitted had that unit been an inclusionary unit. The percentage shall be determined using the following formula: the number of units for which an in-lieu fee is substituted for an inclusionary unit divided by the total number of units to which the inclusionary ordinance applies, multiplied by 62.5%.

3. This fee shall only be applicable to units in a project that are counted in determining the required number of inclusionary units in a project and shall not be applicable to any units provided as a density bonus.

4. In the event that the City Manager makes a determination that an actual sales price does not reflect the fair market value of a unit, the City Manager shall propose an alternate price based on the fair market value of the unit. In the event that the developer and the City Manager cannot agree on a fair market value the City Manager shall select an appraiser to carry out an appraisal of the unit and the appraised value shall be used as the market value.

D. Calculation of Inclusionary Sales Price.

1. The allowable inclusionary sales price for the purpose of calculating the in-lieu fee pursuant to this section shall be three (3) times eighty percent (80%) of the Area Median Income (AMI) last reported as of the closing date of the sale of the unit, with the exception that if the developer has already been authorized to charge an inclusionary sale price based on development costs pursuant to Ordinance 6,790-N.S. (adopted January 27, 2004, sunsetted February 19, 2006) the allowable inclusionary sale price for the purposes of this section shall be the price permitted under that ordinance.

2. Area median income (AMI) shall be calculated in accordance with the affordability regulations established by the City Manager pursuant to Section 23C.12.090.

E. Time of Payment of Fee. The developer shall be required to pay the applicable in-lieu fee no later than the closing date of the sale of a unit as a condition of said closing.

F. Use Permit Obtained Prior to Adoption of This Section. This section shall apply to projects for which all required Permits have already been issued, as long as no units on those projects to which this section would apply have been sold. (Ord. 6946-NS § 1, 2006)

Section 2. Copies of this Ordinance shall be posted for two days prior to adoption in the display case located near the walkway in front of the Maudelle Shirek Building, 2134 Martin Luther King Jr. Way. Within 15 days of adoption, copies of this Ordinance shall be filed at each branch of the Berkeley Public Library and the title shall be published in a newspaper of general circulation.

RESOLUTION NO. ##,###-N.S.

RESOLUTION REQUIRING INCLUSIONARY AFFORDABLE UNITS IN QUALIFIED OPPORTUNITY ZONES

WHEREAS, the 2017 Tax Cuts and Jobs Act created Qualified Opportunity Zones, a tax break that is projected to increase return on investment by 70%; and

WHEREAS, five census tracts in Berkeley: 4243, 4229, 4235, 4289.01, and 4240.01, hereafter referred to as Qualified Tracts, are designated as Qualified Opportunity Zones; and

WHEREAS, these Qualified Tracts are in rapidly gentrifying areas suffering from insufficient affordable housing; and

WHEREAS, Berkeley is far below its Regional Housing Needs Allocation goals for affordable housing, having built 0% of our Extremely Low Income housing, 65% of our Very Low Income housing, 15% of our Low Income Housing, and 0% of our Moderate Income housing needs at roughly 50% through the timeframe examined; and

WHEREAS, AB 2502 grants cities and municipalities the authority to require onsite affordable units; and

WHEREAS, projects in Qualified Opportunity Zones have the financial wherewithal to build onsite affordable units and they are located in lower-income areas with the greatest need for affordable housing; and

WHEREAS, Berkeley Municipal Code 22.20.065.E gives City Council the authority to vary the in-lieu unit options for rental housing by area of the City;

NOW, THEREFORE BE IT RESOLVED that rental housing projects of 10 units or more in Qualified Tracts shall designate 20% of its units as onsite affordable units pursuant to Berkeley Municipal Code 22.20.065.C.2.



Kate Harrison  
Councilmember District 4

ACTION CALENDAR  
October 29, 2019

To: Honorable Mayor and Members of the City Council  
From: Councilmembers Kate Harrison, Sophie Hahn, Cheryl Davila,  
and Ben Bartlett  
Subject: Inclusionary Units in Qualified Opportunity Zones

RECOMMENDATION

Adopt an ordinance amending Berkeley Municipal Code chapter 23C.12.035 requiring onsite inclusionary units in developments in Qualified Opportunity Zones (QOZs). Refer to the Adeline Corridor Subcommittee of the Planning Commission to consider how such a requirement would affect the Adeline Corridor Plan.

BACKGROUND

Qualified Opportunity Zones are urban areas associated with the 2017 Trump tax cuts.<sup>1</sup> The stated goal of QOZs is to incentivize investment in under-resourced urban areas by delaying capital gains taxes and circumventing altogether federal taxes on profits made in QOZs.<sup>2</sup> Ten years after an initial investment into a QOZ, the investor can sell the real estate and not owe any taxes on the profits. Investments in Qualified Opportunity Zones can increase an investor's returns by 70%, according to the Congressional Research Service.<sup>3</sup> Though touted as a way to invest in under-resourced communities, many of the QOZs are in rapidly growing areas, with 75% of the tracts experiencing significant economic growth between 2001 and 2015<sup>4</sup> and 64% of tracts seeing a significant increase in new businesses during the same period.<sup>5</sup> Also, in the Bay Area, QOZs are often in gentrifying areas, reflecting a national pattern: almost 70% of all neighborhoods in

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<sup>1</sup> <https://www.nytimes.com/2019/08/31/business/tax-opportunity-zones.html>

<sup>2</sup> *Ibid.*

<sup>3</sup> [https://www.novoco.com/sites/default/files/atoms/files/crs\\_tax\\_incentives\\_for\\_ozs\\_112018.pdf](https://www.novoco.com/sites/default/files/atoms/files/crs_tax_incentives_for_ozs_112018.pdf)

<sup>4</sup> <https://www.opportunityzonelaw.com/single-post/2018/07/03/Five-Keys-from-the-Novogradac-2018-Opportunity-Zones-Workshop>

<sup>5</sup> *Ibid.*

America that gentrified between 2000 and 2017 either are in a Qualified Opportunity Zone or are adjacent to one.<sup>6</sup>

Five census tracts in Berkeley have been designated as Qualified Opportunity Zones, including Downtown, the Adeline Corridor and South Shattuck, South Berkeley between Sacramento and Shattuck, and part of West Berkeley between University and Dwight, San Pablo and 5<sup>th</sup> Street.<sup>7</sup> The five census tracts<sup>8</sup> in Berkeley are almost all low-income and predominantly Black communities and communities of color. They are as follows:

### Berkeley Opportunity Zone Demographics

Tract Number	Bordering Streets	Poverty Rate	Average Income
4232	West Berkeley between University and Dwight; San Pablo and 5 <sup>th</sup> St	19.2%	\$81,453
4229	Downtown Berkeley between University and Dwight; Oxford and MLK	47.3%	\$52,250
4235	South Berkeley between Dwight and Ashby; Fulton and MLK	20.9%	\$62,386
4239.01	Southern end of Adeline Corridor	13.9% <sup>9</sup>	\$90,882
4240.01	Southern Berkeley between Ashby and City Limits; Sacramento and Adeline	18.1%	\$60,809

### Inclusionary Housing in Berkeley

The Berkeley Housing Trust Fund (HFT) was established in 1990 to pool money from a variety of sources (including developer in-lieu fees) into a single pot for the purpose of constructing affordable housing.<sup>10</sup> From 2009<sup>11</sup> to 2017, localities were required by state law to offer project applicants the option of either building affordable units onsite or paying

<sup>6</sup> <https://ncrc.org/oz/>

<sup>7</sup> <https://opzones.ca.gov/oz-map/>

<sup>8</sup> <https://www.arcgis.com/home/item.html?id=92e085b0953348a2857d3d3dac930337#visualize>

<sup>9</sup> Please note that this poverty rate is too low to be considered a “low income census tract.”

<sup>10</sup> <https://www.cityofberkeley.info/ContentDisplay.aspx?id=6532>

<sup>11</sup> [http://www.reubenlaw.com/palmer\\_case\\_shakes\\_up\\_inclusionary\\_housing\\_rules\\_for\\_rental\\_projects/](http://www.reubenlaw.com/palmer_case_shakes_up_inclusionary_housing_rules_for_rental_projects/)

the in-lieu fee. Thus, pursuant to BMC 23C.12, all new projects in Berkeley with five or more units are currently required to *either* set aside 20% of their units as affordable, pay an in-lieu fee to the HFT, or some combination of both.

AB 2502 (known as the “Palmer Fix”) passed in 2017 and gives jurisdictions the authority to require onsite units instead of giving developers the option to pay an in-lieu fee. The decision to charge in-lieu fees, require inclusionary units, or leave the decision to developers is now set according to prevailing market forces and the desires of local policymakers.<sup>12</sup> Berkeley traditionally incentivized paying in-lieu fees, because the HTF was under-resourced and other funding sources were not available. This approach allowed construction of entirely affordable buildings by non-profits but had several drawbacks:

- Constructing affordable housing projects using in-lieu fees requires capital to be accrued over many years and results in delays in production that market-rate developers may not face.
- Building affordable units in primarily market-rate developments promotes integration of housing throughout the City.
- The state density bonus requires projects to set aside 10% of units for very low income households (at 30-50% the area median income), but there are not comparable state incentives for units affordable to low income households (earning from 50%-80% of area median income). Thus, the majority of project applicants who invoke the state density bonus build 10% of their units to be affordable to very low income households and then pay the in-lieu fee for the remaining local obligation, which would otherwise be required to be built for low-income households. According to the 2019 Housing Pipeline Report, of the 56 market-rate developments currently in the pipeline, 24 elected to utilize the density bonus and pay fees in lieu of the other 10% of affordable units and an additional 21 did not take advantage of the state density bonus and paid in-lieu fees for all or substantial proportion of the requirement. In contrast, 11 projects provided all 20% affordable units onsite. Thus, 80% (24 plus 21 out of 56) paid fees in lieu of some of the required units. Of the 23 projects listed that are now in a Qualified Opportunity Zone, 11 had no onsite affordable units, and seven took advantage of the state density bonus (see attachment 2).
- As a result of these mismatched incentives, Berkeley has achieved only 15% of its low income housing target<sup>13</sup> and 65% of the target set for very low income housing.<sup>14</sup>

<sup>12</sup> <http://inclusionaryhousing.org/designing-a-policy/off-site-development/in-lieu-fees/>

<sup>13</sup> <https://abag.ca.gov/our-work/housing/rhna-regional-housing-need-allocation>

<sup>14</sup> We see in the 2019 Housing Pipeline Report that Berkeley has achieved 65% of its Very Low Income housing goals, 15% of its Low Income housing goals, and 0% of both Extremely Low and Moderate Income goals.

- Since the passage of Measure O, much more funding for non-profit built affordable housing is available. It is critical, given the displacement occurring in Berkeley, to consider requiring some on-site units instead of providing the option of in-lieu fees.

Qualified Opportunity Zones are an ideal place to begin to require inclusionary on-site units. QOZs are intended to revitalize low-income communities, and requiring units affordable to lower-income households in these zones will prevent low-income individuals from being priced out of their own communities. Developers are given significant financial benefits under Opportunity Zones, and thus can include on-site units and still realize a profit.

#### FINANCIAL IMPLICATIONS

Will reduce contributions to the Affordable Housing Trust Fund.

#### ENVIRONMENTAL SUSTAINABILITY

The Qualified Opportunity Zones in Berkeley are along major transit corridors (Shattuck, Adeline, and San Pablo). Last year, Berkeley researchers concluded that infill housing along transit corridors is one of the most impactful policies municipalities can adopt to combat climate change.<sup>15</sup>

#### CONTACT PERSON

Councilmember Kate Harrison, Council District 4, (510) 981-7140

#### ATTACHMENTS

- 1: Ordinance
- 2: 2019 Housing Pipeline Report, highlighted with projects that are in Qualified Opportunity Zones as currently defined.

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<sup>15</sup> <https://rael.berkeley.edu/wp-content/uploads/2018/04/Jones-Wheeler-Kammen-700-California-Cities-Carbon-Footprint-2018.pdf>

AMENDING CHAPTER 23C.12.035 OF THE BERKELEY MUNICIPAL CODE TO  
REQUIRE ON-SITE INCLUSIONARY HOUSING UNITS IN QUALIFIED  
OPPORTUNITY ZONES

BE IT ORDAINED by the Council of the City of Berkeley as follows:

Section 1. That Berkeley Municipal Code Section 23C.12.035 is hereby amended to read as follows:

**23C.12.035 Payment of In-Lieu Fees as an Alternative to Providing Inclusionary Units within a Project**

A.

1. Applicability. As an alternative to providing inclusionary units required in an ownership project, the applicant may elect to enter in an agreement with the City to pay fees as set forth in this section, in-lieu of providing units that are not required to be provided at below market prices pursuant to Government Code Section 65915.

2. The contents of Section 23C.12.035 are not applicable to residential housing projects in Qualified Opportunity Zones

B. Purpose. The fee shall be deposited in the City's Housing Trust Fund.

C. Amount of Fee.

1. The in-lieu fee shall be sixty two and a half percent (62.5%) of the difference between the permitted sale price for inclusionary units and the amounts for which those units are actually sold by the applicant.

2. This fee shall be calculated and collected based on the sales prices of all of the units in a project to which the inclusionary requirement applies, such that the fee as charged shall be a percentage of the difference between the actual sales price for each unit, and the sales price that would have been permitted had that unit been an inclusionary unit. The percentage shall be determined using the following formula: the number of units for which an in-lieu fee is substituted for an inclusionary unit divided by the total number of units to which the inclusionary ordinance applies, multiplied by 62.5%.

3. This fee shall only be applicable to units in a project that are counted in determining the required number of inclusionary units in a project and shall not be applicable to any units provided as a density bonus.

4. In the event that the City Manager makes a determination that an actual sales price does not reflect the fair market value of a unit, the City Manager shall propose an alternate price based on the fair market value of the unit. In the event that the developer and the City Manager cannot agree on a fair market value the City Manager shall select an appraiser to carry out an appraisal of the unit and the appraised value shall be used as the market value.



D. Calculation of Inclusionary Sales Price.

1. The allowable inclusionary sales price for the purpose of calculating the in-lieu fee pursuant to this section shall be three (3) times eighty percent (80%) of the Area Median Income (AMI) last reported as of the closing date of the sale of the unit, with the exception that if the developer has already been authorized to charge an inclusionary sale price based on development costs pursuant to Ordinance 6,790-N.S. (adopted January 27, 2004, sunsetted February 19, 2006) the allowable inclusionary sale price for the purposes of this section shall be the price permitted under that ordinance.

2. Area median income (AMI) shall be calculated in accordance with the affordability regulations established by the City Manager pursuant to Section 23C.12.090.

E. Time of Payment of Fee. The developer shall be required to pay the applicable in-lieu fee no later than the closing date of the sale of a unit as a condition of said closing.

F. Use Permit Obtained Prior to Adoption of This Section. This section shall apply to projects for which all required Permits have already been issued, as long as no units on those projects to which this section would apply have been sold. (Ord. 6946-NS § 1, 2006)

Section 2. Copies of this Ordinance shall be posted for two days prior to adoption in the display case located near the walkway in front of the Maudelle Shirek Building, 2134 Martin Luther King Jr. Way. Within 15 days of adoption, copies of this Ordinance shall be filed at each branch of the Berkeley Public Library and the title shall be published in a newspaper of general circulation.

Table 2 - Approved projects with more than 5 units: No Active Building Permit.															
#	Street Name	Zoning	Ext Low <30% AMI	VLI 31%-50% AMI	LI 51%-80% AMI	MOD 81-120% AMI	BMR Total	Above MOD	Total Units	Entitlement Year	By:	Building Permit Applied For?	Subtotals		
2009	Addison	C-DMU					0	44	44	2018/2019	ZAB	No	Units in Approved projects, no BP yet applied for: <b>1,289</b>		
2902	Adeline	C-SA & R-4		4	4	1	9	41	50	2017	Council				
3051	Adeline	C-SA		0	0	0	0	11	11	2016	ZAB				
2028	Bancroft	C-DMU		2			2	35	37	2019	ZAB				
2012	Berkeley Way	C-DMU	53	54	17		124	1	125	2018	SB35				
2211	Harold	C-DMU		0	0	0	0	302	302	2015	Council				
1601	Oxford	R-3		13	21	0	34	3	37	2018	SB35				
1200	San Pablo	C-W		5			5	52	57	2018	ZAB				
1201	San Pablo	C-W		0	0	5	5	22	27	2006	Council				
1740	San Pablo	C-W		4			4	48	52	2018	ZAB				
2100	San Pablo	C-W		0	0	0	0	96	96	2017/2019	ZAB				
2198	San Pablo	C-W		5			5	52	57	2019	ZAB				
2720	San Pablo	C-W		0	3	0	3	15	18	2007	ZAB				
2190	Shattuck	C-DMU		0	0	0	0	274	274	2019	Council				
2701	Shattuck	C-SA		0	0	4	4	20	24	2007	Council				
3000	Shattuck	C-SA		2	2	0	4	19	23	2018	Council				
1040	University	C-W & R-3		27	0	0	27	0	27	2012	ZAB				
1717	University	C-1		3	0	0	3	25	28	2017	ZAB				
2072	Addison	C-DMU					0	55	55	2018/2019	ZAB			10/26/18	Units in Approved projects, BP applied for: <b>284</b>
2542	Durant	C-T		0	0	0	0	32	32	2018	ZAB			4/4/19	
2527	San Pablo	C-W		6	5	0	11	57	68	2018	Council	8/17/18			
3020	San Pablo	C-W		2	2	0	4	25	29	2007	ZAB	2/11/15			
2628	Shattuck	C-SA					0	78	78	2019	ZAB	5/9/19			
2556	Telegraph	C-T					0	22	22	2018	ZAB	12/19/18			
<b>Totals:</b>			<b>53</b>	<b>127</b>	<b>54</b>	<b>10</b>	<b>244</b>	<b>1,329</b>	<b>1,573</b>						

Table 3 – Approved projects with more than 5 units: Building permit issued.

#	Street Name	Zoning	VLI 31%-50% AMI	LI 51%-80% AMI	MOD 81-120% AMI	BMR Total	Above MOD	Total Units	Entitlement Year	By:	Building Permit Issued	Est. Completion Date
1950	Addison	C-DMU	5	0	0	5	106	111	2016	ZAB	11/17/17	2019
2126	Bancroft	C-DMU	5	0	0	5	45	50	2016	ZAB	11/6/17	2019
2580	Bancroft	C-T	11			11	111	122	2018	ZAB	5/21/19	2020
2035	Blake	C-SA	4	0	0	4	78	82	2016	Council	8/10/17	2020
739	Channing	MU-R				0	10	10	2018	ZAB	6/12/18	Unknown
2510	Channing	C-T	3			3	37	40	2018	ZAB	4/5/18	2020
2631	Durant	R-SMU	0	0	0	0	56	56	2016	Council	12/1/17	2020
1500	San Pablo	C-W & R-1A	16	0	0	16	154	170	2016	Council	12/21/17	2020
2747	San Pablo	C-W	3	3	0	6	33	39	2007	ZAB	8/18/17	2020
2748	San Pablo	C-W	23	0	0	23	0	23	2014	ZAB	5/17/18	2019
2539	Telegraph	C-T	6	0	0	6	64	70	2016	ZAB	10/20/17	2019
2597	Telegraph	C-T & R-2	1	0	0	1	9	10	2017	Council	8/9/18	2020
1698	University	C-1	3	0	0	3	33	36	2014	ZAB	10/19/18	2020
2067	University	C-DMU	4	0	0	4	46	50	2016	ZAB	10/10/18	2020
2111	University	C-DMU	6	0	0	6	62	68	2013	ZAB	6/27/18	2020
2131	University	C-DMU	2	0	0	2	19	21	2013	ZAB	6/27/18	2020
2145	University	C-DMU	3	0	0	3	33	36	2013	ZAB	6/27/18	2020
1900	Walnut	C-DMU	7	0	0	7	73	80	2013	ZAB	6/27/18	2020
<b>Totals:</b>			<b>102</b>	<b>3</b>	<b>0</b>	<b>105</b>	<b>969</b>	<b>1,074</b>				

Table 4 – Approved projects with more than 5 units: Building Permit Issued after 2014 and now occupied.												
#	Street Name	Zoning	VLI 31%-50% AMI	LI 51%-80% AMI	MOD 81-120% AMI	BMR Total	Above MOD	Total Units	Entitlement Year	By:	Building Permit Issued	Complete Date
1935	Addison	C-DMU	0	0	0	0	69	69	2013	Council	10/17/14	5/26/17
2002	Addison	C-DMU	0	0	0	0	6	6	2016	ZAB	2/1/18	8/28/18
2024	Durant	C-DMU	0	0	0	0	78	78	2013	Council	7/8/14	12/7/15
2526	Durant	C-T	0	0	0	0	44	44	2014	ZAB	2/18/14	6/30/17
2532	Durant	C-T	0	0	0	0	7	7	2016	ZAB	6/23/17	1/30/19
2107	Dwight	C-DMU	9	0	0	9	90	99	2012	ZAB	12/1/17	3/24/17
2201	Dwight	R-S	7	0	0	7	70	77	2013	ZAB	6/3/15	11/17/16
2227	Dwight	R-3	0	0	0	0	6	6	2013	Council	9/7/15	5/25/18
2001	Fourth	C-W	12	0	0	12	140	152	2014	ZAB	4/1/16	7/31/18
2441	Haste	C-T	0	0	0	0	42	42	2013	ZAB	5/7/14	6/27/16
3132	MLK	C-SA	0	41	0	41	1	42	2007	ZAB	11/20/15	12/7/17
3015	San Pablo	C-W	8	7	0	15	83	98	2007	Council	3/19/14	2/16/16
2598	Shattuck	C-SA & R-2A	4	3	0	7	25	32	2014	Council	5/1/15	5/31/17
2600	Shattuck	C-SA & R-2A	12	12	0	24	99	123	2014	Council	1/1/14	3/17/17
2711	Shattuck	C-SA	0	0	0	0	18	18	2016	ZAB	9/6/17	9/1/18
800	University	C-W	4	0	0	4	54	58	2013	ZAB	7/15/14	12/2/15
824	University	C-W	4	0	0	4	44	48	2015	ZAB	8/20/15	2/6/18
1812	University	C-1	4	0	0	4	40	44	2014	ZAB	6/25/15	3/7/17
1974	University	C-DMU	8	0	0	8	90	98	2014	ZAB	9/29/15	10/3/17
<b>Totals:</b>			<b>72</b>	<b>63</b>	<b>0</b>	<b>135</b>	<b>1,006</b>	<b>1,141</b>				



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## **SUPPLEMENTAL AGENDA MATERIAL for Supplemental Packet 1**

**Meeting Date:**           **October 29, 2019**

**Item Number:**           **34**

**Item Description:**      **Proposed Formula Retail (Chain Store) Regulations**

**Submitted by:**           **Councilmember Sophie Hahn**

- Add Councilmember Kate Harrison as a Co-Sponsor
- Add New Section, “Policy Committee Track”, and designate referral of this item to the [Land Use, Housing & Economic Development Policy Committee](#)
- Minor, non-substantive edits throughout report



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**ACTION CALENDAR**  
October 29, 2019

To: Honorable Members of the City Council  
From: Councilmembers Sophie Hahn and Kate Harrison  
Subject: Proposed Formula Retail (Chain Store) Regulations

**RECOMMENDATION**

1. Refer to the City Manager and Planning Commission to finalize and return to the City Council for adoption an Ordinance and related amendments to the Berkeley Municipal Code, if any, based on the Draft Formula Retail Ordinance attached hereto, to establish Formula Retail regulations for Commercial and Manufacturing Districts in the City of Berkeley.
2. Refer to the City Manager and Planning Commission to:
  - a. Recommend establishment of Business District boundaries and names, as provided for in Section 23E.18.030(B) of the proposed Formula Retail Ordinance, and
  - b. Through a process that includes public notice and input, as described in the proposed Formula Retail Ordinance, recommend for each Business District whether to allow unlimited Formula Retail, limited Formula Retail (some or all use categories allowed with a Use Permit, Neighborhood Notice, Design Review and findings) or to prohibit Formula Retail.

