



SAN FRANCISCO PLANNING DEPARTMENT

February 23, 2016

Ms. Angela Calvillo, Clerk of the Board
Honorable Supervisor Wiener
Board of Supervisors
City and County of San Francisco
City Hall, Room 244
1 Dr. Carlton B. Goodlett Place
San Francisco, CA 94102

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**Re: Transmittal of Planning Department Case Number 2015-011449PCA
Expand Formula Retail to Include Subsidiaries [Board File No. 150731]
Planning Commission Recommendation: De Facto Disapproval**

Dear Ms. Calvillo and Supervisor Mar:

On January 21, 2016 the Planning Commission conducted a duly noticed public hearing at a regularly scheduled meeting to consider the proposed Ordinance that would amend the Planning Code to revise the definition of Formula Retail to include subsidiaries or affiliates of Formula Retail meeting certain criteria, introduced by Supervisor Mar.

After closing public comment, a motion to adopt a Recommendation for Disapproval failed on a 3 to 3 vote, and no subsequent motion was made. Per Planning Code Section 302(c), given that the Commission was unable to pass a motion the Ordinance is by default forwarded to the Board of Supervisors with a recommendation of disapproval.

The proposed amendments are not defined as a project under CEQA Guidelines Section 15060(c)(2) and 15378 because they do not result in a physical change in the environment.

Please find attached documents relating to the actions of the Commission. If you have any questions or require further information please do not hesitate to contact me.

Sincerely,

A handwritten signature in black ink, appearing to read "Aaron D. Starr", written over a horizontal line.

Aaron D. Starr
Manager of Legislative Affairs

cc:

Nick Pagoulatos, Legislative Aide to Supervisor Mar
Kate H. Stacey, Deputy City Attorney
Alisa Somera, Assistant Clerk, Office of the Clerk of the Board

Transmittal Materials

**CASE NO. 2015-011449PCA
Expand Formula Retail to Include Subsidiaries**

Attachments :

Planning Commission Resolution

Planning Department Executive Summary



SAN FRANCISCO PLANNING DEPARTMENT

Planning Commission Resolution No. 19551 HEARING DATE JANUARY 21, 2016

Project Name: Expand Formula Retail to Include Subsidiaries
Case Number: 2015-011449PCA [Board File No. 150731]
Initiated by: Supervisor Mar / Introduced July 7, 2015
Staff Contact: Aaron Starr, Manager of Legislative Affairs
aaron.starr@sfgov.org, 415-558-6362
Reviewed by: AnMarie Rodgers, Senior Policy Advisor
anmarie.rodgers@sfgov.org, 415-558-6395
Recommendation: **Recommend Disapproval**

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RECOMMENDING THAT THE BOARD OF SUPERVISORS DISAPPROVE A PROPOSED ORDINANCE THAT WOULD AMEND THE PLANNING CODE TO REVISE THE DEFINITION OF FORMULA RETAIL TO INCLUDE SUBSIDIARIES OR AFFILIATES OF FORMULA RETAIL MEETING CERTAIN CRITERIA; ADOPTING FINDINGS, INCLUDING ENVIRONMENTAL FINDINGS, PLANNING CODE SECTION 302 FINDINGS, AND FINDINGS OF CONSISTENCY WITH THE GENERAL PLAN AND PLANNING CODE SECTION 101.1.

WHEREAS, on July 7, 2015 Supervisors Mar introduced a proposed Ordinance under Board of Supervisors (hereinafter "Board") File Number 150731, which would amend the Planning Code to revise the definition of Formula Retail to include subsidiaries or affiliates of Formula Retail meeting certain criteria;

WHEREAS, The Planning Commission (hereinafter "Commission") conducted a duly noticed public hearing at a regularly scheduled meeting to consider the proposed Ordinance on November 19, 2015; and,

WHEREAS, the proposed amendments are not defined as a project under CEQA Guidelines Section 15060(c) and 15378 because they do not result in a physical change in the environment; and

WHEREAS, the Planning Commission has heard and considered the testimony presented to it at the public hearing and has further considered written materials and oral testimony presented on behalf of Department staff and other interested parties; and

WHEREAS, all pertinent documents may be found in the files of the Department, as the custodian of records, at 1650 Mission Street, Suite 400, San Francisco; and

WHEREAS, the Planning Commission has reviewed the proposed Ordinance; and

MOVED, that the Planning Commission hereby recommends that the Board of Supervisors *disapprove* the proposed ordinance.

