

FORMULA BUSINESS RESTRICTION Nimby Overreaction?

SUMMARY

A San Francisco Chronicle columnist recently declared:

“It’s a cruel irony that many of the coastal California cities and counties that have imposed tight restrictions on new housing and development also are home to levels of poverty that don’t get enough attention. Such communities should be aggressively challenged. Their NIMBYism, rationalized as “preserving community character,” is actually making people poorer.”¹

Both the City of Ukiah and the County of Mendocino² have ordinances that restrict formula business development. Are formula business restrictions necessary or desirable, or are they simply a manifestation of nimbyism, which effectively discourages business and job growth?

While the Mendocino County 2016-17 Grand Jury applauds community charm and mom-and-pop small business, we question if the restriction of formula businesses is appropriate in a County that suffers from an inability to fill professional employment positions, a lack of available housing, and too few jobs with benefits, not to mention a general dearth of retail shopping opportunity that is desirable to a youthful demographic. It is not as if these businesses are breaking down doors to open chains here.

A County Supervisor stated to the Grand Jury that the County has been making a concerted effort to change the perception that this County is anti-business. However, that such restrictions have been enacted gives the appearance of a not-so-business friendly culture that the County can ill afford.

GLOSSARY

NIMBY: An acronym for the phrase “Not In My Backyard”.

CEQA: The California Environmental Quality Act is a statute requiring state and local agencies to identify the significant environmental impacts of their actions and to avoid or mitigate those impacts, if feasible. CEQA applies to projects undertaken, funded or requiring an issuance of a permit by a public

¹ Joe Mathews, “Connecting California, Coastal California is Home to the State’s Poorest Kids,” San Francisco Chronicle, March 16, 2017

² Referring to those parts of the unincorporated County that are not under Coastal jurisdiction

agency. The analysis of a project required by CEQA usually takes the form of an Environmental Impact Report or Negative Declaration.

Formula Business (Mendocino County Draft Ordinance): “One of the commercial use types listed below that have 10 or more other locations and that share more than two standard features such as name, décor, services, and color.

- 1) Eating and Drinking Establishments (County Code §20.024.065)
- 2) Food and Beverage Retail Sales (§County Code 20.024.075)
- 3) Food and Beverage Preparation – Without Consumption (County Code §20.024.080)
- 4) Retail Sales, General (County Code §20.024.120)

Formula Business (Downtown Zone Ukiah): City Code §9232: RESTAURANT – FORMULA FAST FOOD: “A restaurant that includes all of the following characteristics:

1. Is required by contractual or other arrangements to maintain any of the following: substantially standardized menus, architecture, building appearance, signs, or other similar standardized features; and
2. Has three (3) or more of the following characteristics:
 - a. Food is pre-made and wrapped before customers place orders;
 - b. Food is served with disposable tableware for on-site consumption;
 - c. Food is ordered from a wall menu at a service counter;
 - d. Food consumed on the premises is ordered while customers are standing;
 - e. Payment is made by customers before food is consumed; or
 - f. The service counter is closer to an entry/exit than is the seating/dining area.Ice cream shops, coffeehouses, bakeries, hot dog stands, or other businesses whose primary function is not the sale of full meals are exempted from this definition.”

Ministerial: Ministerial projects, also known as “by right”, involve only the use of fixed standards or objective measurements, and the public official cannot use personal, subjective judgment in deciding whether or how the project should be carried out. (CEQA Guidelines §15369). There is no public input.

Discretionary: Discretionary projects require the exercise of judgment or deliberation when the public agency or body decides to approve or disapprove a particular activity, as distinguished from situations

where the public agency or body merely has to determine whether there has been conformity with applicable statutes, ordinances, or regulations (CEQA Guidelines §15357). Public input is received.

Use Permit: A use permit gives the County the ability to conduct a more thorough review of a proposed project and subjects projects to public hearings to ensure that the project will be compatible with surrounding land uses and will not adversely affect neighbors or the environment.³

BACKGROUND

The Mendocino County 2016-17 Grand Jury interviewed a city official from Ukiah, who wondered how the new In-N-Out Burger restaurant, located close to the city-county line, would affect the City. The official questioned whether the County of Mendocino (County) had required the restaurant to perform a traffic analysis. The Grand Jury investigated whether the In-N-Out Burger fell under the new County formula business moratorium and whether it needed a special use permit that would allow for public input on the impacts the restaurant would introduce into the area. The Grand Jury speculated that traffic congestion, noise, and litter would increase, and questioned how the restaurant would affect the nearby neighborhoods and the Crossroads Shopping Center's businesses.