**POLICY COMMITTEE TRACK**  
Land Use, Housing & Economic Development Policy Committee

**SUMMARY STATEMENT**

Small businesses are the backbone of Berkeley’s economic health, and represent a significant portion of our living-wage jobs. Unfortunately, they are threatened by increasing costs, displacement, and growing competition from online stores and chain retailers. Though chain or “Formula Retail” establishments have an important role in the mix of businesses operating in Berkeley, an oversaturation of Formula Retail can negatively impacts the local character of

business districts and makes it more difficult for small businesses to become established, to survive, and to thrive.

Berkeley can strengthen protections for small, local and diverse businesses by limiting the number and location of Formula Retail uses in each-certain business districts. Formula Retail restrictions, in place in San Francisco for over 15 years and operative in other California cities that value local business and character, are simple and flexible, and tailored to meet the unique needs, values and sensibilities of each business district.

Formula Retail restrictions establish a definition of Formula Retail and then determine, on a business district by business district basis, whether the district will allow an unlimited amount of Formula Retail; limited Formula Retail; Formula Retail only under specified conditions; or whether a business district will prohibit Formula Retail entirely. Where Formula Retail is limited or allowed only under specified conditions, a Use Permit to establish a Formula Retail Use is required. In districts where no Formula Retail is allowed, or where unlimited Formula Retail is allowed, a Formula Retail Use Permit is not required. Businesses that do not meet the definition of Formula Retail -- smaller and local businesses, including small local chains with up to 20 outlets -- have no new requirements under the regulations.

San Francisco's Formula Retail Ordinance is an excellent model for Berkeley to adapt and carefully tailor to fit Berkeley's specific qualities and needs and follow. It has been in place for more than 15 years, and was the subject of a comprehensive evaluation, which resulted in a revised -- and improved -- regulatory framework. This item proposes that the City of Berkeley implement Formula Retail legislation, patterned after San Francisco, to limit saturation of Formula Retail, support small and local businesses, and preserve the character and quality of our business districts and neighborhood shopping areas.

## **BACKGROUND**

Berkeley's unique character is owed in large part to the presence of small businesses, and these businesses contribute significantly to the economic and cultural vitality of the City. However, small and locally owned businesses face significant challenges due to increasing costs of doing business, constraints of available space, and growing competition from online stores and expanding chain retailers.

### **Challenges Facing Small and Local Businesses**

A basic challenge that many small and local businesses face is finding an affordable location. Commercial rents throughout the Bay Area, including in Berkeley, have risen dramatically in recent years. One estimate found that between 2016 and 2018 office rents in Berkeley increased 15% to 20%.<sup>1</sup> Small businesses are much less likely than chain stores to be able to afford high initial rents when finding new space or to endure annual rent increases, while chain stores are well-equipped to negotiate better rents or afford higher ones. Berkeley's rent

<sup>1</sup> [https://www.cityofberkeley.info/uploadedFiles/Manager/Economic\\_Development/2017-01-16%20WS%20Item%2001%20Economic%20Development%20Worksession.pdf](https://www.cityofberkeley.info/uploadedFiles/Manager/Economic_Development/2017-01-16%20WS%20Item%2001%20Economic%20Development%20Worksession.pdf)

stabilization ordinance, which protects and regulates residential rents, does not apply to commercial property as commercial rent control is prohibited by the State.

Some small businesses also struggle to find appropriately-sized store-fronts. In the Bay Area, 80% of local, independent businesses occupy locations smaller than 3,000 square feet, while 85% of chain retailers occupy a space larger than 3,000 square feet.<sup>2</sup> As demand for small commercial space has increased in urban neighborhoods, supply has not kept pace. In addition, once a space has been occupied by a chain store, or several spaces have been combined for a chain store, and the space has been changed to suit larger-scale needs, it is less likely that a smaller retailer will be able to occupy the space in the future. Thus, storefronts that have been occupied by chain stores can prohibit small businesses from taking hold, even when a property is vacant.

Because most many existing commercial spaces in neighborhood commercial districts are small, the proliferation of larger-floorplate uses -- whether through the combination of existing spaces or construction of new buildings -- not only displaces existing neighborhood businesses but can permanently destroy-change the character and scale of the district.

With the benefits of global supply chains, public subsidies, and, often, reduced competition, chain and online stores are often able to undercut small and independent businesses. A study of West Side Chicago businesses found that the opening of a Walmart in 2006:

*"led to the closure of about one-quarter of the businesses within a four-mile radius [...] By the second year, 82 of the businesses had closed. Businesses within close proximity of Walmart had a 40 percent chance of closing. The probability of going out of business fell 6 percent with each mile away from Walmart."<sup>3</sup>*

This data suggests that large chain retailers negatively impact surrounding businesses because they undercut prices. However these reduced prices do not last for long:

*"Once the chain has eliminated the local competition, prices tend to rise. In Virginia, a survey of several Walmart stores statewide found prices varied by as much as 25 percent. The researchers concluded that prices rose in markets where the retailer faced little competition. A similar conclusion was reached in a survey of Home Depot. Prices were as much as 10 percent higher in Atlanta compared to the more competitive market in Greensboro, North Carolina."<sup>4</sup>*

Local independent businesses are also threatened by online platforms and online marketing by

<sup>2</sup> <https://ilsr.org/watch-san-franciscos-anmarie-rodgers-on-how-the-citys-formula-business-policy-works/>

<sup>3</sup> <http://journals.sagepub.com/doi/abs/10.1177/0891242412457985>

<sup>4</sup> Elizabeth Humstone and Thomas Muller, "Impact of Wal-Mart on Northwestern Vermont," prepared for the Preservation Trust of Vermont, the Vermont Natural Resources Council, and Williston Citizens for Responsible Growth, 1995; Chris Rouch, "Home Depot using predatory pricing tactics, critics say," *Atlanta Journal & Constitution*, March 18, 1995, p. 1B.



chain retailers. For example, one study showed that 55% of online shoppers search for products directly on Amazon, bypassing search engines that may show local results. This means a local retailer wishing to sell its products and services online can easily potentially be undercut and driven out of business, even if demand for their products persists in their community. In part due to market consolidation, the number of new businesses launched each year has fallen by nearly two-thirds in recent decades. Between 2005 and 2015, the number of small retailers fell by 21%.

Large chains and online retailers are able to absorb costs and suffer losses where small and local businesses cannot. Amazon, as an extreme example, can regularly undercut other online prices for extended periods of time to drive out competition, even if it means taking a temporary loss on those items; monopoly pricing on other items is a more than adequate offset. By contrast, small businesses often run on razor-thin margins, lack the necessary financial and structural cushions to survive even a few months' downturn in sales or rise in rent, and cannot match anti-competitive pricing at below cost levels.

### **Benefits of Small and Local Businesses**

Small and locally-owned businesses provide numerous benefits to the communities they serve through the creation of locally-owned supply chains and investment in local employees. In fact, they stimulate local economies to a greater degree than chains. Small businesses reinvest a higher percentage of their profits into the local economy than chains, recirculating 45% of their revenue back into the local economy, compared to 17% recirculated locally by chain stores.<sup>5</sup> A study in Austin, Texas, showed that independent book and music stores returned more than three times as many dollars to the local economy than a proposed large chain book and music outlet would have returned.<sup>6</sup>

Local businesses tend to purchase goods and services from other local businesses, while large chains leverage global supply chains and sometimes even global workforces. Chains have little reason to invest capital in a local economy when more profitable alternatives exist elsewhere, which leads to a lower percentage of their revenue recirculating into the local economy.<sup>7</sup>

Besides contributing to local economic activity, the presence of small and locally-owned businesses results in higher incomes and lower levels of poverty in their communities, while big-box retailers depress wages and benefits for retail employees. Workers in chain retailers also rely more heavily on government subsidies and public assistance, due to the low wages they receive. In Massachusetts, a report showed that of the 50 companies that had the most employees enrolled in the state's low-income and safety net health insurance programs, about half were employees of retail and restaurant chains.<sup>8</sup>

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<http://nebula.wsimg.com/31f003d5633c543438ef0a5ca8e8289f?AccessKeyId=8E410A17553441C49302&disposition=0&alloworigin=1>

<sup>6</sup> <https://www.amiba.net/resources/multiplier-effect/>

<sup>7</sup> [http://www.independentwestand.org/wp-content/uploads/ThinkingOutsidetheBox\\_1.pdf](http://www.independentwestand.org/wp-content/uploads/ThinkingOutsidetheBox_1.pdf)

8

<http://ilsr.org/wp-content/uploads/2011/12/massachusetts-50-plus-employers.pdf>

Beyond economic factors, small and locally-owned businesses also contribute to vibrant and engaged commercial centers and neighborhoods. High concentrations of small businesses can lead to improved public health outcomes,<sup>9</sup> stronger social ties, higher levels of civic engagement, and more resilient communities overall.<sup>10</sup> Data from three major cities (San Francisco, Seattle, and Washington D.C.) showed that commercial districts within cities with fewer chain stores and more local businesses performed better in certain economic, social, and environmental outcomes, by increasing the walk and transit score of the city, offering business districts that are more affordable and flexible to a larger variety of entrepreneurs, and helping the local economy thrive by providing more jobs per square foot.<sup>11,12</sup>

### What is Formula Retail?

Formula retailers -- chain stores -- are establishments with multiple locations that utilize standardized features or a recognizable appearance to encourage patronage. Recognition is dependent upon the repetition of characteristics of one store in multiple locations. Though formula retailers can serve a role within a shopping district, an oversaturation of formula retail outlets reduces the unique character of a district and can contribute to reduced economic activity overall, and make it more difficult for small businesses to survive. Moreover, the generic quality of formula retail runs contrary to General Plan and other Berkeley policies which support enhancement of the unique character of shopping districts and a diversity of business types.

### Regulating Formula Retail

Communities across the country have employed different strategies to address **problems** **challenges** raised by over-concentration of formula retail. Formula retail legislation typically seeks to define the following factors:

- Number of worldwide locations a retailer must have to qualify as a “formula retailer”
- Characteristics that create a recognizable brand across multiple locations, including standardized features, employee uniforms, products, displays, or signage
- Types of retail uses or services that are subject to formula retail legislation and districts where formula retail is limited or prohibited, and
- Administrative process for prohibiting, managing, or modifying formula retail across the community or in specific districts.

### San Francisco’s Formula Retail Framework

<sup>9</sup> “The Health and Wealth of US Counties: How the Small Business Environment Impacts Alternative Measures of Development,” Troy C. Blanchard, et al., *Cambridge Journal of Regions, Economy, and Society*, 2011

<sup>10</sup> <https://ilsr.org/why-care-about-independent-locally-owned-businesses/>

<sup>11</sup>

<http://forum.savingplaces.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=b73e8fc7-7fb2-0fc7-202c-d0ed58ff3089&forceDialog=0>

<sup>12</sup> <https://www.frbatlanta.org/community-development/publications/discussion-papers/2013/01-do-local-business-ownership-size-matter-for-local-economic-well-being-2013-08-19.aspx>

Of the many communities that have implemented a formula retail ordinance, San Francisco has most fully articulated these principles in crafting its policies. Because of the significant resources San Francisco has committed to formula retail regulation, and the length of time regulations have been in place, its regulatory framework has been subject to improvements over time, and provides an excellent a sound model for Berkeley to adapt and carefully tailor to fit Berkeley's specific qualities and needs and follow.

In 2004, San Francisco first enacted legislation to regulate formula retail. The ordinance was revised in 2014, reflecting recommendations outlined in a study of the first ten years of the policy.<sup>13</sup> The ordinance remains in force, and is an effective deterrent against a proliferation of chain stores. Thanks in part to its formula retail policies, San Francisco has more independent businesses and fewer chains per capita than other big cities.<sup>14</sup>

The San Francisco ordinance establishes a conditional use application process for any retail store or restaurant that meets the definition of formula retail. A formula retailer is defined as:

*“a type of retail sales activity or retail sales establishment that has eleven or more other retail sales establishments in operation, or with local land use or permit entitlements already approved, located anywhere in the world. In addition to the **eleven or more** other retail sales establishments located in the World, maintains two or more of the following features: a **standardized** array of **merchandise**, a standardized **facade**, a standardized **decor and color scheme**, a uniform **apparel**, standardized **signage**, a trademark or a servicemark.” (SF Planning Code, § 303.1)*

In certain districts, formula retail is unrestricted (e.g., the downtown district) or entirely disallowed (e.g., North Beach, parts of Chinatown). In most of San Francisco, including the city's Neighborhood Commercial Districts, formula retail is allowed through a conditional use process in which the business application is reviewed by the SF Planning Commission, discussed at a public hearing, and approved (or denied) on a case-by-case basis. Each application is evaluated based on a number of factors:

- Existing concentration of formula retail businesses within the neighborhood
- Availability of similar goods or services within the area
- Compatibility of the proposed business with the character of the neighborhood (including aesthetic features)
- Retail vacancy rates in the area, and
- The balance of neighborhood-serving versus citywide or regional-serving businesses.<sup>15</sup>

<sup>13</sup> [http://208.121.200.84/ftp/files/legislative\\_changes/form\\_retail/Final\\_Formula\\_Retail\\_Report\\_06-06-14.pdf](http://208.121.200.84/ftp/files/legislative_changes/form_retail/Final_Formula_Retail_Report_06-06-14.pdf)

<sup>14</sup> <https://ilsr.org/rule/formula-business-restrictions/2321-2/>

<sup>15</sup> <https://ilsr.org/rule/formula-business-restrictions/2321-2/>

This process allows the SF Planning Commission to exercise discretion and respond to on a case-by-case basis to each business district's unique character and mix of businesses. By limiting formula retail, rents have remained lower in some districts, reducing costs for independent retailers.<sup>16</sup> San Francisco's conditional use permits allow the City to require formula retailers to have pedestrian friendly designs, aesthetics that do not detract from local character, and meet other aesthetic standards.<sup>17</sup> Of the applications submitted by formula retailers during 2004-14, approximately 70% were approved, often with modifications, demonstrating that the conditional permit process is well crafted to balance interests, without unduly restricting formula retail.

Research conducted by San Francisco in 2014 found that only 5% of "chains" had 20 or fewer worldwide locations.<sup>18</sup> While San Francisco did not adopt 20 as the threshold for defining a formula retail activity or enterprise, we are proposing 20 as the threshold to ensure that fast-growing start-ups in the region can grow and thrive. Many small businesses that originate in Berkeley or the Bay Area establish outlets region-wide to help make their businesses sustainable. Berkeley can benefit by having these local emerging small chains in our community while still receiving the economic benefits of local or regional ownership.

## **REVIEW OF EXISTING PLANS, PROGRAMS, POLICIES, AND LAWS**

### **General Plan**

The City of Berkeley has taken an active role in economic development and legislation to better serve the needs of the small and local business community, and to promote the positive economic and social outcomes associated with a thriving small business environment. The policies of the General Plan and Office of Economic Development guide the City's actions towards actively promoting community and neighborhood values with independent, locally owned, and neighborhood-serving businesses.

- Goal #1 of the General Plan is to "Preserve Berkeley's unique character & quality of life", which includes protecting the City's economic diversity.
- Goal #2 of the General Plan also identifies supporting local businesses and neighborhood-serving businesses as a key step toward ensuring Berkeley's supply of decent housing, living-wage jobs, and businesses providing basic goods and services, further stating that a limited number of chain stores "contribut[es] to the vitality of Berkeley's commercial areas".<sup>19</sup>

<sup>16</sup> [http://default.sfplanning.org/legislative\\_changes/form\\_retail/Final\\_Formula\\_Retail\\_Report\\_06-06-14.pdf](http://default.sfplanning.org/legislative_changes/form_retail/Final_Formula_Retail_Report_06-06-14.pdf)

<sup>17</sup> <https://ilsr.org/watch-san-franciscos-anmarie-rodgers-on-how-the-citys-formula-business-policy-works/>

<sup>18</sup> [http://default.sfplanning.org/legislative\\_changes/form\\_retail/Final\\_Formula\\_Retail\\_Report\\_06-06-14.pdf](http://default.sfplanning.org/legislative_changes/form_retail/Final_Formula_Retail_Report_06-06-14.pdf)

<sup>19</sup>

[https://www.cityofberkeley.info/Planning\\_and\\_Development/Home/General\\_Plan\\_-\\_Economic\\_Development\\_and\\_Employment\\_Element.aspx](https://www.cityofberkeley.info/Planning_and_Development/Home/General_Plan_-_Economic_Development_and_Employment_Element.aspx)

- More specifically, Economic Development Actions ED-3 and ED-4 directly address retaining and developing businesses that serve local neighborhood needs, implementing a small business preference program, and utilizing zoning mechanisms to limit “development of undesirable chain stores, formula businesses, and big-box developments” while enabling the expansion of local businesses.<sup>20</sup>

### **Berkeley Policies that Support Small Businesses**

The City of Berkeley has taken action in the past to support local business and limit chains by banning new fast food chains, limiting the number of pharmacies in close proximity to each other, establishing a maximum square footage for big box stores and imposing quotas in commercial districts.

In response to merchant concerns about rising rents demanded by commercial landlords, the City Council in 1985 enacted the “Telegraph Urgency Ordinance”.<sup>21</sup> At the time, the ordinance was the nation’s only program of commercial rent regulation. After commercial rent control was outlawed by the State, Berkeley enacted quotas on various use types in some retail districts, which were intended to preserve diversity and local ownership among businesses and discourage unwanted commercial uses as defined in each commercial district’s purposes. These quotas, which could be violated with a Use Permit and were often exceeded, were eventually removed or greatly simplified.<sup>22</sup>

Berkeley has also acted to limit the size, number and concentration of drugstores that can operate in the City.<sup>23</sup> This was done to prevent pharmacy chains from opening too close to each other while leaving other areas of Berkeley underserved and to preserve a diversity of uses in neighborhood business districts, allowing them to retain their unique character.<sup>24</sup>

In April 2017, the City Council approved a Small Business Support Package, authored by Councilmember Hahn and Mayor Arreguin, to support new and sustain existing small and locally-owned businesses.<sup>25</sup> The package included measures to provide financial support to small businesses and nonprofits impacted by development projects; fees on vacant storefronts and empty lots; a local business advocacy center; streamlining of zoning, permitting, and licensing for small businesses; strengthening Berkeley’s Revolving Loan Fund program; expanding Buy Local preferences; and exploring a Legacy Business-type program for Berkeley.

<sup>20</sup> [https://www.cityofberkeley.info/Planning\\_and\\_Development/Home/General\\_Plan\\_-\\_Economic\\_Development\\_and\\_Employment\\_Element.aspx](https://www.cityofberkeley.info/Planning_and_Development/Home/General_Plan_-_Economic_Development_and_Employment_Element.aspx)

<sup>21</sup> [https://www.cityofberkeley.info/Planning\\_and\\_Development/Home/Southside\\_Plan\\_-\\_DSS\\_6\\_Economic\\_Development.aspx](https://www.cityofberkeley.info/Planning_and_Development/Home/Southside_Plan_-_DSS_6_Economic_Development.aspx)

<sup>22</sup> [https://www.cityofberkeley.info/uploadedFiles/Planning\\_and\\_Development/Level\\_3\\_-\\_Commissions/Commission\\_for\\_Planning/2015-12-16\\_Item%209\\_Quotas-Combined.pdf](https://www.cityofberkeley.info/uploadedFiles/Planning_and_Development/Level_3_-_Commissions/Commission_for_Planning/2015-12-16_Item%209_Quotas-Combined.pdf)

<sup>23</sup> [https://www.cityofberkeley.info/Clerk/City\\_Council/2014/07\\_Jul/Documents/2014-07-01\\_Item\\_01\\_Ordinance\\_7354.aspx](https://www.cityofberkeley.info/Clerk/City_Council/2014/07_Jul/Documents/2014-07-01_Item_01_Ordinance_7354.aspx)

<sup>24</sup> <https://www.cityofberkeley.info/recordsonline/export/16418086.pdf>

<sup>25</sup> [https://www.cityofberkeley.info/Clerk/City\\_Council/2017/04\\_Apr/Documents/2017-04-25\\_Item\\_41\\_Small\\_Business.aspx](https://www.cityofberkeley.info/Clerk/City_Council/2017/04_Apr/Documents/2017-04-25_Item_41_Small_Business.aspx)

In April 2019, the Council approved another important measure to support Berkeley businesses interested in the worker cooperative ownership model.<sup>26</sup> Owned and run by employees, worker cooperatives typically provide higher wages, benefits, professional development, job security, and upward mobility for low to moderate income people. Also, these small businesses provide a diversity of locally owned services. In Berkeley, worker cooperatives such as The Cheese Board Collective, Biofuel Oasis, and Missing Link Bicycle Cooperative have become an integral part of the community's fabric. These and other worker owned businesses create higher quality jobs, increase local reinvestment, and have demonstrable positive impact on business retention.

According to the City of Berkeley's Office of Economic Development (OED),

*"small businesses are a critical part of our local economy: they provide access to essential goods and services, create jobs and economic opportunities, and make essential contributions to Berkeley's vitality and distinct character. In recent years, the viability of small businesses has been threatened by a broad range of issues including the increasing costs of doing business, physical conditions of commercial districts, competition from the Internet, and difficulty engaging with the City of Berkeley."*

The OED is focused on supporting small and local businesses, cooperatives, not for profits and arts organizations -- which make up the majority of Berkeley enterprises. In response to Council direction, and in light of the important role of these types of enterprises in the economic and cultural vitality of the City, the OED has launched five new policy initiatives<sup>27</sup>:

- Improve outreach and communications with small businesses
- Increase support for businesses navigating the permitting process
- Recommend modifications to the zoning ordinance to support small businesses
- Pilot small business retention programs, and
- Support independently owned retailers with marketing, networking and education.

The objectives of these programs include boosting the profitability and sustainability of small businesses, preventing the closure and displacement of small businesses, sustaining and growing business-related municipal revenues, and improving Berkeley's reputation as a place to do business.