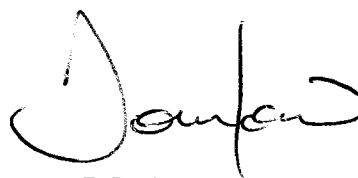
FINDINGS

Having reviewed the materials identified in the preamble above, and having heard all testimony and arguments, this Commission finds, concludes, and determines as follows:

1. The Planning Commission proposed a motion of *disapproval*, which failed to pass on a three to three vote, with Commissioners Moore, Wu, and Richards voting against the motion and Commissioners Fong, Hillis and Antonini voting for the motion. Commissioner Johnson was absent.
2. Pursuant to Section 6(b) of the San Francisco Planning Commission Rules and Regulations "A motion that receives less than four votes is a failed motion resulting in disapproval of the action requested to be taken by the Commission unless a substitute motion for a continuance or other action is adopted."
3. Pursuant to Planning Code Section 302(c) (1) which states, "A proposed amendment to the Planning Code or part that had been introduced by a member of the Board of Supervisors to change the text of the Code or the Zoning Map shall be presented to said Board, together with a copy of the resolution of disapproval, and said amendment or part may be adopted by said Board by a majority vote."

NOW THEREFORE BE IT RESOLVED that the Commission hereby recommends that the Board DISAPPROVE the proposed Ordinance described in this Resolution.

I hereby certify that the foregoing Resolution was adopted by the Commission at its meeting on January 21, 2016.



Jonas P. Ionin
Commission Secretary

Votes on Failed Motion

AYES: Commissioners Fong, Hillis and Antonini

NOES: Commissioners Moore, Wu, Richards

ABSENT: Commissioner Johnson

ADOPTED: January 21, 2016



SAN FRANCISCO PLANNING DEPARTMENT

Executive Summary Planning Code Text Amendment

HEARING DATE: JANUARY 21, 2016
CONTINUED FROM NOVEMBER 19, 2015

Project Name: Expand Formula Retail to Include Subsidiaries
Case Number: 2015-011449PCA [Board File No. 150731]
Initiated by: Supervisor Mar / Introduced July 7, 2015
Staff Contact: Aaron Starr, Manager of Legislative Affairs
aaron.starr@sfgov.org, 415-558-6362
Reviewed by: AnMarie Rodgers, Senior Policy Advisor
Recommendation: **Recommend Disapproval**

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PLANNING CODE AMENDMENT

The proposed Ordinance amends the Planning Code to revise the definition of Formula Retail to include subsidiaries or affiliates of Formula Retail meeting certain criteria.

The Way It Is Now:

A Formula Retail is 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 be defined as Formula Retail, the business must maintain 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 service mark.

The Way It Would Be:

In addition to the criteria listed above, Formula Retail would also include a retail sales or service activity or retail sales or service establishment that meets all three of the following criteria: (A) fifty percent (50%) or more of the stock, shares, or any similar ownership interest of such establishment is owned by an existing Formula Retail use, or a subsidiary, affiliate, or parent of an existing Formula Retail use; (B) there are three or more other retail sales establishments already in operation anywhere in the world; and (C) the retail establishment 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.

BACKGROUND

A Brief History of Formula Retail Controls

In 2004, the Board of Supervisors adopted San Francisco's first Formula Retail controls, which added Section 703.3 ("Formula Retail Uses") to the Planning Code to provide both a definition of Formula Retail and a regulatory framework that intended, based on the findings outlined in the Ordinance, to protect a "diverse base with distinct neighborhood retailing personalities comprised of a mix of businesses." The

Ordinance established the existing definition for Formula Retail as a “type of retail sales activity or retail sales establishment which, along with eleven or more other retail sales establishments, maintains two or more of the following features: a standardized array of merchandise, a standardized façade, a standardized décor and color scheme, a uniform apparel, standardized signage, a trademark or a servicemark.” The Ordinance required Neighborhood Notification pursuant to Planning Code Section 312 for Formula Retail uses, Conditional Use (CU) Authorization for specific area of Cole and Carl Streets and Parnassus and Stanyan Streets and a prohibition on Formula Retail in the Hayes-Gough Neighborhood Commercial District.

In 2007, San Francisco voters approved Proposition G, the “Small Business Protection Act” which amended the Planning Code by adding Section 703.4 required CU authorization for Formula Retail uses (as defined in the Code) proposed in any NCD. Proposition G also noted that nothing precluded 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.”