In-N-Out Burger is one of three formula businesses as defined in the County and Ukiah codes that have been permitted since 2015. Two such businesses have been built and opened; the third remains in litigation.

APPROACH

The Grand Jury compared the permit approval process and fees of the In-N-Out Burger with the recently built Chipotle Mexican Grill in Ukiah. To understand the basis for the County moratorium, we reviewed the Redwood Valley Dollar General building permit controversy.

The Grand Jury reviewed Mendocino County Board of Supervisor (BOS) meeting documents and video, Mendocino County Planning and Building Services reports, memoranda, meeting video, and

³ Mendocino County Planning and Building Services website:
[http://www.co.mendocino.ca.us/planning/pdf/How to apply for a use permit.pdf](http://www.co.mendocino.ca.us/planning/pdf/How%20to%20apply%20for%20a%20use%20permit.pdf)

litigation documents; the City of Ukiah Council and Ukiah Planning Commission minutes, and County and City codes. The Grand Jury also reviewed media coverage of all three business projects.

The Grand Jury interviewed Ukiah city staff, County Planning and Building Services staff, and BOS members.

DISCUSSION

A growing number of cities and towns nationally have discussed enacting restrictions or bans on formula chain businesses. Some have passed, some have been passed over. The underlying motive is the preservation of distinctive community character and small entrepreneurial business ownership. Mendocino County is currently in the process of adopting restrictions on these businesses. Ukiah has an ordinance that prohibits restaurant formula businesses altogether in the downtown zone.

In June 2015, a permit was granted to construct the building for a Dollar General store on a commercial lot in Redwood Valley. Some residents felt that they were “blind-sided” by the permit approval and vociferously objected to the store.⁴ Their protest led the BOS to enact an urgency moratorium on formula businesses. This may be viewed as an overreaction to a singular ministerial business application about one retail chain store that some residents did not like.

Concurrently, an In-N-Out Burger was speedily granted a building permit. Restaurant construction proceeded without objection. This chain restaurant is on North State Street just north of the Ukiah city limits and has ramifications for both the City and the County.

Although Ukiah has a restaurant formula business prohibition for the downtown zone, Chipotle Mexican Grill was exempted from the City code and allowed construction after the developers agreed to design modifications presented by the Ukiah Planning Commission.

The Grand Jury found two inconsistencies. The first inconsistency is that formula business ordinances vary according to their jurisdiction in cities and the County. Different rules apply to different locations

⁴ “Mendocino County imposes temporary ban on chain stores,” Ukiah Daily Journal, September 28, 2015

for similar businesses. For example, Ukiah allowed Chipotle Mexican Grill, a national chain restaurant, to build in the downtown zone despite the City prohibition. Costco, a big box chain retailer outside the downtown zone, has been in litigation for years regarding environmental impact despite the public emphatically supporting the retailer's approval. Under its own set of zoning rules, Fort Bragg permitted Taco Bell, with a rustic exterior befitting the community, to open in 2015. It has been well received. Under County jurisdiction, In-N-Out Burger opened without any required modifications under an exempted commercial area⁵ of the Ukiah Valley Area Plan. Only Dollar General has been rebuked as unwanted development even though the property is in a County zone that allows commercial development by right.

The second inconsistency is that ordinances contradict explicit economic and workforce developmental policy. County budget priorities are economic and new housing development. The two are intertwined: Housing is affordable only when residents are fully employed; and building housing is not feasible without a viable employment base.

At the March 20, 2017 BOS meeting, County Human Resources reported that there is high employee turnover. Beyond discussion of low comparative wages for the region, it was asserted that a major reason for not being able to hire and retain employees is the lack of housing. This has also been reported by the County Agriculture Department as contributing to its inability to fill positions needed for the County cannabis ordinance.⁶ Similarly, a local business owner complained of lack of housing for employees and has applied for approval to build a housing development.⁷

The formula businesses discussed in this report are examples of how business is promoted and challenged in the County. A County Planning and Building official stated to the Grand Jury, "Every community wants some filter on economic development." Indeed, but is prohibition and restriction that could lead to permit denial consistent to our economic needs? The Grand Jury believes that the best practice is to encourage business development generally and to maintain standards by reviewing all business applications for community continuity equally.