### **ACTIONS/ALTERNATIVES CONSIDERED**

San Francisco, Sausalito, San Juan Bautista, Pacific Grove, and other cities across the country have passed legislation regulating formula retailers, tailored to the unique character and needs of their communities. Nantucket, MA, banned all formula retail from its historic downtown district. Cities such as San Francisco, Ojai, and Arcata, CA, and Bristol, RI, have implemented a

<sup>26</sup> [https://www.cityofberkeley.info/Clerk/City\\_Council/2019/02\\_Feb/Documents/2019-02-26\\_Revised\\_Packet\\_2019-02-26\\_Item\\_A\\_Referral\\_Response\\_Supporting\\_Worker\\_Cooperatives\\_pdf.aspx](https://www.cityofberkeley.info/Clerk/City_Council/2019/02_Feb/Documents/2019-02-26_Revised_Packet_2019-02-26_Item_A_Referral_Response_Supporting_Worker_Cooperatives_pdf.aspx)

<sup>27</sup> [https://www.cityofberkeley.info/Clerk/City\\_Council/2019/02\\_Feb/Documents/2019-02-05\\_WS\\_Item\\_02\\_Referral\\_Response\\_Small\\_Business\\_pdf.aspx](https://www.cityofberkeley.info/Clerk/City_Council/2019/02_Feb/Documents/2019-02-05_WS_Item_02_Referral_Response_Small_Business_pdf.aspx)

conditional use framework to limit the number of formula retailers allowed in their commercial districts. Rather than impose outright bans or quotas on formula retail, these cities have a special application process and require robust findings for formula retailers to operate in regulated districts.

Communities have the power to maintain their integrity and character as set forth by their general plans. Only one formula retail ordinance has been challenged and overturned. Islamorada, a vacation destination in the Florida Keys, implemented formula retail restrictions nearly a decade ago. The court reviewing a legal challenge to the ordinance found it would fail to “help the town preserve its character,” noting for the record that Islamorada “has not demonstrated that it has any small town character to preserve”.<sup>28</sup>

The goal of formula retail legislation is not to eliminate formula retail entirely. A key to crafting effective formula retail regulations is to avoid arbitrary quotas or limits on formula retailers, to be responsive to existing community and local flavor, and to adapt any regulations accordingly.

As noted above, Berkeley has experimented with commercial rent control and quotas, among other measures, but currently has very limited regulations in place to ~~support the establishment and continuation of small, local and diverse businesses and~~ curtail the proliferation of chains. Currently, formula retail regulation is considered to be the best tool to achieve these goals.

### **CONSULTATION/OUTREACH OVERVIEW AND RESULTS**

Because this item proposes an Ordinance, it will be ~~routed-referred~~ to a Council [Policy Committee](#) (~~the Land Use, Housing & Economic Development Policy Committee~~) for discussion. Through this process we will reach out to small businesses and property owners to invite them to bring their comments to the committee. In addition, this item is a referral to the City Manager and Planning Commission. Assuming it is sent from the policy committee with a positive recommendation to the City Council and is referred by Council to the City Manager and Planning Commission, there will be many opportunities for citizen, business and property-owner input through the many public meetings envisioned to make this ordinance a reality.

### **RATIONALE FOR RECOMMENDATION**

Berkeley’s small businesses, which are vital to the city’s character and economic health, are threatened by the growth of online stores and chain retailers. Other communities have successfully protected their small and independent businesses by placing restrictions on formula retail. San Francisco’s comprehensive, longstanding and carefully crafted formula retail regulations are an appropriate model for Berkeley -- adapted and carefully tailored to fit Berkeley’s specific qualities and needs, and to help preserve the important character and quality of the City’s commercial districts and neighborhood shopping areas.

This item refers to the City Manager and Planning Commission to undertake all elements necessary to craft and implement successful formula retail regulations in Berkeley.

<sup>28</sup> <https://ilsr.org/bloomberg-restrict-chains/>

A draft ordinance is provided, starting the process of adapting San Francisco's formula retail regulations to Berkeley's existing regulatory framework and processes. The City Manager and Planning Commission are tasked with completing the ordinance and preparing any complementary code amendments necessary to achieve the full regulatory framework. It is expected that the "Uses Permitted" Section of each Commercial and Manufacturing District will require small amendments to reflect the addition of the new Formula Retail Use.

The City Manager is further requested to recommend boundaries and names, if applicable, for Business Districts and, through a process that includes robust community outreach, to recommend for each Business District whether formula retail will be allowed without restriction; allowed with a Use Permit, Neighborhood Notification, Design Review and findings; or disallowed.

Public meetings to discuss whether a Business District should allow, disallow or allow with a Use Permit the establishment of formula retail uses are expected to be organized by the Office of Economic Development and/or Planning Department in collaboration with Councilmember representatives of Business Districts. Notice for such meetings shall, at a minimum, be the same as the notice proposed to obtain a Use Permit for Formula Retail. Several Business Districts can be considered at one meeting, so long as each Business District and surrounding area are noticed.

Notice to obtain a Use Permit for Formula Retail includes the following:

*In addition to the public notice requirements for a Use Permit pursuant to Section 23B.32.020, public notice shall include all businesses and residents (all mailing addresses) and all owners of properties within the Business District where the Formula Retail use is proposed and within a 500 foot radius of the proposed Formula Retail use.*

Formula retail legislation, modeled after San Francisco's policy, will help Berkeley maintain the unique character of its business districts and complement existing efforts and policies to support independent and local merchants. By carefully tailoring Formula Retail legislation to Berkeley's specific needs, the City can ensure a balanced mix of national brands while making sure that small and local businesses lacking the economic muscle to pay high rents and weather downturns still have a chance to thrive.

### **IMPLEMENTATION, ADMINISTRATION, AND ENFORCEMENT**

At the outset, implementation will require creating new forms to be filled out by applicants for business licenses to establish new business or new ownership of existing businesses in Berkeley and zoning permits for new or expanded uses. These can be adapted from San Francisco's forms. Additional forms may require amendment, and some training will be required for staff who process licenses and permit applications.



Once in place, Use Permits for Formula Retail will be administered in the same manner as all other Use Permits and Design Review will also be undertaken in the usual manner. Enhanced notice requirements will require more notices to be sent than in the usual case for a Use Permit, representing minor additional costs.

Regular fees for a Use Permit will be required, ensuring that the Planning Department's costs are covered by the Formula Retail applicant. It is not expected that a large number of applications for Formula Retail Use Permits will be processed in any given year, as a limited number of new businesses open each year and many will not meet the definition of Formula Retail. For those that do meet the definition, only a subset, those that seek to establish themselves in business districts that limit formula retail, will be required to obtain a Use Permit.

### **ENVIRONMENTAL SUSTAINABILITY**

This item supports the Berkeley General Plan goal to protect local and regional environmental quality, as local stores help to sustain vibrant, compact, walkable town centers, which in turn are essential to reducing sprawl, automobile use, habitat loss, and air and water pollution. As stated in a recent OED report, "small businesses often contribute to sustainable transportation and consumer behavior by providing opportunities for residents to shop locally in neighborhood commercial districts that are accessible by foot, bicycle and transit. Successful initiatives that support small businesses in turn promote both environmental and economic sustainability."

### **FISCAL IMPACTS**

By regulating formula retail, Berkeley should reap the well-documented benefits of local ownership. As noted above, small and locally-owned businesses stimulate local economies to a greater degree than chain retailers, increasing tax revenues overall. Automobile sales, one of the largest sales-tax generating use uses in Berkeley, is not subject to Formula Retail regulations; income from this sector would not be impacted.

Once established, formula retail regulations will require limited additional staff time to implement, in the form of new Use Permits being processed by the Planning Department. A new form will need to be created for businesses seeking permits to attest to the number of outlets affiliated with their establishment. This and other forms and administrative regulations are easily adapted from San Francisco's models.

Processing of Formula Retail Use Permits will be done simultaneously with other permit processing, and will only be required in the few instances where a Formula Retail use is seeking to establish itself in a business district that requires a Use Permit for formula retail. In these instances, applicants will pay the usual fees for Use Permit processing, which cover the costs of permit administration.

All non-Formula Retail uses *are exempt* from these regulations, so their permitting process will not be impacted in any way, other than needing to fill out a new form attesting that they do not meet the definition of Formula Retail. A successful formula retail policy will provide significant community and economic benefits and help realize Berkeley's strong commitment to supporting

small and local businesses; incurring few costs for the City of Berkeley and increasing economic activity overall.

### **OUTCOMES AND EVALUATION**

San Francisco ~~did~~ conducted an evaluation of their original Formula Retail regulations ten years after the program was in place. The evaluation resulted in improvements to their ordinance. The version of the San Francisco ordinance proposed for adoption in Berkeley reflects those improvements.

Berkeley's Formula Retail regulations will be considered successful if the business community and neighborhoods surrounding Berkeley's business districts have had the opportunity to weigh in on the appropriateness of bringing specific Formula Retail uses into the business district, and some, but not all, Formula Retail businesses will have received Use Permits. In addition, it is hoped that the implementation of these regulations will result in less rapid inflation of rents, which often reflect rental rates that can be sustained by chains, but are prohibitive for locally owned businesses.

Data ~~about~~ regarding Formula Retail and the impacts of these regulations should be included in the Office of Economic Development's Economic Dashboards and other reports to the City Council.

### **CONTACT INFORMATION**

Councilmember Sophie Hahn, Council District 5, (510) 981-7150

### **ATTACHMENTS/SUPPORTING MATERIALS**

1. Draft Formula Retail Ordinance for Berkeley
2. Commission Guide for Formula Retail, San Francisco Planning Department, August 2018
3. San Francisco Planning Code Section 303.1: Formula Retail Uses
4. San Francisco Municipal Code Section 703.4: Conditional Use Authorization for Formula Retail Uses
5. San Francisco Municipal Code Section 803.6: Formula Retail Uses in Article 8 Districts
6. Stacy Mitchell, Institute for Local Self-Reliance, "The Impact of Chain Stores on Community"
7. Marie Donahue, Institute for Local Self-Reliance, "Why Care about Independent, Locally Owned Businesses?"



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**ACTION CALENDAR**  
October 29, 2019

To: Honorable Members of the City Council  
From: Councilmember Sophie Hahn  
Subject: Proposed Formula Retail (Chain Store) Regulations

**RECOMMENDATION**

1. Refer to the City Manager and Planning Commission to finalize and return to the City Council for adoption an Ordinance and related amendments to the Berkeley Municipal Code, if any, based on the Draft Formula Retail Ordinance attached hereto, to establish Formula Retail regulations for Commercial and Manufacturing Districts in the City of Berkeley.
2. Refer to the City Manager and Planning Commission to:
  - a. Recommend establishment of Business District boundaries and names, as provided for in Section 23E.18.030(B) of the proposed Formula Retail Ordinance, and
  - b. Through a process that includes public notice and input, as described in the proposed Formula Retail Ordinance, recommend for each Business District whether to allow unlimited Formula Retail, limited Formula Retail (some or all use categories allowed with a Use Permit, Neighborhood Notice, Design Review and findings) or to prohibit Formula Retail.

**SUMMARY STATEMENT**

Small businesses are the backbone of Berkeley’s economic health, and represent a significant portion of our living-wage jobs. Unfortunately, they are threatened by increasing costs, displacement, and growing competition from online stores and chain retailers. Though chain or “Formula Retail” establishments have a role in the mix of businesses operating in Berkeley, an oversaturation of Formula Retail negatively impacts the local character of business districts and makes it more difficult for small businesses to become established, to survive, and to thrive.

Berkeley can strengthen protections for small, local and diverse businesses by limiting the number and location of Formula Retail uses in each business district. Formula Retail restrictions, in place in San Francisco for over 15 years and operative in other California cities that value local business and character, are simple and flexible, and tailored to meet the unique needs, values and sensibilities of each business district.

Formula Retail restrictions establish a definition of Formula Retail and then determine, on a business district by business district basis, whether the district will allow an unlimited amount of Formula Retail; limited Formula Retail; Formula Retail only under specified conditions; or whether a business district will prohibit Formula Retail entirely. Where Formula Retail is limited or allowed only under specified conditions, a Use Permit to establish a Formula Retail Use is required. In districts where no Formula Retail is allowed, or where unlimited Formula Retail is allowed, a Formula Retail Use Permit is not required. Businesses that do not meet the definition of Formula Retail -- smaller and local businesses, including small local chains with up to 20 outlets -- have no new requirements under the regulations.

San Francisco's Formula Retail Ordinance is an excellent model for Berkeley to adapt and follow. It has been in place for more than 15 years, and was the subject of a comprehensive evaluation, which resulted in a revised -- and improved -- regulatory framework. This item proposes that the City of Berkeley implement Formula Retail legislation, patterned after San Francisco, to limit saturation of Formula Retail, support small and local businesses, and preserve the character and quality of our business districts and neighborhood shopping areas.

## **BACKGROUND**

Berkeley's unique character is owed in large part to the presence of small businesses, and these businesses contribute significantly to the economic and cultural vitality of the City. However, small and locally owned businesses face significant challenges due to increasing costs of doing business, constraints of available space, and growing competition from online stores and expanding chain retailers.

### **Challenges Facing Small and Local Businesses**

A basic challenge that many small and local businesses face is finding an affordable location. Commercial rents throughout the Bay Area, including in Berkeley, have risen dramatically in recent years. One estimate found that between 2016 and 2018 office rents in Berkeley increased 15% to 20%.<sup>1</sup> Small businesses are much less likely than chain stores to be able to afford high initial rents when finding new space or to endure annual rent increases, while chain stores are well-equipped to negotiate better rents or afford higher ones. Berkeley's rent stabilization ordinance, which protects and regulates residential rents, does not apply to commercial property as commercial rent control is prohibited by the State.

Small businesses also struggle to find appropriately-sized store fronts. In the Bay Area, 80% of local, independent businesses occupy locations smaller than 3,000 square feet, while 85% of

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<sup>1</sup> [https://www.cityofberkeley.info/uploadedFiles/Manager/Economic\\_Development/2017-01-16%20WS%20Item%2001%20Economic%20Development%20Worksession.pdf](https://www.cityofberkeley.info/uploadedFiles/Manager/Economic_Development/2017-01-16%20WS%20Item%2001%20Economic%20Development%20Worksession.pdf)

chain retailers occupy a space larger than 3,000 square feet.<sup>2</sup> As demand for small commercial space has increased in urban neighborhoods, supply has not kept pace. In addition, once a space has been occupied by a chain store, or several spaces have been combined for a chain store, and the space has been changed to suit larger-scale needs, it is less likely that a smaller retailer will be able to occupy the space in the future. Thus, storefronts that have been occupied by chain stores can prohibit small businesses from taking hold, even when a property is vacant.

Because most existing commercial spaces in neighborhood commercial districts are small, the proliferation of larger-floorplate uses -- whether through the combination of existing spaces or construction of new buildings -- not only displaces existing neighborhood businesses but can permanently destroy the character and scale of the district.

With the benefits of global supply chains, public subsidies, and, often, reduced competition, chain and online stores are able to undercut small and independent businesses. A study of West Side Chicago businesses found that the opening of a Walmart in 2006:

*"led to the closure of about one-quarter of the businesses within a four-mile radius [...] By the second year, 82 of the businesses had closed. Businesses within close proximity of Walmart had a 40 percent chance of closing. The probability of going out of business fell 6 percent with each mile away from Walmart."*<sup>3</sup>

This data suggests that large chain retailers negatively impact surrounding businesses because they undercut prices. However these reduced prices do not last for long:

*"Once the chain has eliminated the local competition, prices tend to rise. In Virginia, a survey of several Walmart stores statewide found prices varied by as much as 25 percent. The researchers concluded that prices rose in markets where the retailer faced little competition. A similar conclusion was reached in a survey of Home Depot. Prices were as much as 10 percent higher in Atlanta compared to the more competitive market in Greensboro, North Carolina."*<sup>4</sup>

Local independent businesses are also threatened by online platforms and online marketing by chain retailers. For example, one study showed that 55% of online shoppers search for products directly on Amazon, bypassing search engines that may show local results. This means a local retailer wishing to sell its products and services online can easily be undercut and driven out of business, even if demand for their products persists in their community. In part due to market consolidation, the number of new businesses launched each year has fallen by nearly two-thirds in recent decades. Between 2005 and 2015, the number of small retailers fell by 21%.

<sup>2</sup> <https://ilsr.org/watch-san-franciscos-anmarie-rodders-on-how-the-citys-formula-business-policy-works/>

<sup>3</sup> <http://journals.sagepub.com/doi/abs/10.1177/0891242412457985>

<sup>4</sup> Elizabeth Humstone and Thomas Muller, "Impact of Wal-Mart on Northwestern Vermont," prepared for the Preservation Trust of Vermont, the Vermont Natural Resources Council, and Williston Citizens for Responsible Growth, 1995; Chris Rouch, "Home Depot using predatory pricing tactics, critics say," *Atlanta Journal & Constitution*, March 18, 1995, p. 1B.

Large chains and online retailers are able to absorb costs and suffer losses where small and local businesses cannot. Amazon, as an extreme example, can regularly undercut other online prices for extended periods of time to drive out competition, even if it means taking a temporary loss on those items; monopoly pricing on other items is a more than adequate offset. By contrast, small businesses, often run on razor-thin margins, lack the necessary financial and structural cushions to survive even a few months' downturn in sales or rise in rent, and cannot match anti-competitive pricing at below cost levels.

### **Benefits of Small and Local Businesses**

Small and locally-owned businesses provide numerous benefits to the communities they serve through the creation of locally-owned supply chains and investment in local employees. In fact, they stimulate local economies to a greater degree than chains. Small businesses reinvest a higher percentage of their profits into the local economy than chains, recirculating 45% of their revenue back into the local economy, compared to 17% recirculated locally by chain stores.<sup>5</sup> A study in Austin, Texas, showed that independent book and music stores returned more than three times as many dollars to the local economy than a proposed large chain book and music outlet would have returned.<sup>6</sup>

Local businesses tend to purchase goods and services from other local businesses, while large chains leverage global supply chains and sometimes even global workforces. Chains have little reason to invest capital in a local economy when more profitable alternatives exist elsewhere, which leads to a lower percentage of their revenue recirculating into the local economy.<sup>7</sup>

Besides contributing to local economic activity, the presence of small and locally-owned businesses results in higher incomes and lower levels of poverty in their communities, while big-box retailers depress wages and benefits for retail employees. Workers in chain retailers also rely more heavily on government subsidies and public assistance, due to the low wages they receive. In Massachusetts, a report showed that of the 50 companies that had the most employees enrolled in the state's low-income and safety net health insurance programs, about half were employees of retail and restaurant chains.<sup>8</sup>

Beyond economic factors, small and locally-owned businesses also contribute to vibrant and engaged commercial centers and neighborhoods. High concentrations of small businesses can lead to improved public health outcomes,<sup>9</sup> stronger social ties, higher levels of civic

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<http://nebula.wsimg.com/31f003d5633c543438ef0a5ca8e8289f?AccessKeyId=8E410A17553441C49302&disposition=0&alloworigin=1>

<sup>6</sup> <https://www.amiba.net/resources/multiplier-effect/>

<sup>7</sup> [http://www.independentwestand.org/wp-content/uploads/ThinkingOutsidetheBox\\_1.pdf](http://www.independentwestand.org/wp-content/uploads/ThinkingOutsidetheBox_1.pdf)

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<http://ilsr.org/wp-content/uploads/2011/12/massachusetts-50-plus-employers.pdf>

<sup>9</sup> "The Health and Wealth of US Counties: How the Small Business Environment Impacts Alternative Measures of Development," Troy C. Blanchard, et al., *Cambridge Journal of Regions, Economy, and Society*, 2011

engagement, and more resilient communities overall.<sup>10</sup> Data from three major cities (San Francisco, Seattle, and Washington D.C.) showed that commercial districts within cities with fewer chain stores and more local businesses performed better in certain economic, social, and environmental outcomes, by increasing the walk and transit score of the city, offering business districts that are more affordable and flexible to a larger variety of entrepreneurs, and helping the local economy thrive by providing more jobs per square foot.<sup>11,12</sup>

### **What is Formula Retail?**

Formula retailers -- chain stores -- are establishments with multiple locations that utilize standardized features or a recognizable appearance to encourage patronage. Recognition is dependent upon the repetition of characteristics of one store in multiple locations. Though formula retailers can serve a role within a shopping district, an oversaturation of formula retail outlets reduces the unique character of a district and can contribute to reduced economic activity overall, and make it more difficult for small businesses to survive. Moreover, the generic quality of formula retail runs contrary to General Plan and other Berkeley policies which support enhancement of the unique character of shopping districts and a diversity of business types.

### **Regulating Formula Retail**

Communities across the country have employed different strategies to address problems raised by over-concentration of formula retail. Formula retail legislation typically seeks to define the following factors:

- Number of worldwide locations a retailer must have to qualify as a “formula retailer”
- Characteristics that create a recognizable brand across multiple locations, including standardized features, employee uniforms, products, displays, or signage
- Types of retail uses or services that are subject to formula retail legislation and districts where formula retail is limited or prohibited, and
- Administrative process for prohibiting, managing, or modifying formula retail across the community or in specific districts.

### **San Francisco’s Formula Retail Framework**

Of the many communities that have implemented a formula retail ordinance, San Francisco has most fully articulated these principles in crafting its policies. Because of the significant resources San Francisco has committed to formula retail regulation, and the length of time regulations have been in place, its regulatory framework has been subject to improvements over time, and provides an excellent model for Berkeley to adapt and follow.

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<sup>10</sup> <https://ilsr.org/why-care-about-independent-locally-owned-businesses/>

<sup>11</sup>

<http://forum.savingplaces.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=b73e8fc7-7fb2-0fc7-202c-d0ed58ff3089&forceDialog=0>

<sup>12</sup> <https://www.frbatlanta.org/community-development/publications/discussion-papers/2013/01-do-local-business-ownership-size-matter-for-local-economic-well-being-2013-08-19.aspx>

In 2004, San Francisco first enacted legislation to regulate formula retail. The ordinance was revised in 2014, reflecting recommendations outlined in a study of the first ten years of the policy.<sup>13</sup> The ordinance remains in force, and is an effective deterrent against a proliferation of chain stores. Thanks in part to its formula retail policies, San Francisco has more independent businesses and fewer chains per capita than other big cities.<sup>14</sup>

The San Francisco ordinance establishes a conditional use application process for any retail store or restaurant that meets the definition of formula retail. A formula retailer is defined as:

*“a type of retail sales activity or retail sales establishment that has eleven or more other retail sales establishments in operation, or with local land use or permit entitlements already approved, located anywhere in the world. In addition to the **eleven or more** other retail sales establishments located in the World, maintains two or more of the following features: a **standardized** array of **merchandise**, a **standardized facade**, a **standardized decor and color scheme**, a uniform **apparel**, **standardized signage**, a **trademark** or a **servicemark**.” In other words, retail stores with multiple locations and a recognizable “look” or appearance.” (SF Planning Code, § 303.1)*

In certain districts, formula retail is unrestricted (e.g., the downtown district) or entirely disallowed (e.g., North Beach, parts of Chinatown). In most of San Francisco, including the city’s Neighborhood Commercial Districts, formula retail is allowed through a conditional use process in which the business application is reviewed by the SF Planning Commission, discussed at a public hearing, and approved (or denied) on a case-by-case basis. Each application is evaluated based on a number of factors:

- Existing concentration of formula retail businesses within the neighborhood
- Availability of similar goods or services within the area
- Compatibility of the proposed business with the character of the neighborhood (including aesthetic features)
- Retail vacancy rates in the area, and
- The balance of neighborhood-serving versus citywide or regional-serving businesses.<sup>15</sup>

This process allows the SF Planning Commission to exercise discretion and respond to on a case-by-case basis to each business district’s unique character and mix of businesses. By limiting formula retail, rents have remained lower in some districts, reducing costs for independent retailers.<sup>16</sup> San Francisco’s conditional use permits allow the City to require formula retailers to have pedestrian friendly designs, aesthetics that do not detract from local character, and meet other aesthetic standards.<sup>17</sup> Of the applications submitted by formula

<sup>13</sup> [http://208.121.200.84/ftp/files/legislative\\_changes/form\\_retail/Final\\_Formula\\_Retail\\_Report\\_06-06-14.pdf](http://208.121.200.84/ftp/files/legislative_changes/form_retail/Final_Formula_Retail_Report_06-06-14.pdf)

<sup>14</sup> <https://ilsr.org/rule/formula-business-restrictions/2321-2/>

<sup>15</sup> <https://ilsr.org/rule/formula-business-restrictions/2321-2/>

<sup>16</sup> [http://default.sfplanning.org/legislative\\_changes/form\\_retail/Final\\_Formula\\_Retail\\_Report\\_06-06-14.pdf](http://default.sfplanning.org/legislative_changes/form_retail/Final_Formula_Retail_Report_06-06-14.pdf)

<sup>17</sup> <https://ilsr.org/watch-san-franciscos-anmarie-rodgers-on-how-the-citys-formula-business-policy-works/>



retailers during 2004-14, approximately 70% were approved, often with modifications, demonstrating that the conditional permit process is well crafted to balance interests, without unduly restricting formula retail.