On July 25, 2013, the Planning Commission passed Resolution No. 18931, recommending to the Board of Supervisors that the issue of Formula Retail be further studied to increase understanding of the issue overall and to examine potential economic and visual impacts of proposed controls before any new legislation was enacted. The Planning Department selected Strategic Economics Consulting Group from the City’s pre-qualified economic consultant list maintained by the Controller’s Office to carry out the study.

Funded in its entirety by the Planning Department, the study was completed in June 2014. The Department used the data in the report to analyze existing policy and controls to determine whether changes to the definition, process, or applicable geographic areas would improve neighborhood character and economic vitality. The result of that effort was Board File 140844, Formula Retail and Large-Scale Retail Controls. This ordinance was recommended for approval by the Planning Commission on July 17, 2014, and became effective on December 26, 2015. The new ordinance changed the existing formal retail changes in the following ways:

1. Formula Retail controls previously only applied to business with 11 or more locations in the United States. The ordinance amended the Code so that Formula Retail Controls apply to all business with 11 or more stores anywhere in the world.
2. Applied Formula Retail controls to Limited Financial, Fringe Financial, Tobacco Paraphernalia, Massage and Personal Services. Previously Formula Retail controls applied to only Drive-up Facilities, Eating and Drinking Uses; Liquor Stores; General Retail and Service, Financial Services, Movie Theater and Amusement and Game Arcades.
3. Applied Formula Retail controls to the C-3-G zoned parcels with frontage on Market Street between 12th Street and 6th Street, but only for uses that front onto Market Street.
4. Added two criteria to the existing five that the Commission considers for Formula Retail CUs. One of which requires Formula Retail uses over 20,000 gross square feet, except for grocery stores, to provide an economic impact study pursuant to Sec. 303(i) as part of the CU evaluation. The other requires staff to refer to the Commission Guide for Formula Retail for additional

information on applying the criteria, as well as expanded signage controls for Formula Retail uses.

5. Codified a previously uncoded methodology for calculating the concentration of Formula Retail uses in a neighborhood.
6. Required a full 30-day mailed notice for Formula Retail CU; previously this was only a 20-day notice.
7. CUs were previously required for walk-up facilities, such as ATMS, that were not recessed 3' from the property line. The ordinance eliminated this CU requirement, but subjected ATMs new Performance Based Design Guidelines promulgated in the Planning Commission's Guide to Formula Retail. Further, a single ATM is only subject to the Performance Based Design Guidelines and do not require Formula Retail CU as a Limited Financial Use.
8. Amended the Planning Code to address changes of Formula Retailers, nonconforming uses and abandonment in the following ways:
 - a. A new CU is required for Formula Retailers if they change to another Formula Retailer and meet the definition of intensification. Intensification is defined as changing to a retailer with more locations, expansion of use size, adding a commercial kitchen or change of use category, including retail subcategories.
 - b. An existing Formula Retail use that was never granted a CU cannot change to another Formula Retail use without a CU.
 - c. Change of Formula Retailers that are not determined to be an intensification or enlargement are still subject to the Performance Based Design Guidelines, applied and approved administratively.
 - d. Abandonment for Formula Retail uses is defined as 18 months instead of three years (36 months).

Formula Retail Subsidiary Working Group

One controversial topic that was left outstanding from the Formula Retail legislation is the regulation of subsidiaries. Both Supervisor Mar and Planning Department staff found the proposed regulation of subsidiaries to be complicated and contentious. Therefore, Supervisor Mar formed a working group made up of various stakeholders to further explore the topic and make recommendations to the City's Small Business and Planning Commission about the viability of further regulation. Twenty individuals were invited to participate in the group; including representatives from seven neighborhoods organizations, four San Francisco business groups, two small business owners, one representative from a national Formula Retailer, two public officials, one person from the Office of Economic and Workforce Development, one representative from the real estate industry, and one local resident.

The group had four meetings between January 28 and March 25, 2015. During those meetings the group heard presentations from planning staff and the city attorney's office. The group discussed what a subsidiary is and how it should be defined, how large of a threat subsidiaries are to neighborhood character, the experience of independent businesses, and possible solutions to regulating subsidiaries. Members of the working group maintained diverse views on whether and how the City should regulate subsidiaries; however, there was consensus that existing Formula Retail legislation is important for the vitality of the City's neighborhood commercial districts. Some from the group questioned how large of a threat subsidiaries are to character, and had a difficult time naming more than a few subsidiaries that could threaten neighborhood character. Others were already convinced that subsidiaries were a threat to

neighborhood character. And, as this subset of the group felt that this threat may increase over time, the City should expand the existing formula retail regulation to include subsidiaries. After hearing the dialog and debate, the Supervisor Mar drafted the ordinance before you today.