⁵ <http://www.co.mendocino.ca.us/planning/UVAP.htm>

⁶ "County Ag Dept Struggling to Fill Marijuana Positions," Ukiah Daily Journal, March 27, 2017

⁷ "Housing Development Proposed Along Lovers Lane in Ukiah", Ukiah Daily Journal, March 10, 2017

Community Character Combining District Ordinance

In August 2015, responding to the community protest over the permit granted for construction of a Dollar General store on a vacant commercial parcel at 8451 East Road in Redwood Valley, the BOS directed staff to prepare a draft urgency ordinance putting in place a temporary moratorium on formula businesses. An Urgency Ordinance Establishing Interim Restrictions on the Establishment of Formula Businesses, BOS Ordinance No. 4382, was adopted on September 22, 2015, “prohibiting the issuance of any entitlement for a formula business or formula restaurant, or the making of any determination that would allow a formula business or formula restaurant, in any zoning district during the term of the ordinance,” with certain exceptions.

On November 3, 2015, the BOS extended the September 22 moratorium to allow time for the Department of Planning and Building Services to prepare changes to the zoning code. On April 19, 2016, the Planning and Building Services Director presented the staff report to the BOS that proposed a requirement for a Conditional Use Permit allowing time for public input rather than an outright prohibition of formula businesses. On August 16, 2016, the BOS extended the Urgency Ordinance for 12 months to allow for further study and full review of the proposed ordinance.

The most recent Planning and Building Memorandum, with the recommended amendments to the County zoning ordinance, was presented to the Planning Commission on November 17, 2016. Additional permit fees and estimated project delay for these business applications were put forward in the staff report for the draft ordinance:

“The time to bring a use permit to a public hearing is 6-9 months. In addition to the use permit use fee (\$2,260), special studies (e.g., traffic) may be required to complete the CEQA review and a “Fish and Wildlife Filing Fee” (\$2,260.25) is charged when the project is completed.”

The Planning Commission passed a motion recommending the adoption of the draft ordinance and thereby moved it forward to the BOS.

On March 20, 2017, the Department of Planning and Building Services Interim Director presented the draft ordinance⁸ to the Board of Supervisors. As explained to the Board, the amended County ordinance is not a complete ban but a requirement for formula businesses wanting to open in specified inland commercial zoning areas to obtain a use permit after a public process. However, there is no guarantee of approval and, the Interim Director stated, “it may appear to outside business that there is a prohibition, which in turn may obstruct business applications”.

Additionally, the Hopland Municipal Advisory Council (MAC) requested exemption so as not to deter development, and the Laytonville MAC wanted a more stringent definition of formula business. A member of the BOS wondered if the MACs were becoming like “mini governments” within the County jurisdiction.

The target timeframe for presentation of the proposed ordinance to the BOS is sometime this summer. All potentially affected commercial property owners must be noticed in advance to give them opportunity to address the Board.

Dollar General

The Dollar General building permit was approved in June 2015 magisterially, or “by right”, meaning that no public input or design changes were required. Vocal community members cried foul, saying that such a store would be a blight on the main commercial street. They argued that the store would conflict with the rural character of Redwood Valley⁹ and create unwanted competition with the local market.

A permit appeal was filed, petitioners arguing that potential environmental impacts were not reviewed. At the October 6, 2015 BOS meeting, the Board denied the building permit. This denial was subsequently overturned by the Board and the permit was approved on a close 3-2 vote on November 1, 2015. A civil suit against the County’s approval of the permit without environmental review ensued.

⁸ Amend the Mendocino County Zoning Code – Division I, Title 20 (Inland) to add Chapter 20.147, Community Character (CC) Combining District and Rezone all the C-1 (Limited Commercial) and C-2 (General Commercial) zoning districts to apply the CC Combining zoning in the County

⁹ Board of Supervisors meeting, October 6, 2015

Mendocino County Superior Court denied the suit in entirety in January 2017.¹⁰ The Petitioners have appealed this decision. This continuing court action has delayed the building of the project.