Research conducted by San Francisco in 2014 found that only 5% of “chains” had 20 or fewer worldwide locations.<sup>18</sup> While San Francisco did not adopt 20 as the threshold for defining a formula retail activity or enterprise, we are proposing 20 as the threshold to ensure that fast-growing start-ups in the region can grow and thrive. Many small businesses that originate in Berkeley or the Bay Area establish outlets region-wide to help make their businesses sustainable. Berkeley can benefit by having these local emerging small chains in our community while still receiving the economic benefits of local or regional ownership.

## **REVIEW OF EXISTING PLANS, PROGRAMS, POLICIES, AND LAWS**

### **General Plan**

The City of Berkeley has taken an active role in economic development and legislation to better serve the needs of the small and local business community, and to promote the positive economic and social outcomes associated with a thriving small business environment. The policies of the General Plan and Office of Economic Development guide the City's actions towards actively promoting community and neighborhood values with independent, locally owned, and neighborhood serving businesses.

- Goal #1 of the General Plan is to “Preserve Berkeley’s unique character & quality of life”, which includes protecting the City’s economic diversity.
- Goal #2 of the General Plan also identifies supporting local businesses and neighborhood-serving businesses as a key step toward ensuring Berkeley’s supply of decent housing, living-wage jobs, and businesses providing basic goods and services, further stating that a limited number of chain stores “contribut[es] to the vitality of Berkeley’s commercial areas”.<sup>19</sup>
- More specifically, Economic Development Actions ED-3 and ED-4 directly address retaining and developing businesses that serve local neighborhood needs, implementing a small business preference program, and utilizing zoning mechanisms to limit “development of undesirable chain stores, formula businesses, and big-box developments” while enabling the expansion of local businesses.<sup>20</sup>

### **Berkeley Policies that Support Small Businesses**

<sup>18</sup> [http://default.sfplanning.org/legislative\\_changes/form\\_retail/Final\\_Formula\\_Retail\\_Report\\_06-06-14.pdf](http://default.sfplanning.org/legislative_changes/form_retail/Final_Formula_Retail_Report_06-06-14.pdf)

<sup>19</sup>

[https://www.cityofberkeley.info/Planning\\_and\\_Development/Home/General\\_Plan\\_-\\_Economic\\_Development\\_and\\_Employment\\_Element.aspx](https://www.cityofberkeley.info/Planning_and_Development/Home/General_Plan_-_Economic_Development_and_Employment_Element.aspx)

<sup>20</sup> [https://www.cityofberkeley.info/Planning\\_and\\_Development/Home/General\\_Plan\\_-\\_Economic\\_Development\\_and\\_Employment\\_Element.aspx](https://www.cityofberkeley.info/Planning_and_Development/Home/General_Plan_-_Economic_Development_and_Employment_Element.aspx)

The City of Berkeley has taken action in the past to support local business and limit chains by banning new fast food chains, limiting the number of pharmacies in close proximity to each other, establishing a maximum square footage for big box stores and imposing quotas in commercial districts.

In response to merchant concerns about rising rents demanded by commercial landlords, the City Council in 1985 enacted the “Telegraph Urgency Ordinance”.<sup>21</sup> At the time, the ordinance was the nation’s only program of commercial rent regulation. After commercial rent control was outlawed by the State, Berkeley enacted quotas on various use types in some retail districts, which were intended to preserve diversity and local ownership among businesses and discourage unwanted commercial uses as defined in each commercial district’s purposes. These quotas, which could be violated with a Use Permit and were often exceeded, were eventually removed or greatly simplified.<sup>22</sup>

Berkeley has also acted to limit the size, number and concentration of drugstores that can operate in the City.<sup>23</sup> This was done to prevent pharmacy chains from opening too close to each other while leaving other areas of Berkeley underserved and to preserve a diversity of uses in neighborhood business districts, allowing them to retain their unique character.<sup>24</sup>

In April 2017, the City Council approved a Small Business Support Package, authored by Councilmember Hahn and Mayor Arreguin, to support new and sustain existing small and locally-owned businesses.<sup>25</sup> The package included measures to provide financial support to small businesses and nonprofits impacted by development projects; fees on vacant storefronts and empty lots; a local business advocacy center; streamlining of zoning, permitting, and licensing for small businesses; strengthening Berkeley’s Revolving Loan Fund program; expanding Buy Local preferences; and exploring a Legacy Business-type program for Berkeley.

In April 2019, the Council approved another important measure to support Berkeley businesses interested in the worker cooperative ownership model.<sup>26</sup> Owned and run by employees, worker cooperatives typically provide higher wages, benefits, professional development, job security, and upward mobility for low to moderate income people. Also, these small businesses provide a diversity of locally owned services. In Berkeley, worker cooperatives such as The Cheese Board Collective, Biofuel Oasis, and Missing Link Bicycle Cooperative have become an integral part of

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<sup>21</sup> [https://www.cityofberkeley.info/Planning\\_and\\_Development/Home/Southside\\_Plan\\_-\\_DSS\\_6\\_Economic\\_Development.aspx](https://www.cityofberkeley.info/Planning_and_Development/Home/Southside_Plan_-_DSS_6_Economic_Development.aspx)

<sup>22</sup> [https://www.cityofberkeley.info/uploadedFiles/Planning\\_and\\_Development/Level\\_3\\_-\\_Commissions/Commission\\_for\\_Planning/2015-12-16\\_Item%209\\_Quotas-Combined.pdf](https://www.cityofberkeley.info/uploadedFiles/Planning_and_Development/Level_3_-_Commissions/Commission_for_Planning/2015-12-16_Item%209_Quotas-Combined.pdf)

<sup>23</sup> [https://www.cityofberkeley.info/Clerk/City\\_Council/2014/07\\_Jul/Documents/2014-07-01\\_Item\\_01\\_Ordinance\\_7354.aspx](https://www.cityofberkeley.info/Clerk/City_Council/2014/07_Jul/Documents/2014-07-01_Item_01_Ordinance_7354.aspx)

<sup>24</sup> <https://www.cityofberkeley.info/recordsonline/export/16418086.pdf>

<sup>25</sup> [https://www.cityofberkeley.info/Clerk/City\\_Council/2017/04\\_Apr/Documents/2017-04-25\\_Item\\_41\\_Small\\_Business.aspx](https://www.cityofberkeley.info/Clerk/City_Council/2017/04_Apr/Documents/2017-04-25_Item_41_Small_Business.aspx)

<sup>26</sup> [https://www.cityofberkeley.info/Clerk/City\\_Council/2019/02\\_Feb/Documents/2019-02-26\\_Revised\\_Packet\\_2019-02-26\\_Item\\_A\\_Referral\\_Response\\_Supporting\\_Worker\\_Cooperatives\\_pdf.aspx](https://www.cityofberkeley.info/Clerk/City_Council/2019/02_Feb/Documents/2019-02-26_Revised_Packet_2019-02-26_Item_A_Referral_Response_Supporting_Worker_Cooperatives_pdf.aspx)

the community's fabric. These and other worker owned businesses create higher quality jobs, increase local reinvestment, and have demonstrable positive impact on business retention.

According to the City of Berkeley's Office of Economic Development (OED),

*“small businesses are a critical part of our local economy: they provide access to essential goods and services, create jobs and economic opportunities, and make essential contributions to Berkeley's vitality and distinct character. In recent years, the viability of small businesses has been threatened by a broad range of issues including the increasing costs of doing business, physical conditions of commercial districts, competition from the Internet, and difficulty engaging with the City of Berkeley.”*

The OED is focused on supporting small and local businesses, cooperatives, not for profits and arts organizations -- which make up the majority of Berkeley enterprises. In response to Council direction, and in light of the important role of these types of enterprises in the economic and cultural vitality of the City, the OED has launched five new policy initiatives<sup>27</sup>:

- Improve outreach and communications with small businesses
- Increase support for businesses navigating the permitting process
- Recommend modifications to the zoning ordinance to support small businesses
- Pilot small business retention programs, and
- Support independently owned retailers with marketing, networking and education.

The objectives of these programs include boosting the profitability and sustainability of small businesses, preventing the closure and displacement of small businesses, sustaining and growing business-related municipal revenues, and improving Berkeley's reputation as a place to do business.

#### **ACTIONS/ALTERNATIVES CONSIDERED**

San Francisco, Sausalito, San Juan Bautista, Pacific Grove, and other cities across the country have passed legislation regulating formula retailers, tailored to the unique character and needs of their communities. Nantucket, MA, banned all formula retail from its historic downtown district. Cities such as San Francisco, Ojai, and Arcata, CA, and Bristol, RI, have implemented a conditional use framework to limit the number of formula retailers allowed in their commercial districts. Rather than impose outright bans or quotas on formula retail, these cities have a special application process and require robust findings for formula retailers to operate in regulated districts.

Communities have the power to maintain their integrity and character as set forth by their general plans. Only one formula retail ordinance has been challenged and overturned. Islamorada, a vacation destination in the Florida Keys, implemented formula retail restrictions nearly a decade ago. The court reviewing a legal challenge to the ordinance found it would fail

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<sup>27</sup> [https://www.cityofberkeley.info/Clerk/City\\_Council/2019/02\\_Feb/Documents/2019-02-05\\_WS\\_Item\\_02\\_Referral\\_Response\\_Small\\_Business\\_pdf.aspx](https://www.cityofberkeley.info/Clerk/City_Council/2019/02_Feb/Documents/2019-02-05_WS_Item_02_Referral_Response_Small_Business_pdf.aspx)

to “help the town preserve its character,” noting for the record that Islamorada “has not demonstrated that it has any small town character to preserve”.<sup>28</sup>

The goal of formula retail legislation is not to eliminate formula retail entirely. A key to crafting effective formula retail regulations is to avoid arbitrary quotas or limits on formula retailers, to be responsive to existing community and local flavor, and to adapt any regulations accordingly.

As noted above, Berkeley has experimented with commercial rent control and quotas, among other measures, but currently has very limited regulations in place to support the establishment and continuation of small, local and diverse businesses and curtail the proliferation of chains. Currently, formula retail regulation is considered to be the best tool to achieve these goals.

### **CONSULTATION/OUTREACH OVERVIEW AND RESULTS**

Because this item proposes an Ordinance, it will be routed to a Council Committee for discussion. Through this process we will reach out to small businesses and property owners to invite them to bring their comments to the committee. In addition, this item is a referral to the City Manager and Planning Commission. Assuming it is sent from the policy committee with a positive recommendation to the City Council and is referred by Council to the City Manager and Planning Commission, there will be many opportunities for citizen, business and property-owner input through the many public meetings envisioned to make this ordinance a reality.

### **RATIONALE FOR RECOMMENDATION**

Berkeley’s small businesses, which are vital to the city’s character and economic health, are threatened by the growth of online stores and chain retailers. Other communities have successfully protected their small and independent businesses by placing restrictions on formula retail. San Francisco’s comprehensive, longstanding and carefully crafted formula retail regulations are an appropriate model for Berkeley -- adapted and carefully tailored to fit Berkeley’s specific qualities and needs, and to help preserve the important character and quality of the City’s commercial districts and neighborhood shopping areas.

This item refers to the City Manager and Planning Commission to undertake all elements necessary to craft and implement successful formula retail regulations in Berkeley.

A draft ordinance is provided, starting the process of adapting San Francisco’s formula retail regulations to Berkeley’s existing regulatory framework and processes. The City Manager and Planning Commission are tasked with completing the ordinance and preparing any complementary code amendments necessary to achieve the full regulatory framework. It is expected that the “Uses Permitted” Section of each Commercial and Manufacturing District will require small amendments to reflect the addition of the new Formula Retail Use.

The City Manager is further requested to recommend boundaries and names, if applicable, for Business Districts and, through a process that includes robust community outreach, to

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<sup>28</sup> <https://ilsr.org/bloomberg-restrict-chains/>

recommend for each Business District whether formula retail will be allowed without restriction; allowed with a Use Permit, Neighborhood Notification, Design Review and findings; or disallowed.

Public meetings to discuss whether a Business District should allow, disallow or allow with a Use Permit the establishment of formula retail uses are expected to be organized by the Office of Economic Development and/or Planning Department in collaboration with Councilmember representatives of Business Districts. Notice for such meetings shall, at a minimum, be the same as the notice proposed to obtain a Use Permit for Formula Retail. Several Business Districts can be considered at one meeting, so long as each Business District and surrounding area are noticed.

Notice to obtain a Use Permit for Formula Retail includes the following:

*In addition to the public notice requirements for a Use Permit pursuant to Section 23B.32.020, public notice shall include all businesses and residents (all mailing addresses) and all owners of properties within the Business District where the Formula Retail use is proposed and within a 500 foot radius of the proposed Formula Retail use.*

Formula retail legislation, modeled after San Francisco's policy, will help Berkeley maintain the unique character of its business districts and complement existing efforts and policies to support independent and local merchants. By carefully tailoring Formula Retail legislation to Berkeley's specific needs, the City can ensure a balanced mix of national brands while making sure that small and local businesses lacking the economic muscle to pay high rents and weather downturns still have a chance to thrive.

### **IMPLEMENTATION, ADMINISTRATION, AND ENFORCEMENT**

At the outset, implementation will require creating new forms to be filled out by applicants for business licenses to establish new business or new ownership of existing businesses in Berkeley and zoning permits for new or expanded uses. These can be adapted from San Francisco's forms. Additional forms may require amendment, and some training will be required for staff who process licenses and permit applications.

Once in place, Use Permits for Formula Retail will be administered in the same manner as all other Use Permits and Design Review will also be undertaken in the usual manner. Enhanced notice requirements will require more notices to be sent than in the usual case for a Use Permit, representing minor additional costs.

Regular fees for a Use Permit will be required, ensuring that the Planning Department's costs are covered by the Formula Retail applicant. It is not expected that a large number of applications for Formula Retail Use Permits will be processed in any given year, as a limited number of new businesses open each year and many will not meet the definition of Formula Retail. For those that do meet the definition, only a subset, those that seek to establish themselves in business districts that limit formula retail, will be required to obtain a Use Permit.

### **ENVIRONMENTAL SUSTAINABILITY**

This item supports the Berkeley General Plan goal to protect local and regional environmental quality, as local stores help to sustain vibrant, compact, walkable town centers, which in turn are essential to reducing sprawl, automobile use, habitat loss, and air and water pollution. As stated in a recent OED report, “small businesses often contribute to sustainable transportation and consumer behavior by providing opportunities for residents to shop locally in neighborhood commercial districts that are accessible by foot, bicycle and transit. Successful initiatives that support small businesses in turn promote both environmental and economic sustainability.”

### **FISCAL IMPACTS**

By regulating formula retail, Berkeley should reap the well-documented benefits of local ownership. As noted above, small and locally-owned businesses stimulate local economies to a greater degree than chain retailers, increasing tax revenues overall. Automobile sales, one of the largest sales-tax generating use uses in Berkeley, is not subject to Formula Retail regulations; income from this sector would not be impacted.

Once established, formula retail regulations will require limited additional staff time to implement, in the form of new Use Permits being processed by the Planning Department. A new form will need to be created for businesses seeking permits to attest to the number of outlets affiliated with their establishment. This and other forms and administrative regulations are easily adapted from San Francisco’s models.

Processing of Formula Retail Use Permits will be done simultaneously with other permit processing, and will only be required in the few instances where a Formula Retail use is seeking to establish itself in a business district that requires a Use Permit for formula retail. In these instances, applicants will pay the usual fees for Use Permit processing, which cover the costs of permit administration.

All non-Formula Retail uses *are exempt* from these regulations, so their permitting process will not be impacted in any way, other than needing to fill out a new form attesting that they do not meet the definition of Formula Retail. A successful formula retail policy will provide significant community and economic benefits and help realize Berkeley’s strong commitment to supporting small and local businesses; incurring few costs for the City of Berkeley and increasing economic activity overall.

### **OUTCOMES AND EVALUATION**

San Francisco did an evaluation of their original Formula Retail regulations ten years after the program was in place. The evaluation resulted in improvements to their ordinance. The version of the San Francisco ordinance proposed for adoption in Berkeley reflects those improvements.

Berkeley’s formula retail regulations will be considered successful if the business community and neighborhoods surrounding Berkeley’s business districts have had the opportunity to weigh in on the appropriateness of bringing specific formula retail uses into the business district, and

some, but not all, formula retail businesses will have received Use Permits. In addition, it is hoped that the implementation of these regulations will result in less rapid inflation of rents, which often reflect rental rates that can be sustained by chains, but are prohibitive for locally owned businesses.

Data about formula retail and the impacts of these regulations should be included in the Office of Economic Development's Economic Dashboards and other reports to the City Council.

**CONTACT INFORMATION**

Councilmember Sophie Hahn, Council District 5, (510) 981-7150

**ATTACHMENTS/SUPPORTING MATERIALS**

1. Draft Formula Retail Ordinance for Berkeley
2. Commission Guide for Formula Retail, San Francisco Planning Department, August 2018
3. San Francisco Planning Code Section 303.1: Formula Retail Uses
4. San Francisco Municipal Code Section 703.4: Conditional Use Authorization for Formula Retail Uses
5. San Francisco Municipal Code Section 803.6: Formula Retail Uses in Article 8 Districts
6. Stacy Mitchell, Institute for Local Self-Reliance, "The Impact of Chain Stores on Community"
7. Marie Donahue, Institute for Local Self-Reliance, "Why Care about Independent, Locally Owned Businesses?"

ORDINANCE NO. ####-N.S.

ADDING CHAPTER 23E.XX TO THE BERKELEY MUNICIPAL CODE TO ADOPT THE BERKELEY FORMULA RETAIL ORDINANCE

BE IT ORDAINED by the Council of the City of Berkeley as follows:

Section 1. That a new Chapter 23E.18 is hereby added to the Berkeley Municipal code to read as follows:

Chapter 23E.18  
FORMULA RETAIL USES

Sections:

- 23E.18.010 Findings and Purpose
- 23E.18.020 Applicability
- 23E.18.030 Definitions
- 23E.18.040 Business Districts - Formula Retail Prohibited
- 23E.18.050 Business Districts - Formula Retail Permitted Without Restrictions
- 23E.18.060 Business Districts - Formula Retail Permitted with Use Permit, Neighborhood Notification, Design Review and Findings
- 23E.18.070 Formula Retail Use Permit - Neighborhood Notification - Design Review - Findings
- 23E.18.080 Determination of Formula Retail Use
- 23E.18.090 Change, Enlargement or Intensification of Formula Retail Use

**23E.18.010 Findings and Purpose**

The Council of the City of Berkeley finds and declares as follows:

- (1) The first goal of the City of Berkeley’s General Plan is to “Preserve Berkeley’s unique character and quality of life.” Berkeley’s diverse and distinct neighborhoods are strongly identified by the local character of their commercial and manufacturing districts.
- (2) A top priority of Berkeley’s General Plan Economic Development and Employment Element is to “support businesses that are independent, locally owned and neighborhood serving.”
- (3) Policy ED-3 of Berkeley’s General Plan Economic Development and Employment Element is to “[p]romote policies, programs, and services that support a diverse local economy providing a range of goods and services, that support existing local businesses, and that encourage new, independent business ventures.”



- (4) Policy ED-3 (E) of Berkeley's General Plan Economic Development and Employment Element speaks directly to the need to regulate chain, formula and big-box businesses by developing and implementing "[p]lanning and zoning mechanisms that promote community-serving commercial diversity and that limit development of undesirable chain stores, formula businesses, and big-box developments without limiting the ability of local businesses to grow and expand and, when needed, to establish additional outlets in various parts of the city."
- (5) Policy ED-4 (B) of Berkeley's General Plan Economic Development and Employment Element, relating to Neighborhood and Avenue Commercial Districts, seeks to "[m]aintain a diverse mix of commercial goods and services in the shopping districts" and to "establish criteria" for "local ownership."
- (6) Policy ED-9.1 of the Downtown Area Plan recommends economic development strategies that encourage the establishment of new businesses with ownership structures that keep consumer dollars in the local economy
- (7) Policy ED-5 (A) of Berkeley's Southside Plan seeks to support the attraction and retention of locally owned, small businesses and provide technical assistance through citywide programs for potential small business owners.
- (8) Policy Goal 7 of the West Berkeley Plan is to, "Protect small businesses, particularly arts and crafts businesses, so they can continue to flourish in West Berkeley."
- (9) Policy Strategies 12 and 13 of the University Avenue Strategic Plan broadly support small and local business. Strategy 13(C) outlines the importance of attracting locally-owned businesses.
- (10) The unregulated establishment of Formula Retail uses negatively impacts business establishment opportunities for smaller and medium-size businesses and decreases the diversity and uniqueness of merchandise and services available to residents and visitors, and the diversity of business owners.
- (12) Formula Retail regulations are in place in numerous California cities that value the local character of business districts and support local, diverse and unique retail stores, services and ownership including San Francisco, Sausalito, San Juan Bautista, Pacific Grove, Ojai and Arcata.
- (13) Formula Retail regulations have been in place for more than 15 years in San Francisco; their impacts have been studied and their regulations have been updated and refined over time, providing a carefully crafted and successful model for Berkeley to adapt and follow.
- (14) Formula Retail regulations, based on the San Francisco model, are inherently flexible, allowing different criteria for Formula Retail to be applied in each district, and allowing for

adjustments over time in response to changing neighborhood and district values, goals and needs.

### **23E.18.020 Applicability**

Formula Retail Regulations shall be applicable in all Commercial (C) and Manufacturing (M) Districts, as defined in BMC Title 23(E).

### **23E.18.030 Definitions**

- A. A **Formula Retail** use is a type of retail sales or service activity or establishment that has twenty (20) or more other retail sales or service activities or establishments in operation, or with local land use or permit entitlements already approved, under the same or different ownership, located anywhere in the world, that maintains two or more of the following features in common with such other activities or establishments:
1. A Standardized Array of Merchandise or Services
  2. Standardized Uniform Apparel
  3. A standardized Facade
  4. Standardized Decor and/or Color Scheme
  5. Standardized Signage
  6. A standardized Trademark
  7. A Standardized Servicemark.
- B. **Business District** shall be defined as any Commercial or Manufacturing District, or portion thereof, with business activities or enterprises clustered together, usually at one or more corners or on contiguous, abutting, confronting or adjacent blocks.