ISSUES AND CONSIDERATIONS

Why Formula Retail is Regulated

Formal Retail uses are regulated in San Francisco in order to protect the uniqueness of San Francisco's neighborhood commercial districts. According to the Findings in Section 303.1, "Formula Retail uses, 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." Findings in Section 303.1 further state that "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," and that Formula Retail establishment detract "from the unique community character of its impact on the homogenization." The Findings in Section 303.1 set out the intention behind regulating Formal Retail, which is not based on who owns the business, but is based on the physical impacts that Formula Retail have and the potential homogenization of the neighborhood caused by Formula Retail businesses.

Parent and Subsidiary Companies

The proposed Ordinance is designed to address a few recent cases of new or proposed establishments that did not have to go through the Formula Retail Conditional Use process even though they were owned by Formula Retailers, such as the Jack Spade store in the Mission (owned by Fifth and Company, the same holding company that owns Kate Spade an established Formula Retailer), and Athleta and Evolution Juice in the Upper Fillmore (owned by The Gap and Starbucks, respectively). Athleta would now already be defined as Formula Retail under the City's existing controls. However, based on the businesses that are already located in San Francisco, this proposed change is unlikely to have a wide-ranging effect. According to the Department's study¹ citywide, subsidiaries account for only three percent of retail businesses in San Francisco that have 12 or more corporate family members.

While generally subsidiaries are thought of as large established corporations funding a new concept to compete with existing businesses, the Department's 2014 Study found that expanding the definition to include establishments that are majority-owned by Formula Retail businesses subsidiary regulations could also affect small business owners². For example, a local business owner, Adriano Paganini, owns 14 restaurants including 10 Super Duper Burgers. The remaining restaurants are neighborhood serving unique restaurant concepts including Beretta, Delarosa, Starbelly, Lolida and most recently, Uno Dos Tacos. While Super Duper Burgers is not currently a Formula Retail use, it is on its way to becoming one if more than 11 locations open. If the definition of Formula Retail is expanded to include subsidiaries, any business that Mr. Paganini owns more than 50 percent of would be considered Formula Retail once it has

¹ "San Francisco Retail Economic Analysis". A report prepared for the San Francisco Planning Department by Strategic Economics. June 2014.

² Strategic Economics, "San Francisco Formula Retail Economic Analysis", prepared for San Francisco Planning Department. April 10, 2014 Draft Document, Page 117.

three or more locations if those businesses also maintain 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. Yet other businesses with a different owner or ownership structure would be considered Formula Retail only once they have 11 or more locations.

How Uses Are Defined in the Planning Code

In the Planning Code, all regulated uses are defined solely by their physical characteristics or land use impacts; aspects that are verifiable and have a clear and direct connection to the land use. Even Formula Retail uses rely on physical characteristics to define the use; if the Formula Retail use is owned as a franchisee or a major corporation it is still regulated in the same manner. The proposed Ordinance would change that physical, land use-based set of considerations and require the Planning Department to consider who owns the business, how much of a percentage each investor has in the business, and if any of those investors have other business that qualify as Formula Retail. This type of regulation is entirely new for the Planning Department and outside of our area of expertise.

It's also not clear that this information would be readily available to the Department should we be required to confirm the ownership of a business during the permitting process or when investigate a complaint. When Jack Spade was trying to open in the Mission it was owned by Liz Claiborne Inc., which also owned Kate Spade. In February 2014 the ownership company was known as Fifth and Pacific Companies and is now known as Kate Spade & Company. These large corporations regularly change names, ownership structures and buy and sell subsidiaries. Corporations could easily create separate holding companies to avoid Formula Retail controls. For non-public companies, this information would not necessarily be readily available and difficult to verify in the event of a dispute about the ownership definition.

Additional Findings for Section 303.1

The proposed Ordinance also adds additional findings to Section 303.1 that are intended to support the addition of subsidiaries to the Formula Retail controls. The new findings are included below, but in short the findings state that these businesses should be regulated like Formula Retail because they are likely to implement existing practices that they have experience with in their other Formula Retail establishments; that the likelihood that the number of subsidiary retail outlets will increase rapidly is great; and that spin-off businesses that are owned by a business defined as Formula Retail will have impacts on a neighborhood that are similar to the impacts caused by the "parent" Formula Retail outlets themselves.