Given that the business was magisterially approved “by right” under County code, there was no opportunity for residents of Redwood Valley to have input into the development. They may have been better served with design discussion requiring Dollar General to adopt a rustic exterior and signage appropriate to its rural setting rather than instigating a formula business moratorium. In that case, if the business failed there would be an acceptable commercial building available in the community.

The side of the argument that was not voiced in the public discussion is that the Dollar General will fill a retail need for many residents of the community. It will also lower the number of shopping trips to Ukiah from Redwood Valley and Potter Valley.

Dollar General employee benefits include healthcare, 401k retirement plan, paid vacation and holidays, and product discounts. Salary options and job benefits typically vary by Dollar General location.¹¹

In-N-Out Burger

Coinciding with the BOS action on formula businesses, In-N-Out Burger purchased the Fjord’s restaurant site at 1351 North State Street, just north of Ukiah city limits, demolished that landmark building, and built and opened its new chain restaurant on January 25, 2017.

The In-N-Out Burger was not subject to the provisions of the formula business moratorium because it was located in a specifically exempted county area¹² in a commercial zone designated in the Ukiah Valley Area Plan. It was also considered simply a replacement restaurant. As a result, the permit was issued very quickly “by right”. There was no requirement for design review or any particular modifications of the building plans.

¹⁰ Mendocino County Superior Court, Order and Judgment Denying Petition for Writ of Mandate and Exhibit A, January 23, 2017

¹¹ Dollar General Employee Handbook, February 2015:
<https://www.scribd.com/doc/293508174/Dollar-General-Employee-Handbook>

¹² Map of exempted area, Attachment D of Draft Ordinance (page 13):
http://www.co.mendocino.ca.us/planning/pdf/current/OA_20160001%20Formula%20Business.pdf

In-N-Out Burger agreed to construct new ADA-complaint sidewalks and the “dreaded bump” to enter the shopping center.¹³ The Department of Transportation Director stated, “And I gotta hand it to them, they’re stepping up and doing more...Everything I asked them to do they agreed to, which was great, because they didn’t have to. But they want to be a classy business.”¹⁴ So, while the restaurant stepped up, it was not required to submit a traffic analysis nor provide engineering for mitigation of potential congestion or other impacts by virtue of the current zoning code.

The popularity of this formula business development was evidenced when it opened by lines of cars at the drive-through, a full parking lot, and consumers at the counter. The restaurant added many permanent jobs offering pay exceeding minimum wage, variable work schedules, health care benefits, a retirement plan, free meals on work days, discounts, and holiday, vacation and sick time.¹⁵

It is appreciated that the In-N-Out Burger replaced Fjords, a restaurant that had been closed for years, on a site that had become a long-term eyesore. However, by adhering to current County zoning code that required the issuance of the building permit by right, the County missed an opportunity to have the developer listen to public concerns. In-N-Out may have provided, at their expense, improvements to mitigate such impacts as additional traffic congestion, noise, and odor in the surrounding unincorporated area and Ukiah. Such discussions have occurred in other Northern California counties during the permitting process.¹⁶

Chipotle Mexican Grill

In comparison, the Chipotle Mexican Grill in Ukiah at 596 E. Perkins Street had to jump through a number of hoops required by the Ukiah Planning Commission and City Council for approval under the Downtown Zoning Code. First, formula fast food restaurants are prohibited in the downtown zone. Even though Chipotle meets the criteria given by City code for a formula restaurant, it was expressly deemed not a formula fast food business by a unanimous Ukiah City Council vote on August 20, 2014, and the permit was approved.

¹³ “In-N-Out Burger to take over Fjords building in Ukiah,” Ukiah Daily Journal, April 12, 2016

¹⁴ Ibid

¹⁵ <http://www.in-n-out.com/employment/restaurant.aspx>

¹⁶ “Neighbors Voice Concerns about In-N-Out’s Plan for Novato,” Novato Patch, August 16, 2011; “Walnut Creek: In-N-Out Burger Eyed for North Main Street,” East Bay Times, March 7, 2017

At the June 24, 2015 Planning Commission meeting, the City Planning Director projected that the restaurant would create 30 to 35 new permanent restaurant positions and 25 temporary construction jobs. The Director stated, "Right there is the major reason why we find this project consistent with the General Plan. It supports the local economy. It creates jobs." Additionally, the Planning Commission unanimously exempted the restaurant from the Downtown Plan in three other areas: the building is one story rather than the two required; the frontage is more than the code specifies; and the 20 proposed parking spaces exceeds the 8-maximum allowed. The Planning Commission also passed recommendations on exterior color, bike racks, and low-emission vehicle parking spaces.