For purposes of this Chapter, Business Districts shall be: *[Business Districts to be recommended by staff or Planning Commission as entire Zoning Districts or meaningful sub-areas of large Zoning Districts. Where a Business District is not an entire Zoning District, the borders of such District, and a name, will need to be expressly provided. The following are examples/suggestions]*

1. C-1 - South Telegraph (Parker to Oakland Border?)
2. C-1 - University Corridor (MLK to Curtis?)
3. C-N - Euclid District *[to be delineated]*
4. C-N - Hopkins/Monterey District *[to be delineated]*
5. C-N - El Dorado District *[to be delineated]*
6. C-N - Alcatraz District *[to be delineated]*
7. C-N - Dwight/Sacramento *[to be delineated]*
8. C-N - MLK/Virginia *[to be delineated]*
9. C-N - Gilman *[to be delineated]*
10. C-N - Neighborhood *[Etc. - each node to be delineated]*
11. C-E - Elmwood District
12. C-NS + C-1 - North Shattuck District (Rose to Hearst)
13. C-T Telegraph District
14. C-SO Solano District

15. C-DMU - Central Downtown District (University to Bancroft?)
16. C-DMU - North Downtown District (North of University Ave.)
17. C-DMU - South Downtown District (South of Bancroft?)
18. C-SA - Lorin District *[to be delineated]*
19. C-SA - South Sacramento (Stuart to Oakland Border?)
20. C-SA - Dwight/Sacramento *[to be delineated]*
21. C-SA - *[Etc. - each Business District to be delineated]*
22. C-W - Fourth Street (C-W West of 6th from Addison to Virginia?)
23. C-W + C-1 - International District (University from 6th to Curtis & San Pablo from Delaware to Dwight?)
24. C-W - South San Pablo (Dwight to Oakland Border + areas West of San Pablo?)
25. C-W - North San Pablo (Delaware to Albany Border + areas West of San Pablo?)
26. *[ETC.]*

- C. **Standardized Array of Merchandise or Services** shall be defined as 50% or more of merchandise from a single distributor or bearing uniform markings or 50% or more of merchandise or services uniform across activities or establishments in the United States.
- D. **Trademark** shall be defined as a word, phrase, name, symbol or design, or a combination of words, phrases, names, symbols, or designs that identifies and distinguishes the source of merchandise from one establishment from those of others.
- E. **Servicemark** shall be defined as a word, phrase, name, symbol, or design, or a combination of words, phrases, names, symbols or designs that identifies and distinguishes a service or array of services from one establishment from those of others.
- F. **Decor** shall be defined as the style of interior finishes and furnishings, which may include but is not limited to wall coverings, carpeting, furniture, layout, color scheme, interior signage, and fixtures.
- G. **Facade** is defined as provided in BMC Section 23F.04.010
- H. **Signage** is defined as provided in BMC Section 20.08.220.
- I. **Uniform Apparel** shall be defined as standardized items of clothing including but not limited to standardized aprons, pants, shirts, smocks or dresses, hats, and pins (other than name tags) and standardized colors of apparel.
- J. **Retail Sales or Service Activity or Retail Sales or Service Establishment**  
For the purposes of this Section, a retail sales or service activity or retail sales or service establishment shall include the following uses, whether functioning as a principal, Accessory, Ancillary or Incidental Use.

- Adult-oriented Business
- Alcoholic Beverage Sales
- Alcoholic Beverage Service
- Amusement Device Arcade
- Appliance Store
- Automobile Repair and Service
- Automobile Used Car Establishment
- Bakery
- Bingo Parlor
- Business Support Service
- Cannabis Uses
- Childcare Business or Facility
- Clothing Store
- Commercial Recreation Center
- Dance, Exercise, Martial Arts or Music Studio
- Department Store
- Drive-in Use
- Drugstore
- Dry Cleaning and Laundry Agent
- Entertainment Establishment
- Financial Services, Retail
- Food Products Store
- Food Service establishment
- Gift/Novelty Shop
- Hobby Shop
- Hotel, Tourist
- Personal/household Service
- Retail Products Store
- Service use
- Smoke Shop
- Tobacco Retailers

*[These business types are taken from Definitions (+ Tobacco Retailers). There may be additional Business types defined elsewhere in the code to be considered for listing or exclusion]*

*[NOT included - do not list:*

- *Automatic teller machine*
- *Automobile Parts Store*
- *Automobile Rentals*
- *Automobile Sales*
- *Automobile Use Automobile Wrecking Establishment*
- *Chair Massage*
- *Charitable Use*
- *Commercial Use*
- *Community Care Facility*
- *Community and Institutional Use*
- *Firearm/Munitions Business*
- *Gasoline/Automobile Fuel Station*
- *Media Production*
- *Medical Practitioner Office*
- *Mini-Storage Warehouse*
- *Non-Chartered Financial Institution*
- *Nursing Home*
- *Plumbing Shop*
- *Recycling Redemption Center*
- *Seasonal Product Sales*
- *Theater]*

**23E.18.040 Business Districts - Formula Retail Prohibited**

Formula Retail is prohibited in the following Business Districts:

*[ list ]*

*[Business Districts where Formula Retail is Prohibited to be recommended through public meetings organized by Economic Development and/or Planning Department in collaboration with Councilmember representatives of Business Districts. Notice for such meetings shall, at a minimum, be the same as required notice to obtain a Use Permit for Formula Retail. Several Business Districts can be considered at one meeting. Recommendations go to Planning Commission(?) and then Council for approval]*

**23E.18.050 Business Districts - Formula Retail Permitted Without Restrictions**

Formula Retail is permitted without restrictions in the following Business Districts:

*[ list ]*

*[Business Districts where Formula Retail is allowed without restriction to be recommended through public meetings organized by Economic Development and/or Planning Department in collaboration with Councilmember representatives of Business Districts. Notice for such meetings shall, at a minimum, be the same as required notice to obtain a Use Permit for Formula Retail. Several Business Districts can be considered at one meeting. Recommendations go to Planning Commission(?) and then Council for approval]*

**23E.18.060 Business Districts - Formula Retail Permitted with Use Permit, Neighborhood Notification, Design Review and Findings**

Formula Retail or specific types of Formula Retail is permitted with a Use Permit, Neighborhood Notification, Design Review and Findings in the following Business Districts:

*[ list ]*

*[Business Districts where Formula Retail is allowed with a Use Permit, Neighborhood Notification, Findings and Design Review to be recommended through public meetings organized by Economic Development and/or Planning Department in collaboration with Councilmember representatives of Business Districts. Notice for such meetings shall, at a minimum, be the same as required notice to obtain a Use Permit for Formula Retail. Several Business Districts can be considered at one meeting. Recommendations go to Planning Commission(?) and then Council for approval.]*

*Formula Retail with a Use Permit may be allowed in a District only for certain Retail Sales or Service Activity or Retail Sales or Service Establishment types (and not for others) and, in addition to the findings required for a Use Permit and findings required for Formula Retail (Section 23E.18.070), may be subject to additional findings unique to a specific District or type of Retail Sales or Service Activity or Retail Sales or Service Establishment (i.e., restaurants, financial services, etc.)]*

**23E.18.070 Formula Retail Use Permit - Neighborhood Notification - Design Review - Findings**

To obtain a Use Permit for a Formula Retail use, in addition to the requirements at Chapter 23B.32, in this Chapter, and elsewhere in the Berkeley Municipal Code, Neighborhood Notification, Design Review and additional findings are required, as provided below:

- A. **Neighborhood Notification.** In addition to the public notice requirements for a Use Permit pursuant to Section 23B.32.020, public notice shall include all businesses and

residents (all mailing addresses) and all owners of properties within the Business District where the Formula Retail use is proposed and within a 500 foot radius of the proposed Formula Retail use.

- B. **Design Review.** Facades, Signage and all other features visible from the public right of way shall be subject to Design Review pursuant to BMC Sections 23B.08, 23E.08, and 23E.12 and in accordance with Design Review Guidelines promulgated pursuant to BMC Section 23E.08.040.A.
- C. **Findings.** In addition to the Use Permit findings required in BMC 23B.32.040 and any additional findings required by this Chapter or the Berkeley Municipal Code, the Zoning Adjustments Board shall make the following findings with regard to any proposed Formula Retail use:
1. The Formula Retail use at its proposed location conforms with or largely supports the Purposes, as stated in BMC Title 23E, of the Commercial or Manufacturing District in which such use is proposed. In making this finding, all Purposes for the Commercial or Manufacturing District in which the Formula Retail Use is proposed shall be explicitly considered.
  2. The Formula Retail use at its proposed location conforms with or largely supports any Plan adopted by the City Council that covers some or all of the Business District in which it is proposed. Such plans include, but are not limited to, the Southside Plan, the South Shattuck Strategic Plan, the University Avenue Strategic Plan, the West Berkeley Plan and the South Berkeley Area Plan and Appendices.
  3. The existing concentration of Formula Retail uses is appropriate for the Business District in which the Formal Retail use is proposed, and the addition of the Formula Retail use will not substantially change the character of the Business District, nor contribute to, or create, an over-concentration of Formula Retail within the Business District.
  4. The proposed Formula Retail use provides goods or services that are not otherwise available within the Business District or that would complement existing uses.
  5. The proposed Formula Retail use is compatible with the existing architectural and aesthetic character of the district.
  6. In Business Districts with average vacancy rates of more than [10%? 5%?] over the 3 years preceding the year in which the application for the Formula Retail Use Permit was filed, the proposed Formula Retail Use will bring needed vitality to the Business District.

**23E.18.080 Determination of Formula Retail Use**

- A. In Business Districts in which Formula Retail uses are prohibited pursuant to Section 23E.18.040 or subject to a Use Permit pursuant to Section 23E.18.060, any application for a [Business License or Zoning Permit] determined by the City to be for a Formula Retail use that does not identify the use as a Formula Retail use is incomplete and cannot be processed until the omission is corrected.
- B. Any [license granted or] entitlement approved that is determined by the City to have been, at the time of application, for a Formula Retail use that did not identify the use as Formula Retail is subject to revocation at any time.
- C. If the City determines that a [license or] entitlement, or an application for the same, is for a Formula Retail use, the applicant or holder of the license or entitlement bears the burden of proving to the City that the proposed or existing use is not a Formula Retail use.

**23E.18.090 Change, Enlargement or Intensification of Formula Retail Use**

- A. In Business Districts subject to to BMC Section 23E.18.040, a change to another Formula Retail use or enlargement or intensification in use for a nonconforming Formula Retail use is prohibited.
- B. In Business Districts subject to BMC Section 23E.18.060:
  - 1. Enlargement or intensification of existing Formula Retail uses and changes of Formula Retail from one use category to another, including a change from one use to another within the sub-categories of uses set forth in the definitions of Food Products Store, Food Service Establishment, Personal/Household Service and Retail Products Store at BMC Section 23R.04.010, require a new Formula Retail Use Permit.
  - 2. Changes of Formula Retail owner or operator within the same use category do not require a new Use Permit but any changes to the Facade, Signage and other features visible from the public right of way are subject to Design Review, applied and approved administratively by the Zoning Officer [subject to an appropriate fee as set forth in XXX.]

***[Concept to Consider from SF Regs - add to .070(C)(3)?: To determine the existing concentration of Formula Business Uses within a Business District, the Planning Department shall calculate the percentage of the total linear street frontage within the Business District that is occupied by Formula Retail and non-Formula Retail businesses. For each property, the Planning Department shall divide the total linear frontage of the lot facing a public-right of way by the number of storefronts, and then calculate the percentage of the total linear frontage for Formula Retail and non-Formula Retail.***

***Use Tables for each C and M District will need to be amended to specify the conditions under which Formula Retail, if any, is allowed in the District or in Business Districts within the District, and additional District or Business District-specific findings, if any, required]***

DRAFT





SAN FRANCISCO  
PLANNING  
DEPARTMENT

# Commission Guide for Formula Retail

DETERMINING LOCATIONAL APPROPRIATENESS AND  
PERFORMANCE-BASED DESIGN GUIDELINES

SAN FRANCISCO PLANNING DEPARTMENT | UPDATED: AUGUST 2018





SAN FRANCISCO  
PLANNING  
DEPARTMENT

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Cover Photograph: GGP Inc.

The purpose of this document is to evaluate the appropriateness of each individual formula retail establishment's use, design, and necessity, to help preserve the character of the City's neighborhoods.



Photos by Matthew Dito



## PURPOSE

The Commission Guide to Formula Retail is intended to maintain the character and aesthetic qualities of San Francisco neighborhoods. It is designed to encourage harmony between retailers and the districts they reside in.

This document seeks to promote such harmony in two ways. First, the document establishes the methodology the Department will use in evaluating the appropriateness of the formula retail use in the neighborhood. Second, this document articulates Performance-Based Design Guidelines to ensure that the proposed formula retail use is aesthetically compatible with the neighborhood.

### RELEVANT CODE SECTIONS

*Section 303.1:* Formula Retail Uses

*Section 703.4:* Conditional Use Authorization for Formula Retail Uses

*Section 803.6:* Formula Retail Uses in Article 8 Districts

*Article 6:* Signs

*Article 11:* Preservation of Buildings and Districts of Architectural, Historical, and Aesthetic Importance in the C-3 Districts

## INTRODUCTION

Formula retail can act as a homogenizing force in neighborhoods if its presence overwhelms neighborhood character. Formula retail, by nature, is repetitive. If not properly regulated, this repetition can detract from San Francisco's vibrant neighborhoods by inundating them with familiar brands that lack the uniqueness the City strives to maintain.

San Francisco is a city of surprises. Its diverse and distinct neighborhoods are identified in large part by the character of their commercial areas. This feeling of surprise invites both residents and visitors alike to explore the City.

Urban neighborhood streets should invite walking and bicycling. The City's mix of architecture contributes to a strong sense of neighborhood community within the larger City. Many formula retail concepts are developed and refined in suburban locations. Standard store design that primarily accommodates automobile traffic may not work in dense, transit-oriented cities.

The Performance-Based Design Guidelines can improve pedestrian walkability and encourage more walking in neighborhoods by helping to preserve a safe, aesthetically pleasing area that feels connected from beginning to end. This is achieved by improving pedestrian accessibility and by creating stores with unique visual identities that also don't overpower one another.

The increase of formula retail businesses in the City's neighborhood commercial areas, if not monitored and regulated, will hamper the City's goal of a diverse retail



While any one formula retail establishment may fit well in a neighborhood, overconcentration of formula retail can degrade the character of a street.

Illustration by Raven Keller  
for The Bold Italic

base with distinct neighborhood retailing personalities comprised of a mix of businesses.

These standards are intended to lessen the visual impacts that the repetitiveness of formula retail brings by first evaluating whether the formula retail use is either necessary or desirable in the neighborhood. See a discussion of this topic in Part I: Determining Locational Appropriateness. Once the use is deemed appropriate, the next step is to ensure aesthetic compatibility. For more information on this topic, see "Part II: Performance-Based Design Guidelines."

While a factor in the homogenization of neighborhoods, formula retail does provide lower-cost goods and services, and is generally recognized to provide more employment opportunities to minorities and low-income workers. Formula retail is neither good nor bad – and it plays an irrefutable role in the City. To best accentuate the benefits of formula retail, the City should regulate it with care, helping to reduce its standardized features.

San Francisco needs to protect its vibrant small business sector and create a supportive environment for new business innovations. One of the eight Priority Policies of the City's General Plan resolves that "existing neighborhood-serving retail uses be preserved and enhanced and future opportunities for resident employment in and ownership of such businesses enhances."

The Planning Department recognizes the benefits formula retail can bring to the City. Where the use would provide a necessary or desirable addition to the neighborhood, staff will work with applicants to improve their aesthetics, including signage, storefront design, transparency, and pedestrian accessibility, to help them successfully integrate into San Francisco's neighborhoods.

# I. Determining Locational Appropriateness

For every conditional use authorization the Planning Commission must determine if the proposed use is necessary or desirable for the community and compatible with the neighborhood, per Planning Code Sec. 303(c) (1). Beyond the general consideration of “necessary or desirable,” the Commission reviews five more specific criteria in consideration of conditional use authorization for formula retail. This document establishes the methodology the department will use in assessing these five determining criteria, as required by Planning Code Sec. 303.1.

Determining location appropriateness should be by informed quantitative and qualitative analysis. In general, professional discretion should be used to identify factors not specifically required in this document. For example, if a daily need use is located immediately outside the selected appropriate vicinity, it should still be discussed in the case report. In addition to analyzing the five Planning Code required criteria, professional analysis of locational appropriateness should include the following:

**A characterization of the district as a whole**, based on the stated intent of the district as well as how the district has evolved since it was created. Describe the scale and massing of buildings and uses. Discuss the dominant design orientation people vs. auto-orientation. Consider if the district can be described in other ways: family oriented, entertainment district, culturally-specific, for example. Determine whether there are capital

improvements or large development projects in the pipeline.

**A characterization of the immediate vicinity of the proposed establishment location.** A characterization of the immediate vicinity within 300’ of the subject property is a standard distance that would generally be appropriate. For projects that require conditional use authorization for use size, or occupy a tenant space larger than 10,000 square feet, a one-quarter mile vicinity is more appropriate and should be used. The vicinity concentration should include all commercial uses, not just those within the same Zoning District.

**A description of the commercial nature of the district.**  
Are there retail anchors or clusters present or developing?  
Are there retail or other trends emerging?

**Identification of long term vacancies and/or any commercial use related issues and concerns.**

**Identification of the unique characteristics of the District and/or neighborhood**, where appropriate.

## CRITERIA AND METHODOLOGY

The five criteria and methodology for analyzing locational appropriateness should be examined as described below:

### Existing concentrations of formula retail uses within general vicinity of the proposed project.

- The concentration of formula retail uses is the percentage (%) of formula retail ground floor commercial uses amongst all ground floor commercial uses within the vicinity.
- Generally, the appropriate “vicinity” when determining a concentration is 300’. However, if the proposed use requires conditional use authorization for use size, or proposes to occupy a tenant space that is equal to or greater than 10,000 square feet, a one-quarter mile vicinity should be used.
- Calculation shall include all parcels that are wholly or partially located within the selected radius that are also zoned commercial or contain commercial uses.
- An evaluation of the linear frontage concentration of formula retail establishments within the selected vicinity shall be done.
- An evaluation of the linear frontage concentration of formula retail establishments within the selected vicinity. Concentration is based on Planning Commission Resolution No. 18843, adopted on April 11, 2013 and summarized below. Staff will calculate the concentration of formula retail linear frontage within the selected vicinity of the subject property. Corner parcels are more heavily weighted when counting linear frontage due to their greater aesthetic impacts.
- The methodology is as follows: for each property, including the subject property, the total linear frontage of the lot facing a public right-of-way is divided by the number of storefronts. Formula retail storefronts and their linear frontage are separated from the non-formula retail establishments and their linear frontage. The final calculations are the percentages (%) of formula retail and non-formula retail frontages (half of a percentage shall be rounded up).
- An evaluation of the number of formula retail uses as a percentage (%) of all commercial uses within the selected vicinity. This calculation will count all ground floor storefronts as a commercial use.

→ The Department does not identify an ideal concentration threshold because it varies significantly by zoning district. This variation is based on pre-existing uses, vacancy rates, massing and use sizes, and neighborhood needs. Comparisons of the formula retail concentration to citywide numbers and to comparable neighborhoods are encouraged.

→ Concentration thresholds may also vary significantly based on proximity to a zoning district more favorable to formula retail, or to a Commercial District that principally permits formula retail.

### The availability of other similar uses within the vicinity of the proposed project.

- An evaluation of similar retail uses within the district requires a concentration calculation of retail sales and/or service uses that offer the similar products or services to those being proposed. This concentration shall be based on the number of available uses as a percentage of all commercial uses.
- Using the same selected appropriate vicinity as identified in criterion 1B, an evaluation and accompanying map shall be produced showing the location of similar uses throughout the vicinity. If no similar uses are available within the vicinity or district, the closest offerings may be identified.

### The compatibility of the proposed formula retail use with the existing architectural and aesthetic character of the district.

- Use the Performance-Based Design Guidelines to ensure compatibility with the signage, storefront design, storefront transparency, and pedestrian accessibility.
- Identify the business’ place in the District (corner, anchor, recessed from street) and whether it is in a protected viewshed in the General Plan.

### The existing retail vacancy rates within the district.

- Identify current vacancy rates in district and compared to historic vacancy rates, if this information is available.

→ Identify vacancies within the selected vicinity and discuss the conditions and potential impacts of vacant buildings within the selected vicinity.

**The existing mix of Citywide-serving retail uses and daily needs serving retail uses within the appropriate vicinity of the proposed location.** Neighborhood Commercial Districts are intended to serve the daily needs of the neighborhood residents. As such, daily needs service retailers are those that provide goods and services that residents want within walking distance of their residence or workplace.

It is important to note that formula retail uses can also be daily needs serving uses; the terms are not mutually exclusive. For example, banks and other financial institutions are subject to formula retail controls; however, having a bank within walking distance is a valuable amenity to a neighborhood.

→ Evaluate the provision of daily needs for the immediate vicinity in relation to the district's defined intent. Some districts are intended to only support residents. Conversely, the district may be intended to meet resident needs and wider shopping or tourist needs.

→ The following uses are considered "Daily Needs" uses:

- Limited Restaurant, as defined by Planning Code Sec. 102
- Specific Other Retail, Sales, and Services, as defined by the following subsections of Planning Code Sec. 102:
  - (a) General Grocery
  - (b) Specialty Grocery
  - (c) Pharmaceutical drugs and personal toiletries
  - (e) Self-service Laundromats and dry cleaning
  - (f) Household goods and services
  - (g) Variety merchandise, pet supply stores, and pet grooming services
  - (l) Books, music, sporting goods, etc.
- Personal services, as defined by Planning Code Sec. 102
- Limited Financial Service, as defined by Planning Code Sec. 102, and/or Financial Service, as defined by Planning Code Sec. 102
- Trade Shops as defined by the following subsections of Planning Code Sec. 102
  - (1) Repair of personal apparel, accessories, household goods, appliances, furniture and similar items, but excluding repair of motor vehicles and structures
  - (6) Tailoring

## II. Performance-Based Design Guidelines



### **FORMULA RETAIL SIGNAGE**

This section establishes design guidelines to ensure the aesthetic compatibility of formula retail uses.

Signage creates visual impacts which affect how residents feel about their neighborhood and play a role in the attraction of visitors who are important to the City's economy. Signs serve as markers and create individual identities for businesses that add to the greater identity of a neighborhood and district, hence the need for guidelines to ensure compatibility between businesses and their surroundings.

Formula retail uses can have a homogenizing effect on neighborhood character. This is largely due to standardized signage and branded features that promote recognition. These Performance-Based Design Guidelines seek to minimize the uniform aspects of formula retail signage.

Business signs are generally regulated to ensure an appropriate and equitable degree of commercial communication without contributing to visual clutter.



Photos by Matthew Dito



Scale of sign is inappropriate and extends beyond the storefront entrance.



Sign does not extend out and beyond the width of the storefront opening.