Additional Finding #19: Companies that rely on strong branding to market a variety of items under brand umbrellas will tend to replicate their existing business models as they expand. Subsidiary or spin-off retail outlets may be new, but the company will be inclined to implement existing practices that they have experience with, like their existing Formula Retail business models.

Additional Finding #20: Even where a Formula Retailer's subsidiary or spin-off retail establishment does not have 11 or more retail outlets already, the likelihood that the number of subsidiary retail outlets will increase rapidly is great. The adverse impact may be delayed, but the impact on neighborhood character

will be the same. Many Formula Retail businesses expand rapidly once they introduce a new retail outlet line.

Additional Finding #21: Affiliates, subsidiaries or other spin-off businesses that are owned by a business defined as Formula Retail will have impacts on a neighborhood that are similar to the impacts caused by the “parent” Formula Retail outlets themselves. For all of the reasons specified above, the City needs to protect its vibrant and expanding small business sector, and maintain a supportive environment for new small business innovations. Accordingly, additional restrictions on Formula Retail uses are necessary and desirable where other outlets of Formula Retail subsidiaries already exist and share the common and homogenous features of Formula Retail uses.

REQUIRED COMMISSION ACTION

The proposed Ordinance is before the Commission so that it may recommend adoption, rejection, or adoption with modifications to the Board of Supervisors.

RECOMMENDATION

The Department recommends that the Commission recommend *disapproval* of the proposed Ordinance and adopt the attached Draft Resolution to that effect.

BASIS FOR RECOMMENDATION

The Planning Department’s strongly supports the regulation of Formula Retail as a way to enhance and preserve the unique character of our neighborhoods. The Planning Department has been at the forefront of regulating Formula Retail for the past 11 years and we continue be open to new ways to improve upon our current regulations. However, the Department is concerned that the proposal to regulate subsidiaries would set a precedent for the Department to start regulating businesses by ownership or ownership structure rather than land use impacts, unlike every other use in the Planning Code.

The Department is also concerned that this ordinance would put in place a large regulatory burden that we would not be able to effectively enforce for a relatively small problem. This form of regulation requires a level of expertise that the Department does not have. Businesses are required to file a Formula Retail affidavit with their application stating whether or not they are a Formal Retail use; however, the Department only investigates and verifies these statements based on complaints. If a complaint is filed and the Department asked for verification of ownership structure, the Department would not be able to determine if the information provided does verify whether or not the majority owner of the business also owns a Formula Retail business. The Department would also not be able verify ownership stakes in companies that are not publically traded because of different reporting requirements, and large corporation ownership structures are subject to change at any time.

The proposed Ordinance would also place a greater regulatory burden on businesses with only three locations than a business with 11 locations based on the “likelihood” that these businesses would become successful and expand. The Department is not qualified to evaluate the “likelihood” of future expansions. It is unlikely that even experienced business professions could effectively determine which businesses will succeed and which will fail. Further, many businesses started in San Francisco and later became Formula Retail even though these were not started by other Formula Retail businesses. The likelihood of expansion is not necessarily based on ownership structure; it’s based on how successful the business model is and the interest the owners have in expanding the business. Further, not all businesses that are

owned by existing Formula Retail do expand to 11 or more locations; Black Fleece and Evolution Fresh mentioned above are still under the 11 store threshold.

If the Board adopts these additional controls, the Department recommends that the ordinance include a clear statement that the existing formula retail provisions should be preserved even without the additional restrictions on subsidiaries, in the event that the restrictions on subsidiary businesses are challenged in court. The current Formula Retail restrictions have been in place for a long time in San Francisco, and we think it would be beneficial that the Board of Supervisors is clear that these new restrictions should not affect or call into question the City's long-standing formula retail controls.

ENVIRONMENTAL REVIEW

The proposed amendments are not defined as a project under CEQA Guidelines Section 15060(c) and 15378 because they do not result in a physical change in the environment.

PUBLIC COMMENT

Since this case report was initially published last year, the Department and the Commission have received a letter of support for the Department's disapproval recommendation from the SF Chamber of Commerce and a letter of support of the ordinance from the North Beach Business Association.

RECOMMENDATION: Recommendation of Disapproval

Attachments:

Exhibit A: Draft Planning Commission Resolution
Exhibit B: Board of Supervisors File No. 150731