Chipotle broke ground on December 14, 2015 and opened on November 27, 2016. The building is generally considered an attractive addition to the east entrance to downtown Ukiah.

Employee benefits include healthcare with a wellness premium discount, 401k Retirement Plan, an Educational Assistance Program, vacation time, free shift meal, and free uniforms.¹⁷

Development Costs

It is a well-established economic principle that the larger the business capitalization the more likely the business will survive beyond three to five years. Formula businesses are usually well capitalized. They plan for and can manage the development fees additional to the construction necessary to build from the ground up, which is becoming increasingly more difficult for individuals.

In-N-Out Burger:

- County Building Permit: \$8,749.98
- Millview Water service connection fee: \$14,325.79
- Sewer Connection/Capital Improvement Fee: \$112,984.04
- Grease Trap Inspection Fee: \$100
- Sewer Lateral Inspection Fee: \$50
- Plan Check Fee: \$1,274.25
- Hydrant and lateral construction costs: Not specified

¹⁷ <http://careers.chipotle.com/benefits>

Chipotle Mexican Grill:

- Ukiah Building permit fees \$71,166.72, including the associated sewer connection fee of \$22,258.24

Dollar General:

- County Building Permit fee: \$10,157.27
- Well and Septic: Not specified
- Legal fees: Not specified

FINDINGS

- F1. Formula businesses are restricted or prohibited, except when they are not. Ordinances are written and applied in different jurisdictions resulting in dissimilar treatment of similar businesses, and even applied differently in the same jurisdiction.
- F2. The proposed County Community Character Combining District Ordinance adds additional expense and time, discouraging business permit applications in the County.
- F3. The City of Ukiah has applied its zoning ordinance inconsistently.
- F4. The downtown Ukiah formula business prohibition and the County Community Character Combining District Ordinance reflect an anti-business attitude that stymies economic growth.
- F5. Community character may be achievable through design modification.
- F6. In-N-Out Burger could have mitigated neighborhood concerns and Dollar General could have been required to provide design modifications if the code had not been written to allow “by right” commercial development.
- F7. The County Community Character Combining District zoning regulations go too far by adding time and expense to the application with the risk of capricious denial.
- F8. The “wisdom of the market place” should be allowed to determine the success or failure of business.

RECOMMENDATIONS

The Grand Jury recommends that:

- R1. The County zoning ordinance include community character design review for **all** business development. (F1, F2, F4, F5, F7)
- R2. The County and Ukiah eliminate “by right” business permits and formula business restrictions, and consistently review all business development under discretionary use permits for community character. (F1, F3, F4, F6, F8)
- R3. Ukiah modify the Ukiah City code to eliminate the prohibition on formula business in the downtown zone and treat all business development equally. (F3, F4, F5, F8)

RESPONSES

Pursuant to Penal Code §933.05, responses are *required* from the following individual(s):

- Ukiah City Manager (F1, F3, F4, F5 and R2, R3)

Pursuant to Penal Code §933.05, responses are *required* from the following governing bodies:

- Mendocino County Board of Supervisors (F1, F2, F4–F8 and R1, R2)
- Ukiah City Council (F1, F3–F5 and R2, R3)

Pursuant to Penal Code §933.05, responses are *requested* from the following individual(s):

- Director, Mendocino County Planning and Building Services Department (F1, F2, F4–F8) and (R1, R2)

BIBLIOGRAPHY

Planning and Building Memorandum OA_2016-0001 Formula Business, dated November 17, 2016, http://www.co.mendocino.ca.us/planning/pdf/current/OA_2016-0001%20Formula%20Business.pdf

Reports issued by the Civil Grand Jury do not identify individuals interviewed. Penal Code §929 requires that reports of the Grand Jury not contain the name of any person or facts leading to the identity of any person who provides information to the Grand Jury.