Signage guidelines for formula retail business signs<sup>1</sup> are as follows:

- One sign per tenant shall be permitted. A ground floor establishment with a corner storefront may have one sign on each building façade. Signs should not extend beyond with width of the storefront opening.
  - Signage, painted on glass doors, windows, and transoms, where the sign does not exceed 25% of the glazed area, is permitted.
  - Sign depth should be reduced by placing the transformer in a remote location and not housed within the sign itself.
  - Signs that are located on the inside of a storefront should be setback a minimum of 6" from the display glass.
  - Scale of signs and placement on the building should be appropriate to the elements of the building and the character of the neighborhood.
- Upper story establishments with a corner storefront may have one sign adjacent to the building entrance. It should be a small identification sign or plaque, installed adjacent to the ground floor entrances.
  - Signs should be constructed of durable high-quality materials that retain their characteristics within a high-traffic area over time. Acrylic and vinyl signs are discouraged.
  - Signage is to be scaled and placed primarily for pedestrian legibility, and secondarily for vehicular visibility.
  - Materials should be compatible with the craftsmanship, and finishes associated with the District. Glossy or highly reflective surfaces will not be approved.
  - Signs should be attached in a manner that avoids damaging or obscuring any of the character-defining features associated with the subject building. Signs should be attached in a manner that allows for their removal without adversely impacting the exterior of the building, ideally pin-mounted.

<sup>1</sup> A business sign is defined as a sign which directs attention to a business, commodity, service, industry, or other activity which is sold, offered, or conducted, other than incidentally, on the premises upon which such sign is located, or to which it is affixed.

Photos by Matthew Dito



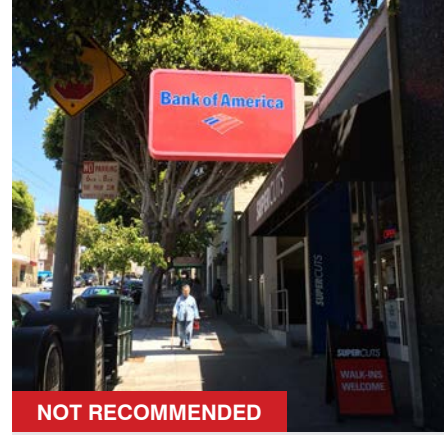
**NOT RECOMMENDED**

There is an excessive number of wall signs attached to the building facade, and the windows are covered, preventing visibility.



**NOT RECOMMENDED**

Sign is directly lit with visible lighting conduits.



**NOT RECOMMENDED**

Scale, placement, and design of sign are inappropriate to the building and its surroundings.



**RECOMMENDED**

A corner storefront with one sign on each building facade, as permitted.



**RECOMMENDED**

Sign is indirectly lit with a reduced profile due to a light emitting diode (LED) method of illumination.



**RECOMMENDED**

Sign is attached above the entrance bay, and does not detract from the buildings aesthetic qualities.

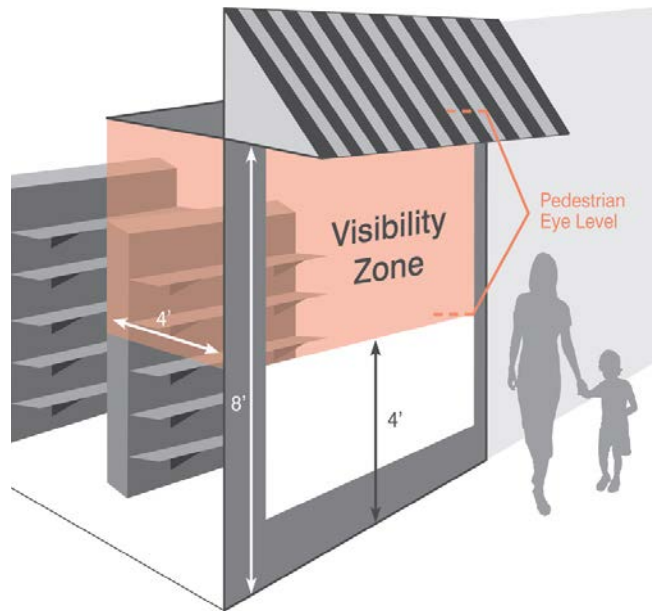
- Signs should be externally illuminated, or appear to be indirectly illuminated, such as by installing an external fixture to illuminate the sign or by using a reverse channel halo-lit means of illumination.
- Signs should have an opaque background that does not transmit light and text.
- Signs should be minimized in profile or depth, for example, by using a light emitting diode method of illumination.

- Sign legibility shall be of minimum appropriate intensity to be visible while not being visually dominating.
- Signage lights should be dimmed or off when business is closed.
- Businesses should not use exterior digital or LED screens to amplify branding beyond the signage limits.

## FORMULA RETAIL TRANSPARENCY

A transparent storefront welcomes customers inside with products and services on display, discourages crime with more “eyes on the street”, reduces energy consumption by allowing natural light into stores, and enhances the curb appeal and value of the store, as well as the entire neighborhood. As mentioned earlier, successful city living depends on surprise to maintain interest. Even if the formula retailer is familiar, a view into the store may spur interest in the people and products inside.

The City strives to ensure that tenant spaces remain transparent to the exterior, contribute to the activity of the public realm and do not devolve into de facto sign boards for tenants.



### Visibility Requirements

To ensure visibility into active spaces, any fenestration provided at eye level must have visibility beyond a window display and into the store.

The following definitions apply:

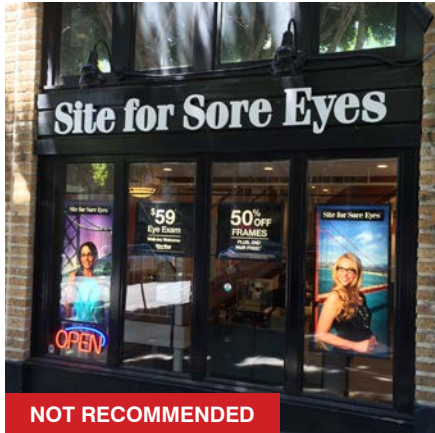
- **Pedestrian Eye Level:** the space between 4-feet and 8-feet in height above the adjacent sidewalk level, following the slope if applicable.
- **Visibility to the Inside of the Building:** the area inside the building within 4-feet of the window surface at pedestrian eye level must be 75 percent (%) open to perpendicular view.

Therefore, any fenestration of frontages with active uses must have visibility to the inside of the building with at least 75 percent (%) open to perpendicular view with a 4-foot by 4-foot “visibility zone” at pedestrian eye level. In addition, 60 percent (%) of all street frontages must be transparent windows, while any railings or grillwork placed in front of or behind storefront windows must be at least 75 percent (%) transparent at a perpendicular view.

To ensure visibility, business signs may not exceed one-third the area of the window in which the sign is located. The Department will work with applicants to improve visibility wherever possible.

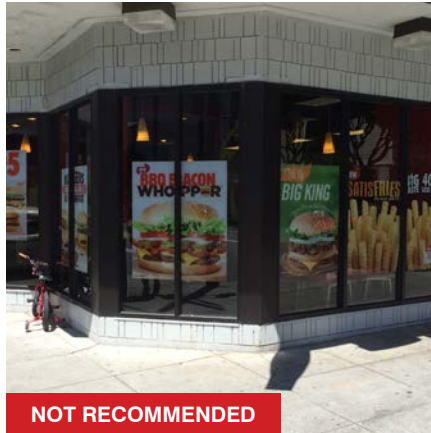
The Performance-Based Design Guidelines require formula retail applicants to work with staff to determine what transparency improvements can be made. Changes required may include converting windows to transparent glazing, relocating shelving and displays away from windows, or removing security grilles and other window coverings.

Photos by Matthew Dito



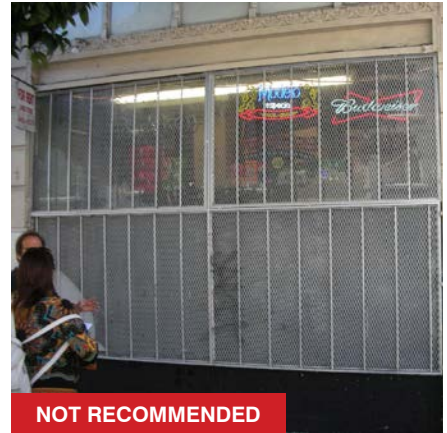
**NOT RECOMMENDED**

Views through the frontage fenestration are obstructed by advertising signs and business identifiers.



**NOT RECOMMENDED**

The 4-foot by 4-foot visibility zone inside the establishment is obstructed by excessive signage.



**NOT RECOMMENDED**

The security grille does not have at least 75% transparency at a perpendicular view.



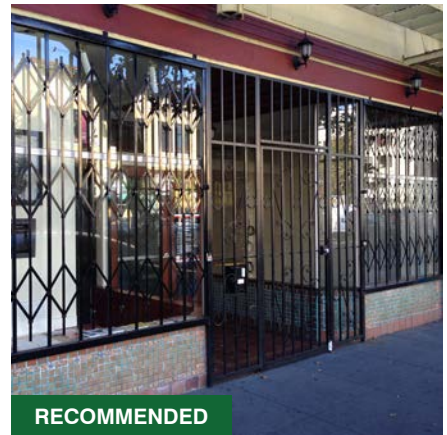
**RECOMMENDED**

The space between 4 feet and 8 feet above the sidewalk has at least 75% of its frontage fenestrations open to perpendicular view.



**RECOMMENDED**

Limited window signage maximizes visibility inside the store.



**RECOMMENDED**

The security grille allows for visibility of at least 75% at a perpendicular view.

**What This Means For Formula Retail Uses**

1. Windows that have been covered over with boards, film, or paint must be restored to transparency.
2. Security gates or grillwork on the inside or outside of the window glass must be primarily transparent (at least 75 percent (%) open to perpendicular view).
3. Shelving, display cases, appliances, and other items placed within four feet of the window glass must be no taller than four feet or be primarily transparent (at least 75 percent [%] open to perpendicular view).
4. All exterior signs must have a sign permit or must be removed.
5. Business signs affixed to the window (painted or adhered to the glass) can be no larger than one-third the size of the window on which they are placed.

## FORMULA RETAIL STOREFRONT DESIGN

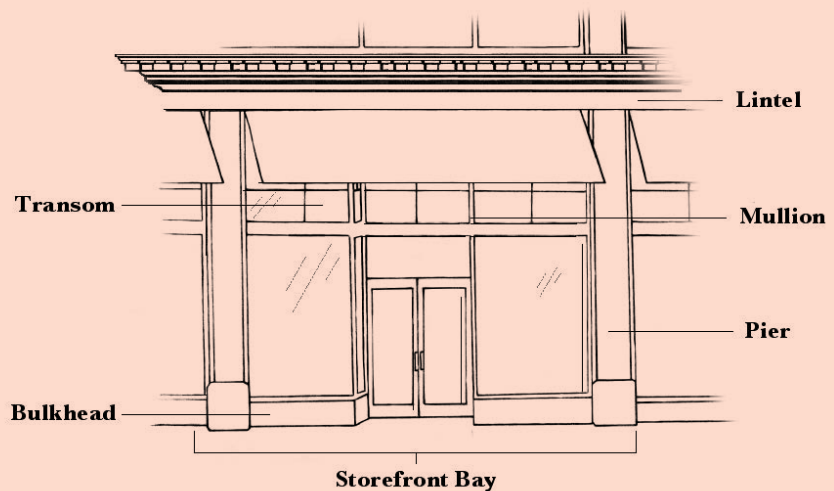
Storefront design can be used to extend branding beyond the dimensions of signage. To maintain emphasis on architecture and to prevent formula retail from overwhelming neighborhood character, it's important to prevent facades from becoming defacto branding opportunities.

Historic qualities present in a storefront should be preserved and maintained, as well as integrated into additions or modifications made to the storefront. The most successful storefronts combine contemporary design with sensitivity to the character defining storefront components.



### Storefront Components

The components of Performance-Based Design Guidelines for Storefront Design are: facades and street walls, corner lots, storefront bays, entrances, bulkheads, and display windows.



#### TYPICAL FEATURES INCLUDE:

**Bulkhead:** The low paneled base of a storefront bay that supports the glazing and elevates merchandise for pedestrian viewing.

**Façade Materials:** Original exterior cladding, typically brick, wood or stone provide a sense of permanence, scale and texture and often convey the work of skilled craftsmen.

**Lintel:** The horizontal structural element that spans above the storefront bays to support the weight of the upper façade.

**Mullion:** The vertical element that separates window units or storefront glazing; typically not a structural support for the building.

**Pier:** The vertical structural or decorative elements, also known as a column, which supports and/or frames the glazing.

**Storefront Bay:** Defined by the height of the lintel and separated by piers, a storefront bay is composed of bulkhead, glazing, transom, and entry.

**Transom:** The small, operable or inoperable framed windows above the glazing and below the lintel that filter light into the ground floor space; sometimes sheltered by awnings.

Photos by Matthew Dito



Design, including colors, finish, and texture, is inconsistent with the surrounding buildings.



Storefront design is consistent with surrounding buildings, and the setback creates a continuous street wall and edge.

### Façades and Street Walls

The façade is the exterior wall of the building, or frontage, and should utilize traditional building materials such as terra cotta, brick, stone, and scored stucco. The color should be limited to different tones of one color, and said color should be similar in profile to the surrounding buildings. Buildings should have a finished texture that is smooth and painted with a satin or light finish. Color washing an entire storefront to extend branding detracts from the character of a neighborhood and will not be permitted.

The design should remain consistent with surrounding buildings in the neighborhood. As such, the setback should be as such that it creates a consistent, continuous street wall and edge.

### Corner Lots

Many buildings on corner lots exhibit special features that emphasize the corner and add accent to both intersecting streets, providing visual interest to pedestrians. Corner entrances, storefront windows, and displays that extend along both street facades emphasize corner lots are encouraged.

Where entrances are not located at the corner, storefront windows should turn the corner, in addition to windows on each side of the building.

### Storefront Bays

Appropriate alignment and proportions of the storefront bay are critical in creating a unified appearance within the district.

Windows should be consistent in height and design with storefront doors to create a cohesive appearance, however, slight variations in alignment can add visual interest. Piers and lintels should be treated and designed as a single component. The lintel establishes the top of the storefront bay, visually separating it from upper floors. Proper proportions must be maintained between windows and the lintel. Elements such as signs and awnings that obscure the spacing of the bays or other elements that define those bays should be avoided. Colors should be similar in profile to the surrounding buildings, and limited to different tones of one color.

### Entrances

Typically, entrances are recessed by about two to six feet from the sidewalk, allowing for protection from the rain, providing additional display frontage, and creating a rhythm of defined commercial spaces. Together, these features can establish a sense of scale and identify business entrances. In San Francisco, entrances for people should be emphasized and entrances for cars should be minimized.

A service door may also exist for access to building systems.



Colorwashing a building facade in branded color serves as oversized signage and is not permitted.

### Bulkhead

The bulkhead is the one to two foot high based of the building, upon which the storefront display window is placed. Traditionally, bulkheads are made of painted wood, decorative metal, small ceramic tiles, or masonry. Replacements should match or be compatible with original materials. Bulkheads should be consistent with surrounding buildings in the neighborhood, and are typically between 18 inches and 24 inches.



Transparent display with simple, effective signage on the bulkhead.

### Storefront Displays

Storefront display windows typically consist of large panes of plate glass set in metal or wood frames, with the primary purpose of allowing passerby to see goods or services available inside. Individual panes of a window are separated by mullions, which should be as narrow and as limited in number as possible. This maximizes visibility into interior activity and merchandising.



While the establishment utilizes the corner lot with its entrance, the facade and bulkhead are incompatible with the surrounding buildings.

Photos by Matthew Dito

## PEDESTRIAN ACCESSIBILITY

Ensuring that businesses are easily accessible creates a more inviting environment in commercial neighborhoods. For smaller formula retail establishments, pedestrian accessibility is usually not a problem. Larger formula retail establishments, however, tend to limit and control entrances. A suburban design may cater to those who arrive by car. In order to preserve the City's walkable character, formula retail in particular must be designed for pedestrians. Entrances that are distinguishable from the façade of a building invite and allow pedestrian access. Entrances should be located in a manner that keeps with the rhythm established by surrounding buildings. This consistency creates a familiarity that draws the attention of pedestrians.

Requirements for pedestrian accessibility are as follows:

- All businesses must have an ADA compliant entrance
- Corner lot locations should have at least an entrance on the corner, or one on each street
- Improve the pedestrian environment with clearly visible, easy, safe routes to business entries, including through parking lots and to the public sidewalk and transit stops.
- Provide pedestrian access onto the site from the main street on which the business is located.
- All existing street-facing doors, with the exception of emergency and service entrances, shall remain unlocked and open to the public during regular business hours.



The business entrance is not distinguishable from the corner lot window, and is located in a manner that does not utilize or promote pedestrian access to the building.



Business entrances are distinguishable from the building facade with a consistent rhythm that creates a familiarity to draw attention of pedestrians. Entrances are also visually compatible with the entrances to upper residences.

Photos by Matthew Dito



## LIMITED FINANCIAL SERVICES

Limited Financial Services are defined in Planning Code Sections 102 as a retail use which provides banking services, when not occupying more than 15 feet of linear frontage or 200 square feet of gross floor area. Automated teller machines (ATM), if installed within such a facility or on an exterior wall as a walk-up facility, are included in this category. A Conditional Use authorization is required for all Limited Financial Services that are also a formula retail use, with the exception of single automated teller machines located within another use that are not visible from the street [Sec. 303.1(b)(13)].

When placing an ATM, the feature should be integrated into the overall composition of the storefront, so as to not detract from the architecture or the quality of the pedestrian experience.

A single ATM at a street façade may be permitted without conditional use authorization if the machine meets the Performance-Based Design Guidelines in this document. A single automated teller machine may not be permitted at the street front if it compromises the storefront's ability to meet other Performance-Based Design Guidelines, including visibility and transparency goals.



This illustration represents the design guidelines for ATMs.

### General guidelines for ATMs are as follows:

- Minimize lighting elements and brightness intensity.
- Areas using materials that need to be lit, or backlit, should be minimized.
- ATMs should be proportionate to the storefront or building facade.
- Framing elements should be used, as appropriate, to integrate ATMs into the facade composition.
- Architectural quality should be maximized.

Photos by Matthew Dito



This requires a conditional use permit because there is more than one ATM at the street front.



Colorwashing a building facade in branded color serves as oversized signage and is not permitted.



**SAN FRANCISCO  
PLANNING  
DEPARTMENT**

**FOR MORE INFORMATION:  
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*Planning staff are available by phone and at the PIC counter.  
No appointment is necessary.*

## San Francisco Planning Code

**SEC. 303.1. FORMULA RETAIL USES.****New Ordinance Notice**

**Publisher's Note:** This section has been **AMENDED** by new legislation (Ord. [205-19](#), approved 9/11/2019, effective 10/12/2019). The text of the amendment will be incorporated under the new section number when the amending legislation is effective.

**(a) Findings.**

(1) San Francisco is a city of diverse and distinct neighborhoods identified in large part by the character of their commercial areas.

(2) One of the eight Priority Policies of the City's General Plan resolves that "existing neighborhood-serving retail uses be preserved and enhanced and future opportunities for resident employment in and ownership of such businesses enhanced."

(3) Retail uses are the land uses most critical to the success of the City's commercial districts.

(4) Formula Retail businesses are increasing in number in San Francisco, as they are in cities and towns across the country.

(5) San Francisco is one of a very few major urban centers in the State in which housing, shops, work places, schools, parks and civic facilities intimately co-exist to create strong identifiable neighborhoods. The neighborhood streets invite walking and bicycling and the City's mix of architecture contributes to a strong sense of neighborhood community within the larger City community.

(6) Notwithstanding the marketability of a retailer's goods or services or the visual attractiveness of the storefront, the standardized architecture, color schemes, decor and signage of many Formula Retail businesses can detract from the distinctive character and aesthetics of certain Neighborhood Commercial Districts.

(7) The increase of Formula Retail businesses in the City's neighborhood commercial areas, if not monitored and regulated, will hamper the City's goal of a diverse retail base with distinct neighborhood retailing personalities comprised of a mix of businesses. Specifically, the unregulated and unmonitored establishment of additional Formula Retail uses may unduly limit or eliminate business establishment opportunities for smaller or medium-sized businesses, many of which tend to be non-traditional or unique, and unduly skew the mix of businesses towards formula retailers in lieu of unique or start-up retailers, thereby decreasing the diversity of merchandise available to residents and visitors and the diversity of purveyors of merchandise.

(8) If, in the future, neighborhoods determine that the needs of their Neighborhood Commercial Districts are better served by eliminating the notice requirements for proposed Formula Retail uses, by converting Formula Retail uses into conditional uses in their district, or by prohibiting Formula Retail uses in their district, they can propose legislation to do so.

(9) Neighborhood Commercial Districts are intended to preserve the unique qualities of a district while also serving the daily needs of residents living in the immediate neighborhood; however, community members have reported loss of daily needs uses due to inundation of formula retailers that target larger citywide or regional audiences. The City strives to ensure that goods and services that residents require for

daily living are available within walking distance and at an affordable price. Establishments that serve daily needs and Formula Retail establishments are neither mutually exclusive nor completely overlapping.

(10) The San Francisco retail brokers' study of 28 Neighborhood Commercial Districts conducted in 2014 found that the healthiest and most viable retail environments offer a mix of retailers who vary in size and offerings; including a mix of conventional and cutting edge retailers as well as established players and newcomers.

(11) Formula retailers are establishments with multiple locations and standardized features or a recognizable appearance. Recognition is dependent upon the repetition of the same characteristics of one store in multiple locations. The sameness of Formula Retail outlets, while providing clear branding for consumers, counters the general direction of certain land use controls and General Plan Policies which value unique community character and therefore need controls, in certain areas, to maintain neighborhood individuality.

(12) The homogenizing effect of Formula Retail, based on its reliance on standardized branding, is greater if the size of the Formula Retail use, in number of locations or size of use or branded elements, is larger. The increased level of homogeneity distracts from San Francisco's unique neighborhoods, which thrive on a high level of surprise and interest maintained by a balanced mix of uses and services, both independent and standardized.

(13) Due to the distinct impact that Formula Retail uses have on a neighborhood, these uses are evaluated for concentration as well as compatibility within a neighborhood. As neighborhoods naturally evolve over time, changes and intensifications of Formula Retail uses should also be re-evaluated for concentration and compatibility within a neighborhood.

(14) According to an average of ten studies done by the firm Civic Economics and published by the American Independent Business Alliance in October of 2012, spending by independent retailers generated 3.7 times more direct local spending than that of Formula Retail chains.

(15) Money earned by independent businesses is more likely to circulate within the local neighborhood and City economy than the money earned by Formula Retail businesses which often have corporate offices and vendors located outside of San Francisco.

(16) According to a 2014 study by the San Francisco Office of Economic Analysis (OEA) report "Expanding Formula Retail Controls: Economic Impact Report" the uniqueness of San Francisco's neighborhoods is based on a combination of unique visual characteristics and a sense of community fostered by small merchants and resident relationships. A Formula Retail establishment is determined by its recognizable look which is repeated at every location, therefore, detracting from the unique community character.

(17) The OEA Report found that in general, chain stores charge lower prices and provide affordable goods, but may spend less within the local economy, and can be unpopular with some residents because they can be seen to diminish the character of the neighborhood. At the same time, this OEA Report found that excessively limiting chain stores can reduce commercial rents and raise vacancy rates.

(18) Through a 2014 study commissioned by the Planning Department, titled "San Francisco Formula Retail Economic Analysis," staff and consultants conducted one-on-one interviews and worked with small groups including independent retailers, small business owners, merchants associations, formula retailers, commercial brokers, neighborhood representatives and other stakeholders. The Study found that landlords often perceive a benefit in renting to large established chains, which landlords believe typically have better credit and can sign longer leases than local, independent retailers, lowering the risk that the tenant will be unable to pay its rent. The existing land use controls for Formula Retail may create a disincentive for formula retailers to locate where the formula retail controls apply.

(b) **Definition.** A Formula Retail use is hereby defined as a type of retail sales or service activity or retail sales or service establishment that has eleven or more other retail sales establishments in operation, or

with local land use or permit entitlements already approved, located anywhere in the world. In addition to the eleven establishments either in operation or with local land use or permit entitlements approved for operation, the business maintains two or more of the following features: a standardized array of merchandise, a standardized facade, a standardized decor and color scheme, uniform apparel, standardized signage, a trademark or a servicemark.

(1) Standardized array of merchandise shall be defined as 50% or more of in-stock merchandise from a single distributor bearing uniform markings.

(2) Trademark shall be defined as a word, phrase, symbol or design, or a combination of words, phrases, symbols or designs that identifies and distinguishes the source of the goods from one party from those of others.

(3) Servicemark shall be defined as word, phrase, symbol or design, or a combination of words, phrases, symbols or designs that identifies and distinguishes the source of a service from one party from those of others.

(4) Decor shall be defined as the style of interior furnishings, which may include but is not limited to, style of furniture, wall coverings or permanent fixtures.

(5) Color Scheme shall be defined as selection of colors used throughout, such as on the furnishings, permanent fixtures, and wall coverings, or as used on the facade.

(6) Facade shall be defined as the face or front of a building, including awnings, looking onto a street or an open space.

(7) Uniform Apparel shall be defined as standardized items of clothing including but not limited to standardized aprons, pants, shirts, smocks or dresses, hats, and pins (other than name tags) as well as standardized colors of clothing.

(8) Signage shall be defined as business sign pursuant to Section 602.3 of the Planning Code.

(c) **"Retail Sales or Service Activity or Retail Sales or Service Establishment."** For the purposes of this Section 303.1, a retail sales or service activity or retail sales or service establishment shall include the following uses whether functioning as a Principal or Accessory Use, as defined in Articles 1, 2, 7, and 8 of this Code:

- Bar § 102;
- Drive-up Facility §§ 102, 890.30;
- Eating and Drinking Use § 102;
- Liquor Store § 102;
- Sales and Service, Other Retail § 890.102 and Retail Sales and Service, General;
- Restaurant § 102;
- Limited-Restaurant § 102;
- Sales and Service, Retail §§ 102, 890.104;
- Service, Financial §§ 102, 890.110;
- Movie Theater §§ 102, 890.64;
- Amusement Game Arcade §§ 102, 890.4;

- Service, Limited Financial, except single automated teller machines at the street front that meet the Commission's adopted Performance-Based Design Guidelines and automated teller machines located

within another use that are not visible from the street § 102;

- Service, Fringe Financial §§ 102, 890.113;
- Tobacco Paraphernalia Establishment §§ 102, 890.123;
- Massage Establishment §§ 102, 890.60;
- Service, Personal §§ 102, 890.116
- Service, Instructional § 102 ;
- Gym; § 102
- General Grocery § 102;
- Specialty Grocery § 102;
- Pharmacy § 102;
- Jewelry Store §§ 102, 890.51;
- Tourist Oriented Gift Store §§ 102, 890.39;
- Non-Auto Vehicle Sales or Rental §§ 102, 890.69; and
- Cannabis Retail §§ 102, 890.125.

(d) **Conditional Use Criteria.** With regard to a Conditional Use authorization application for a Formula Retail use, the Planning Commission shall consider, in addition to the criteria set forth in Section 303, the criteria below and the Performance-Based Design Guidelines adopted by the Planning Commission to implement the criteria below.

(1) The existing concentrations of Formula Retail uses within the district and within the vicinity of the proposed project. To determine the existing concentration, the Planning Commission shall consider the percentage of the total linear street frontage within a 300-foot radius or a quarter of a mile radius, at the Planning Department's discretion, from the subject property that is occupied by Formula Retail and non-Formula Retail businesses. The Department's review shall include all parcels that are wholly or partially located within the 300-foot radius or quarter-mile radius. If the subject property is a corner parcel, the 300-foot radius or quarter mile radius shall include all corner parcels at the subject intersection. For each property, the Planning Department shall divide the total linear frontage of the lot facing a public-right of way by the number of storefronts, and then calculate the percentage of the total linear frontage for Formula Retail and non-Formula Retail. Half percentage points shall be rounded up.

For the Upper Market Street Neighborhood Commercial District only, if the application would bring the formula retail concentration within a 300-foot radius to a concentration of 20% or above, Planning Department staff shall recommend disapproval of the application to the Planning Commission. If the application would not bring the formula retail concentration within the 300-foot radius to a concentration of 20% or above, Planning Department staff shall assess the application according to all the other criteria listed in this Subsection 303.1(d), and recommend approval or disapproval to the Planning Commission, according to its discretion and professional judgment. In either case, the Planning Commission may approve or reject the application, considering all the criteria listed in this Subsection 303.1(d).

(2) The availability of other similar retail uses within the district and within the vicinity of the proposed project.

(3) The compatibility of the proposed Formula Retail use with the existing architectural and aesthetic character of the district.

(4) The existing retail vacancy rates within the district and within the vicinity of the proposed project.

(5) The existing mix of Citywide-serving retail uses and daily needs-serving retail uses within the district and within the vicinity of the proposed project.

(6) Additional relevant data and analysis set forth in the Performance-Based Design Guidelines adopted by the Planning Commission.

(7) For Formula Retail uses of 20,000 gross square feet or more, except for General or Specialty Grocery stores as defined in Articles 2, 7 and 8 of this Code, the contents of an economic impact study prepared pursuant to Section 303(i) of this Code.

(8) Notwithstanding anything to the contrary contained in Planning Code Article 6 limiting the Planning Department's and Planning Commission's discretion to review signs, the Planning Department and Planning Commission may review and exercise discretion to require changes in the time, place and manner of the proposed signage for the proposed Formula Retail use, applying the Performance-Based Design Guidelines.

(e) **Conditional Use Authorization Required.** A Conditional Use Authorization shall be required for a Formula Retail use in the following zoning districts unless explicitly exempted:

(1) All Neighborhood Commercial Districts in Article 7;

(2) All Mixed Use-General Districts in Section 840;

(3) All Urban Mixed Use Districts in Section 843;

(4) All Residential-Commercial Districts as defined in Section 209.3;

(5) Chinatown Community Business District as defined in Section 810;

(6) Chinatown Residential/Neighborhood Commercial District as defined in 812;

(7) Western SoMa Planning Area Special Use District as defined in 823;

(8) Limited Commercial Uses in RH, RM, RTO, and RED Districts, as permitted by Sections 186, 186.3, and 231;

(9) Third Street Formula Retail Restricted Use District, as defined in Section 786;

(10) The C-3-G District with frontage on Market Street, between 6th Street and the intersection of Market Street, 12th Street and Franklin Street; and

(13)<sup>1</sup> The Central SoMa Special Use District as defined in Section 848, except for those uses not permitted pursuant to subsection (f) below.

(f) **Formula Retail Uses Not Permitted.** Formula Retail uses are not permitted in the following zoning districts:

(1) Hayes-Gough Neighborhood Commercial Transit District;

(2) North Beach Neighborhood Commercial District;

(3) Chinatown Visitor Retail District;

(4) Upper Fillmore District does not permit Formula Retail uses that are also Restaurant or Limited-Restaurant uses;

(5) Broadway Neighborhood Commercial District does not permit Formula Retail uses that are also Restaurant or Limited-Restaurant uses;

(6) Mission Street Formula Retail Restaurant Subdistrict does not permit Formula Retail uses that are also Restaurant or Limited-Restaurant uses;

(7) Geary Boulevard Formula Retail Pet Supply Store and Formula Retail Eating and Drinking Subdistrict does not permit Formula Retail uses that are also either a Retail Pet Supply Store or an Eating and Drinking use as set forth in Section 781.4;

(8) Taraval Street Restaurant Subdistrict does not permit Formula Retail uses that are also Restaurant or Limited-Restaurant uses;

(9) Chinatown Mixed Use Districts do not permit Formula Retail uses that are also Restaurant or Limited-Restaurant uses; and

(10) Central SoMa Special Use District does not permit Formula Retail Uses that are also Bar, Restaurant, or Limited Restaurant Uses as defined in Section 102.

(g) **Neighborhood Notification and Design Review.** Any application for a Formula Retail use as defined in this section shall be subject to the notification and review procedures of Sections 311 or 333, as applicable, of this Code.

(h) **Determination of Formula Retail Use.** In those areas in which Formula Retail uses are prohibited or subject to the provisions of Subsections 303.1(d) or (e), any application for an entitlement or determination determined by the City to be for a Formula Retail use that does not identify the use as a Formula Retail use is incomplete and cannot be processed until the omission is corrected. Any entitlement approved or determination made that is determined by the City to have been, at the time of application, for a Formula Retail use that did not identify the use as a Formula Retail use is subject to revocation at any time. If the City determines that an entitlement or determination, or an application for the same, is for a Formula Retail use, the applicant or holder of the entitlement bears the burden of proving to the City that the proposed or existing use is not a Formula Retail use.

(i) **Performance-Based Design Guidelines.** All new, enlarged, intensified or non-intensified Formula Retail uses or establishments must comply with the Commission's adopted Performance-Based Design Guidelines for Formula Retail, as directed by the Planning Department and Planning Commission.

(j) **Change of Use.** Changes of Formula Retail establishments are generally described below, except that a change of a Formula Retail use that is also a nonconforming use pursuant to Section 182 is prohibited. In all other instances, changes of Formula Retail establishments from one use category to another, including a change from one use to another within the sub-categories of uses set forth in the definition of Retail Sales and Services in Section 102 and in Section 890.102 for Mixed Use Districts, require a new Conditional Use authorization as a new Formula Retail use. Changes of Formula Retail owner or operator within the same use category that are determined to be an enlargement or intensification of use pursuant to subsection 178(c) are required to obtain Conditional Use authorization and shall meet the Commission's adopted Performance-Based Design Guidelines for Formula Retail. In cases determined not to be an enlargement or intensification of use, the Performance-Based Design Guidelines for Formula Retail may be applied and approved administratively by the Planning Department, unless the applicant requests a Conditional Use hearing at the Planning Commission. The applicant shall also pay an administrative fee to compensate Planning Department and City staff for its time reviewing the project under this subsection (j), as set forth in Section 360 of this Code.

(k) **Accessory Uses.** Conditional Use authorization shall be required for all Accessory Uses within those use categories subject to Formula Retail controls as defined in this Section 303.1, except for the following:

(1) Single automated teller machines falling within the definition of Limited Financial Services that are located at the street front that meet the Commission's adopted Performance-Based Design Guidelines for automated teller machines;

(2) Automated teller machines located within another use that are not visible from the street;

(3) Vending machines that do not exceed 15 feet of street frontage or occupy more than 200 square feet of area facing a public right of way.



(Added by Ord. [235-14](#), File No. 140844, App. 11/26/2014, Eff. 12/26/2014; amended by Ord. [22-15](#), File No. 141253, App. 2/20/2015, Eff. 3/22/2015; Ord. [129-17](#), File No. 170203, App. 6/30/2017, Eff. 7/30/2017; Ord. [229-17](#), File No. 171041, App. 12/6/2017, Eff. 1/5/2018; Ord. [202-18](#), File No. 180557, App. 8/10/2018, Eff. 9/10/2018; Ord. [179-18](#), File No. 180423, App. 7/27/2018, Eff. 8/27/2018, Oper. 1/1/2019; Ord. [296-18](#), File No. 180184, App. 12/12/2018, Eff. 1/12/2019)

#### AMENDMENT HISTORY

Divisions (c)(18) and (19) added; Ord. [22-15](#), Eff. 3/22/2015. Division (a)(9) amended; former divisions (c)(1)-(19) merged into division (c) and current division (c) amended; divisions (d) and (e)(4) amended; former divisions (e)(5) and (e)(9) deleted; former divisions (e)(6)-(8) and (e)(10)-(12) redesignated as (e)(5)-(10) and amended; divisions (g), (j), and (k) amended; Ord. [129-17](#), Eff. 7/30/2017. Division (c) amended; Ord. [229-17](#), Eff. 1/5/2018. Divisions (c), (f)(4)-(6), (f)(8)-(9), and (j) amended; Ord. [202-18](#), Eff. 9/10/2018. Division (g) amended; Ord. [179-18](#), Oper. 1/1/2019. Divisions (e)(13)<sup>1</sup> and (f)(10) added; Ord. [296-18](#), Eff. 1/12/2019.

#### CODIFICATION NOTE

1. So in Ord. 296-18.

[Print](#)

## San Francisco Planning Code

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**SEC. 703.4. CONDITIONAL USE AUTHORIZATION FOR  
FORMULA RETAIL USES.**

(a) This Section 703.4 shall be known as the Small Business Protection Act.

(b) Except for those zoning districts where Formula Retail uses are not permitted as set forth in Section 303.1(f), establishment of a Formula Retail use, as defined in Section 303.1, in any Neighborhood Commercial District, as identified in Article 7, shall require Conditional Use authorization pursuant to the criteria of Sections 303(c) and 303.1 and be subject to the terms of Sections 303.1(g) and (h).

(c) Nothing herein shall preclude the Board of Supervisors from adopting more restrictive provisions for Conditional Use authorization of Formula Retail use or prohibiting Formula Retail use in any Neighborhood Commercial District.

(Added by Proposition G, 11/7/2006; amended by Ord. [235-14](#), File No. 140844, App. 11/26/2014, Eff. 12/26/2014; Ord. [129-17](#), File No. 170203, App. 6/30/2017, Eff. 7/30/2017)

**AMENDMENT HISTORY**

Division (b) amended; Ord. [235-14](#), Eff. 12/26/2014. Section amended; Ord. [129-17](#), Eff. 7/30/2017.

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## San Francisco Planning Code

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**SEC. 803.6. FORMULA RETAIL USES IN ARTICLE 8 DISTRICTS.**

The Formula Retail controls set forth in Section 303.1 of this Code apply to Article 8 Districts.

(Added by Ord. 204-06, File No. 060482, App. 7/25/2006; amended by Ord. 269-08, File No. 081234, App. 11/25/2008; Ord. [298-08](#), File No. 081153, App. 12/19/2008; Ord. [140-11](#), File No. 110482, App. 7/5/2011, Eff. 8/4/2011; Ord. [75-12](#), File No. 120084, App. 4/23/2012, Eff. 5/23/2012; Ord. [106-12](#), File No. 120047, App. 6/22/2012, Eff. 7/22/2012; Ord. [42-13](#), File No. 130002, App. 3/28/2013, Eff. 4/27/2013; Ord. [56-13](#), File No. 130062, App. 3/28/2013, Eff. 4/27/2013; Ord. [235-14](#), File No. 140844, App. 11/26/2014, Eff. 12/26/2014)

**AMENDMENT HISTORY**

Section amended in its entirety; Ord. [235-14](#), Eff. 12/26/2014.



# The Impact of Chain Stores on Community

BY STACY MITCHELL | DATE: 18 APR 2000 |    

***A speech by ILSR's Stacy Mitchell delivered at the annual conference of the American Planning Association, April 2000***

Chain store proliferation has weakened local economies, eroded community character, and impoverished civic and cultural life. Moreover, consolidation has reduced competition and may harm consumers over the long-term. Contrary to conventional wisdom, the decline of independent businesses is not inevitable, nor is it simply the result of free market forces. Rather, public policy has played a major role, particularly through tax incentives and other development subsidies that give national chains a significant advantage. Meanwhile, a growing number of communities are taking a different approach. They are adopting land use rules that deter chain stores and actively encourage local ownership.

Let me begin by reading something that Jane Jacobs wrote in her book, *The Death and Life of Great American Cities*, about the relationship between locally owned businesses and community. Community is one of those words so overused that we rarely pause to consider its meaning. For Jacobs, what constitutes community is not any one particular thing, but rather the many small interactions that occur in our everyday lives.

"It grows," she writes, "out of people stopping by the bar for a beer, getting advice from the grocer and giving advice to the newsstand man, comparing opinions with other customers at the bakery and nodding hello to the two boys drinking pop on the stoop . . . hearing about a job from the hardware man and borrowing a dollar from the druggist . . .

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"Most of it is ostensibly utterly trivial, but the sum is not trivial at all. The sum of such casual, public contact at the local level. . . most of it fortuitous, most of it associated with errands . . . is a feeling for the public identity of people, a web of public respect and trust, and a resource in time of personal or neighborhood need. The absence of this trust is a disaster to a city street."<sup>1</sup>

What Jacobs describes here could be an urban neighborhood or a small town. Its defining feature—and indeed the very foundation of this close-knit community—is a vibrant local retail economy. It is a place of small stores and sidewalks; a place where public and private space overlaps; and a place where we buy goods and services from businesses owned by our neighbors.

Such places are increasingly rare. Small-scale, pedestrian streets are giving way to massive, impersonal shopping centers. Street life has suffered, as our daily errands revolve increasingly around stores accessible only by car. Locally owned businesses are disappearing, displaced by national chains that have limited ties and no long-term commitment to the community.

The loss of locally owned stores and the pace of retail consolidation is staggering. 11,000 independent pharmacies have closed since 1990. Independent bookstores have fallen from 58 percent of book sales in 1972 to just 17 percent today. Local hardware dealers are on the decline, while two companies have captured 30 percent of the market. Blockbuster rents one out of three videos nationwide. Five firms control one-third of the grocery market, up from 19 percent just five years ago. A single firm, Wal-Mart, now accounts for 7 percent of all consumer spending.<sup>2</sup>

If the current trends continue, independent retailers might soon be a thing of the past. But, in the midst of this unprecedented expansion by national retail corporations, another trend is underway: a growing number of communities are rejecting chain stores.

Last summer, residents of Ashland, Virginia mounted a spirited campaign to block a proposed Wal-Mart. In October, the Planning Commission voted unanimously to reject the store. In Chelsea, Michigan, residents organized a picnic to protest plans for a Rite Aid drugstore. The event drew a crowd of 1100 people. Rite Aid quickly backed down. Similar events are occurring across the country.

Indeed, over the past two years, dozens, or perhaps hundreds, of neighborhood groups have sprung up to protect their homegrown businesses. In Lake Placid, New York, a group known as the Residents for Responsible Growth is working with neighboring towns to form a regional response to chain store expansion. In Flagstaff, Arizona, it was the arrival of a Barnes & Noble and a Home Depot that prompted residents to form the Friends of Flagstaff's Future. In Northfield, Minnesota, the Citizens for Responsible Development is working to defend the town's historic Main Street and local shops.

## CONSUMERS

The debate over chain stores is often characterized as a struggle between our hearts and wallets. We may mourn the loss of the corner drugstore, a fixture in the neighborhood for three generations, or the local independent bookstore, but ultimately we believe that, as consumers, we are better off. We tend to take as self-evident the chain stores' claims that they bring us lower prices and wider selection.

Over the long-term, however, consumers are best served when there are numerous competitors in the market. The big retail corporations, like Home Depot, Toys R Us, and Best Buy, are known in the industry as "category killers." The name is significant. These businesses do not intend to compete with local stores; they aim to be the only game in town.

Typically, a chain store will enter a new market sporting deep discounts. Many chains employ loss leaders to attract customers. Wal-Mart has been known to sell gallons of milk for 25 cents or to price entire departments below its own acquisition costs. This sets up a battle that local merchants cannot win. If they

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don't match the chain's prices, they risk losing customers. If they do match the chain's prices, they will lose money on every sale. While a chain can afford to operate a new outlet at a loss indefinitely, it's only a matter of time before the local business will be forced to close.

Once the chain has eliminated the local competition, prices tend to rise. In Virginia, a survey of several Wal-Mart stores statewide found prices varied by as much as 25 percent. The researchers concluded that prices rose in markets where the retailer faced little competition. A similar conclusion was reached in a survey of Home Depot. Prices were as much as 10 percent higher in Atlanta compared to the more competitive market in Greensboro, North Carolina.<sup>3</sup>

As for wider selection, consumers should be especially wary of the claims made by chain stores. Independent merchants are usually the first to sell products made by small companies. By contrast, most national chains refuse to do business with small and mid-sized companies. They prefer to deal only with large manufacturers. The result is that small manufacturers—even those that make innovative products, publish great books, or distribute ground-breaking films—are having an increasingly difficult time reaching consumers.<sup>4</sup>

Consider the impact of this on book publishing. Borders Books and Barnes & Noble certainly stock a large number of titles under one roof, but these are virtually the same titles found in each of their 2,000 stores. Although local bookstores tend to be smaller, collectively they stock — and promote — far more titles than either of the chains. They take risks on unknown authors and small publishers. A number of best-selling writers, including Barbara Kingsolver and Amy Tan, contend that, without independent booksellers, their first books would have gone quietly out of print.

## LOCAL ECONOMIES

Even if chain stores do save us a few dollars now and again, it comes at a great cost. Chain stores contribute far less to the local economy than independent businesses.

Developers often present new chain store developments as major additions to the local economy. They note the growth in retail sales and shopping options. They tally up the number of new jobs and the added tax revenue that the development will bring.

What is often overlooked is the other side of the balance sheet. Unlike new manufacturing facilities, which do create real economic growth, new retail stores simply shift consumer spending from one area of town to another. A new big box store can only be successful at the expense of existing businesses.

A study in Iowa, for example, found that new Wal-Mart stores derive on average of 84 percent of their sales from existing businesses within the community.<sup>5</sup> Similar conclusions have been reached in studies of big box development in Massachusetts, Maine, Vermont, New York, California, and Virginia.

What all of the studies find is that very little of the sales generated by a new retail store represent new retail spending. Instead these developments simply shift economic activity from one part of town to another. The end result is not economic development, but rather economic displacement.

One study in Greenfield, Massachusetts concluded that a proposed Wal-Mart store would cost existing businesses \$35 million in sales. The 177 jobs expected to be gained by the Wal-Mart would be offset by the loss of 148 jobs at other businesses.<sup>6</sup> A similar study in Saint Albans, Vermont found that a new Wal-Mart would derive 76 percent of its sales from local businesses. Many of these stores would be forced to close, leading to a significant net decline in total retail employment and property tax revenue.<sup>7</sup>

Trading locally owned businesses for chain stores also entails the loss of significant secondary economic benefits.

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Local stores keep profits circulating within the local economy. They also support a variety of other local businesses. They create opportunities for service providers, like accountants and printers. They do business with the community bank. They advertise through independent radio stations and other local media outlets. They purchase goods from local or regional distributors. In this way, a dollar spent at a locally owned businesses sends a ripple of economic benefits through the community.

By contrast, chain stores typically centralize these functions at their head offices. They keep local investment and spending to a minimum. They bank with big national banks. They bypass local radio stations in favor of national advertising. In this way, much of a dollar spent at a chain store leaves the community immediately.

Small, independent stores also create economic diversity and stability. Because they are locally owned, these stores are firmly rooted in the community. They are unlikely to move and will do their best to weather economic hard times.

Chain stores, by contrast, tend to be fair-weather friends. They are highly mobile and will abandon a location if profit margins do not meet their expectations. The worst case scenario is when a big box store builds on the edge of town, destroys the central business district, and, then a few years later, decides that it too will close its doors. The town is left with a dead Main Street and nothing to show for it. Nationwide, there are more than 300 empty Wal-Marts.<sup>8</sup> It's very difficult to find a tenant for these single-purpose buildings and they often remain vacant for many years.

A community that loses its local businesses to national chains also risks losing other economic development opportunities. New technologies have enabled many companies to operate virtually anywhere. When these companies consider location options, towns with a vibrant commercial core and a unique character are often at the top of the list.

## COMMUNITY

From an economic perspective, there is much to suggest that chain stores may not be our best value. But perhaps more significant than any of the economic considerations are the qualitative benefits of local ownership. Locally owned businesses build strong communities. They provide a foundation for the web of connections and trust that Jane Jacobs believed so essential to a healthy neighborhood.

There are several reasons for this. The first is that independent stores tend to be located in humanly-scaled, pedestrian-oriented shopping districts, as opposed to the sprawling, isolated experience of a chain store parking lot.

The second reason is that local stores create a sense of place and community identity. They reflect the local culture. They give neighborhoods their distinct flavor. They are often a source of community pride and an attraction to visitors.

Chain stores, by contrast, are sapping communities of their character and individuality. Even the most famous American cities are losing their unique appeal. Kmart, Costco, and Home Depot are building in Manhattan. Fifth Avenue is home to Starbucks and The Gap. These same stores can be found on Michigan Avenue in Chicago, Market Street in San Francisco, and thousands of other locations worldwide.

The arrival of chain stores may also entail the destruction of important local landmarks. An 1876 Friends Meeting house in Richmond, Indiana, for example, was demolished for a CVS drugstore. In Nashville, the Jacksonian Apartments, eligible for the National Register of Historic Places, were torn down for a Walgreen drugstore.<sup>9</sup>

The third way that independent businesses strengthen community is through their contributions to civic and cultural life. Local merchants are more than providers of goods and services. They often take a

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organize local festivals. According to the U.S. Small Business Administration, small businesses give more time and money to charitable organizations than do their large competitors.<sup>10</sup>

Because they live in the places where they do business, local merchants tend to be far more committed to the community's well-being and long-term stability than distant corporations. This commitment manifests itself in a variety of ways. In St. Paul, Minnesota, for example, the local food cooperative recently opened a new store in a low income neighborhood on a lot that had been vacant for years. As with many construction projects, the coop ran into higher than expected costs. Several independent merchants, including the local bookseller, stepped in and provided a sizable and much-needed loan. Meanwhile, Barnes & Noble and Borders Books, both of which operate stores in the city, were nowhere to be found.

Finally, the shift from local to absentee-owned stores means that business decisions are no longer made locally by members of the community. Who decides whether to close a store in a distressed neighborhood, stock a controversial book, sell produce from local farms, pay a living wage, or contribute to a local charity? In the case of chain stores, these decisions occur in distant boardrooms, where the values of the local community carry little or no weight.

This loss of local decision-making and the growing power of a small number of large corporations has implications for democracy. In 1952, Senator Hubert Humphrey asked, "Do we want an America where the economic market place is filled with a few Frankensteins and giants? Or do we want an America where there are thousands upon thousands of small entrepreneurs, independent businessmen, and landholders who can stand on their own feet and talk back to their Government or to anyone else?"<sup>11</sup>

## NEW RULES

There are tremendous benefits to choosing the latter path. Our ability to do so will depend not only on the decisions we make as consumers, but on the decisions we make as citizens. The actions of policymakers, and, in particular, planners, are critical to reviving the homegrown economy and ensuring that local businesses continue to be a vital part of our communities.

Many contend that public policy should have no role in shaping the retail economy. This is, after all, a free market.

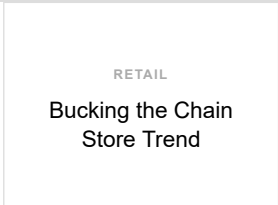
But public policy is never neutral, and has, in fact, played a major role in the expansion of national chain stores. In many ways, public policy has undermined local retailers by giving large retail corporations unfair advantages.

Examples can be found at all levels of government. Congress, for instance, has exempted retailers like Amazon.com and Barnes & Noble from collecting sales tax on internet sales. This effectively gives these companies a 6 to 8 percent price advantage over local stores.

At the city and state level, tax incentives and other kinds of subsidies are routinely made available to chain stores. In Wisconsin, nearly \$20 million was provided a few years ago for a distribution center for Target stores. The city of Rochester, Minnesota spent \$3 million attracting a Barnes & Noble. Long Beach, California waived \$6 million in taxes for a development that included Kmart. In Florida, Walgreens has requested \$4.5 million in state and county tax breaks for the construction of a new warehouse.<sup>12</sup>

Similar examples can be found all over the country. Even if your hometown does not provide such subsidies, the chains that expand there are able to do so in part because of public funding they've received elsewhere. Rarely are tax breaks and subsidies given to locally owned businesses. Instead, they often see their tax dollars used to subsidize a competitor.

In other cases, city governments have evicted local businesses to make room for chain store developments. A proposal currently under consideration in Pittsburgh would level 60 buildings and





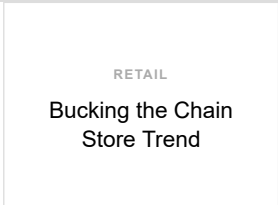
three dozen chain stores. The beneficiaries of this plan include The Gap, Borders Books, and FAO Schwartz.<sup>13</sup>

Under these circumstances, even the most competitive, efficient, and popular independent businesses are struggling to stay afloat.

What these examples make clear is that the loss of independent businesses is not inevitable. Rather than undermining the local economy, many communities are taking a different approach. They have made sustaining humanly scaled, unique homegrown businesses a primary focus of planning and economic development decisions.

They are adopting a variety of land use rules that deter chain stores and foster local ownership. Many have restricted the physical size of new stores. Others allow new retail development only if it meets specific criteria defined by the community. Some have banned uniformity, by prohibiting “formula” businesses. Others have barred new retail development outside of the town’s central business district. (Examples of these policies, including the full text of the local ordinance, can be found on the New Rules web site, created by the Institute for Local Self-Reliance, at <http://www.ilsr.org>.)

By designing policies that put community first, local businesses can once again become a key component in a dynamic retail economy and a vibrant community.



## NOTES

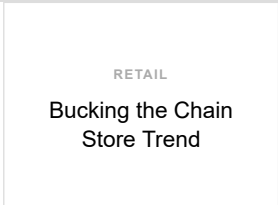
1. Jane Jacobs, *The Death and Life of Great American Cities*, New York: Random House, 1961.
2. National Community Pharmacists Association; American Booksellers Association; Ace Hardware Corporation; Video Software Dealers Association; “Five Hundred Largest U.S. Corporations,” *Fortune*, April 2000.
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4. Lionel Diaz, Senior Vice President, Manufacturers’ Agents National Association, Testimony before the Committee on Small Business, U.S. House of Representatives, August 10, 1994.
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10. Patricia A. Frishkoff and Alicja M. Kostecka, “Business Contributions to Community Service,” U.S. Small Business Administration, 1991.



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Stacy Mitchell is a researcher for the Institute for Local Self-Reliance (ILSR), a national nonprofit organization advancing community-oriented economic development through research and educational activities.



About Author

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Stacy Mitchell

Stacy Mitchell is co-director of the Institute for Local Self-Reliance and directs its Independent Business Initiative, which produces research and designs policy to counter concentrated corporate power and strengthen local economies.

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[...] FACT: Less than 30% of the money spent with a national retailer actually stays within your community... to where the opposite is true with a locally owned business. Over 70% of the money you spend stays with your community. (<http://ilsr.org/impact-chain-stores-community>) [...]

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[...] Before you get started on a rant...yes, of course I'm glad chain stores employ local residents. No, I would not want any of them to lose their jobs. Yes, I do realize that there are a few local chains where a corporate-employed manager has the authority to, and does ,support our local community through non-profit assistance. However, time and again, research has shown the net effect of a global or national chain





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# Why Care about Independent, Locally Owned Businesses?

BY MARIE DONAHUE | DATE: 23 JUL 2018 | [Social media icons]

Locally owned businesses play a central role in healthy communities and are among the best engines that cities and towns have for advancing economic opportunity and building resilient places. Small business ownership has been a pathway to the middle class for generations of Americans and continues to be a crucial tool for expanding prosperity and community self-determination. Here, we outline five important reasons for local officials to support independent businesses, based on a growing body of research.

## 1 | Local small businesses are linked to higher incomes and less inequality.

Enacting policies that strengthen small businesses and expand opportunities for local entrepreneurs is one of the most effective ways of reducing inequality and expanding the middle class.

In 2013, for example, an economist at the Federal Reserve Bank of Atlanta found that counties with larger shares of local small businesses outperform their peers on three critical economic indicators: they have stronger per capita income growth, faster employment growth, and lower poverty rates.[1] Using two decades of data from a number of countries, another study found that areas with more small and mid-size businesses had lower levels of income inequality.[2]

## 2 | Entrepreneurship fuels job creation.

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Across the country, the rate of new business formation has fallen sharply over the last 20 years, contributing to sluggish job growth and wage stagnation. “New businesses account for nearly all net new job creation,” concludes a Kauffman Foundation research brief.<sup>[3]</sup>

Cities that achieve higher rates of entrepreneurship and new business creation than the national average are better off. They generate more jobs, which in turn lifts wages. While cities may be tempted to focus only on tech startups, expanding opportunities for residents to launch businesses that meet community needs in retail, services, food production, and other sectors can have even greater impact.

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### 3 | Independent businesses generate more tax revenue at lower public cost.

Locally owned businesses in dense, mixed-use commercial districts generate more tax revenue for cities than sprawling shopping centers, while also costing less in public services. An analysis from the Government Finance Review, drawing on data from a sample of 30 cities in 10 states, found that a community earns about \$7 in property taxes per acre on the average big-box retail store, compared to \$287 per acre on a mixed-use, mid-rise business district.<sup>[4]</sup> The compact nature of these districts also means they make more efficient use of public infrastructure and services.

### 4 | Local businesses foster community cohesion and well-being.

The social fabric of a community is tightly coupled with the health of its independent businesses. Research has shown that communities with a larger share of local businesses have more social capital, stronger social ties, higher levels of civic engagement, and better success solving problems.

A 2011 study from the Cambridge Journal of Regions, Economy, and Society, for example, found that areas with a greater concentration of small businesses, all else being equal, have improved public health outcomes than those with fewer small businesses.<sup>[5]</sup> The authors speculate that local ownership of business enhances a community's capacity to solve problems. Other research has found the presence of independent retailers helps communities retain their residents, especially those with college degrees.<sup>[6]</sup>

Taken together, these studies show that cultivating a vibrant independent business sector not only strengthens the economy; doing so can advance social goals as well.

### 5 | Community-scaled businesses reduce pollution and improve environmental sustainability.

Independent businesses help to sustain compact downtown and neighborhood commercial districts, which curb sprawl and automobile use, and enable residents to fulfill more of their daily needs close to home.

Several studies have found that people who live near small stores walk more for errands and, when they do drive, their trips are shorter. That's not all: small retailers also influence how likely people are to take public transit. A study of 3,200 households in King County, Wash. (the Seattle area), for example, found that residents of neighborhoods with the most local businesses logged 26 percent fewer automobile miles than people living in areas with few neighborhood stores, and they were significantly more likely to take public transit to work.<sup>[7]</sup>

### By supporting local retailers, local officials can create a healthier, more sustainable community.

This list is part of our **Local Policy Action Toolkit** for independent businesses and is available to download and share as a **two-page PDF**.



Click to download a two-page PDF version of this "Why Care" resource.

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Find more details about the studies mentioned here, and others, by going to the Institute for Local Self-Reliance's resource page — **Key Studies: Why Local Matters**. Additional resources about the importance of independent businesses to the local economy can be found on our **Why Local** page.

### Notes

- [1] "Locally Owned: Do Local Business Ownership and Size Matter for Local Economic Well-being?" Anil Rupasingha, Federal Reserve Bank of Atlanta. 2013.
- [2] "Wage Inequality and Firm Growth," Holger M. Mueller et al., LIS Working Paper, 2015.
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- [7] "A Study of Land Use, Transportation, Air Quality, and Health in King County, WA," Lawrence Frank and Company, The Neighborhood Quality of Life Study, Center for Clean Air Policy, GeoStats, & McCann Consulting, 2005; "Neighborhood stores: An overlooked strategy for fighting global warming" Stacy Mitchell, Grist, 2009.

At the Independent Business initiative at the Institute for Local Self-Reliance, we research and advocate for policies that strengthen independent businesses and reduce the power of dominant corporations. **Check out more of our work**, and sign up for our **monthly newsletter** so that you don't miss our latest research.

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Marie Donahue was a Research Associate with the Institute for Local Self-Reliance's Energy Democracy and Independent Business Initiatives in 2018-2019. She analyzed and wrote about the implications of corporate concentration and monopoly in these sectors.

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CONSENT CALENDAR

January 21, 2020

To: Honorable Members of the City Council  
 From: Councilmember Sophie Hahn  
 Subject: Small Business Listening Sessions

RECOMMENDATION

Refer to the City Council's Land Use, Housing & Economic Development policy committee to establish regular Small Business/Enterprise Listening Sessions.

BACKGROUND

Berkeley has over 40 community Boards and Commissions, but none dedicated to addressing the needs of small businesses, not for profits and other small and local enterprises. At the same time, these entities are regulated and taxed by the City and depend on the Office of Economic Development (OED) and the Planning Department, among others, for technical assistance and support.

The recent establishment of City Council-level policy committees, including the Land Use, Housing & Economic Development (LUHED) committee, provides a new and welcome opportunity for Berkeley's small enterprises to connect with the City, to share their perspectives, and to comment on policies and programs affecting small businesses. This item formalizes that opportunity by establishing regular Small Business/Enterprise Listening Sessions at the Council's LUHED committee.

Berkeley's unique character is owed in large part to the presence of small businesses and not for profits (including arts organizations). These enterprises contribute significantly to our economic and cultural vitality, but face significant challenges due to increasing costs, space constraints and, in the case of small businesses, growing competition from online stores and chain retailers.

The OED, Chamber of Commerce, and other business organizations in Berkeley host well-attended networking events, seminars and listening sessions for small businesses and not for profits, and work with them one-on-one. Through participation at these events, conversations with the Director of Economic Development and Chamber and Business Improvement District leaders, and following email and online conversations, it is clear that Berkeley's small enterprises are eager to communicate with the Council and Mayor on a wide variety of topics.

This item requests that the LUHED committee establish a recurring agenda item, approximately once per quarter, to give small business owners and not for profits a focused opportunity to address and engage with the Council. Listening sessions could be focused on one or several topics, with additional time allocated for general comments. Committee members, the OED, business associations, business/not for profit leaders and members of the public could recommend topics, which might include exploring the costs of doing business, challenges in finding affordable and appropriate space, and permitting challenges. Timing, frequency and topics of listening sessions should be determined by the LUHED committee, but it is recommended that sessions and topics be announced as far in advance as possible, to allow staff and community partners to undertake broad outreach.

#### ENVIRONMENTAL SUSTAINABILITY

This item supports the Berkeley General Plan goal to protect local and regional environmental quality, as small, local businesses help to sustain vibrant, compact, walkable town centers, which in turn are essential to reducing sprawl, automobile use, habitat loss, and air and water pollution.

#### FISCAL IMPACTS

Supporting small and local businesses/enterprises in Berkeley provides significant community and economic benefits. Committee meetings are already noticed, organized and staffed by the City. The only possible additional cost of implementing this item is minimal time for Economic Development staff to do outreach.

#### CONTACT INFORMATION

Councilmember Sophie Hahn, Council District 5, (510) 981-7150





Office of the Mayor

ACTION CALENDAR

February 11, 2020

To: Honorable Members of the City Council

From: Mayor Jesse Arreguín and Councilmembers Kate Harrison, Sophie Hahn, and Rigel Robison

Subject: Amending B.M.C. Chapter 13.78 to Prohibit Additional Fees for Roommate Replacements and Lease Renewals and Terminations

RECOMMENDATION

Adopt first reading of an Ordinance to amend Berkeley Municipal Code (B.M.C.) Chapter 13.78 (Tenant Screening Fees Ordinance) to prohibit property owners from assessing additional fees on roommate replacements, lease renewals and terminations.

BACKGROUND

California Civil Code Section 1950.6 permits property owners to charge applicants a fee to purchase a consumer credit report and to validate, review, or otherwise process an application for the rent or lease of residential rental property. State law sets a cap on the amount that can be charged for a rental application screening fee at \$30.00, with increases annually based on the CPI. The fee is currently set at \$53.11. The fee cannot exceed the costs of the services needed to review the application.

In April 2011, the Berkeley City Council unanimously approved Ordinance No. 7171-N.S., to add Chapter 13.78 to the Berkeley Municipal Code relating to tenant screening fees. This was enacted to advance implementation of state law by requiring a copy of California Civil Code Section 1950.6 (the state tenant screening fee law) and information regarding the current maximum allowable fee as set by state law, be given to all applicants who pay an application fee for rental housing. The ordinance also provides a private right of action for individual tenants if an owner is found to be in violation of the ordinance.

In October 2014, B.M.C. Chapter 13.78 was amended to designate the Rent Stabilization Board to calculate the maximum allowable Tenant Screening Fee in accordance to California Civil Code Section 1950.6.

Recently, multiple tenants have contacted the Rent Stabilization Board and the Mayor's Office to express concern over property owners assessing additional fees for lease renewals, replacing roommates, or when a tenant vacates prior to the expiration of the lease term. These fees are in addition to screening fees permitted under state law.

This practice is not expressly permitted under state law and places additional financial burdens on a tenant's right to move out, and adding or replacing roommates. With rents in Berkeley and the Bay Area some of the highest in the country, these fees make it financially prohibitive for existing tenants to pay rental costs, continue existing leases or move out to seek new housing accommodations. In order to prevent displacement and keep housing affordable, the City should

update B.M.C. Chapter 13.78 to make explicit that such fees are unlawful in the City of Berkeley.

The proposed ordinance would prohibit landlords from charging these additional fees in the City of Berkeley for lease renewals, roommate replacements and vacating the lease prior to the expiration of the lease term. The ordinance would not prohibit landlords from charging screening fees on proposed roommates, or prohibit a landlord from recovering any charges, fees or damages associated with termination of tenancies that are authorized under California Civil Code Section 1951.2.

ENVIRONMENTAL SUSTAINABILITY

There are no identifiable environmental effects associated with this recommendation.

FISCAL IMPACTS OF RECOMMENDATION

No additional fiscal impact. The ordinance is enforced through the civil court process.

RATIONALE FOR RECOMMENDATION

As we approach the lease renewal season, these amendments will clarify existing protections for tenants who are targeted by excessive fees.

CONTACT PERSON

Mayor Jesse Arreguín                      510-981-7100

Attachments:

1: Ordinance

ORDINANCE NO.

AMENDING BERKELEY MUNICIPAL CODE CHAPTER 13.78 TO PROHIBIT NON-REFUNDABLE APPLICATION FEES ASSOCIATED WITH EXISTING TENANCIES AND LEASE TERMINATION FEES

BE IT ORDAINED by the Council of the City of Berkeley as follows:

Section 1. That Berkeley Municipal Code Chapter 13.78 is hereby amended to read as follows:

**Chapter 13.78**  
**TENANT SCREENING AND LEASE FEES**

Sections:

- 13.78.010 Notification of state law limitation on tenant screening fees.
- 13.78.015 Calculation and publication of maximum allowable tenant screening fee.
- 13.78.016 Prohibition of non-refundable application fees associated with existing tenancies.
- 13.78.017 Prohibition of lease termination fees.
- 13.78.018 Applicability to existing rental agreements.
- 13.78.020 Remedies – Civil penalty – Not exclusive.

**13.78.010 Notification of state law limitation on tenant screening fees.**

When an owner of residential rental property or ~~his or her~~ the owner's agent receives a request to rent residential property in the City of Berkeley from an applicant and ~~he or she~~ the owner charges that applicant a fee to purchase a consumer credit report and to validate, review, or otherwise process an application for the rent or lease of residential rental property, ~~he or she~~ the owner shall provide, either in the rental application or in a separate disclosure prior to receipt of the fee, a clear and conspicuous tenant screening fee rights statement and a statement of the maximum fee cap permitted under California Civil Code Section 1950.6(b). The "Tenant Screening Fee Rights Statement" shall mean the following statement or a statement substantially similar to the following statement:

"Pursuant to California law you have tenant screening fee rights, including the right to a copy of your consumer credit report if one is obtained with your screening fee, a refund of any unused portion of the fee and a receipt of the costs of the screening. For more information about your rights, please visit <https://www.codepublishing.com/CA/Berkeley/cgi/NewSmartCompile.pl?path=Berkeley13/Berkeley1378/Berkeley1378.html>~~[URL to be provided by City].~~"

**13.78.015 Calculation and publication of maximum allowable tenant screening fee.**

Beginning on January 1, 2015, the Rent Stabilization Board shall calculate and publish on an annual basis the maximum allowable tenant screening fee in accordance with California Civil Code Section 1950.6(b).

**13.78.016 Prohibition of Non-refundable Application Fees Associated with Existing Tenancies**

It is unlawful for an owner of residential rental property or the owner's agent to charge a non-refundable fee to any existing tenant for the purpose of renewing a tenancy, in whole or in part,

including any fee associated with the departure of a roommate or to request to add or replace a roommate in a pre-existing household.

Nothing in this law is intended to disallow a property owner, or the owner's agent, to charge a "tenant screening fee" as permitted under California Civil Code Section 1950.6 to any tenant, including any new or additional roommate who seeks to be added to an existing rental agreement or lease, seeking to rent or lease residential rental property.

#### **13.78.017 Prohibition of Lease Termination Fees**

It is unlawful for an owner of residential property, or the owner's agent, to charge any fee for the termination of their tenancy prior to the expiration of a lease. Nothing in this section shall prohibit a landlord from recovering any charges, fees or damages, associated with termination of tenancies that are authorized under California Civil Code Section 1951.2.

#### **13.78.018 Applicability to Existing Rental Agreements**

This chapter is applicable to all residential rental agreements regardless of any contractual language in any rental agreement or lease to the contrary. Any provision of an existing rental agreement or lease that violates the provisions of this chapter shall be null, void, and unenforceable.

#### **13.78.019 Reserved**

#### **13.78.020 Remedies – Civil penalty – Not exclusive.**

A. The remedies provided under this section are in addition to any the City or any person might have under applicable law.

B. Any owner of residential rental property shall be liable to any applicant or tenant harmed for a civil penalty of two hundred fifty dollars (\$250.00) if the owner fails to comply with any part of this Chapter.

C. Any person aggrieved by the owner's failure to comply with this Chapter may bring a civil action against the owner of the residential rental property for all appropriate relief including damages and costs which ~~she or he~~ the applicant may have incurred as a result of the owner's failure to comply with this Chapter.

D. In any action to recover damages resulting from a violation of this Chapter the prevailing plaintiff(s) shall be entitled to reasonable attorneys' fees in addition to other costs, and in addition to any liability for damages

Section 2. Copies of this Ordinance shall be posted for two days prior to adoption in the display case located near the walkway in front of the Maudelle Shirek Building, 2134 Martin Luther King Jr. Way. Within 15 days of adoption, copies of this Ordinance shall be filed at each branch of the Berkeley Public Library and the title shall be published in a newspaper of general circulation.