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Goodbye Main Street?

By Jeff Hirt and Joe Sellars

After decades of losing ground to suburban big box stores and chain restaurants, America's main streets are once again a major focus of development activity.



Jeff Hirt

Chain retail and restaurants are threatening the unique character of downtown Golden, Colorado.

Thanks to new urbanism and smart growth and other infill policies that redirect development inward, these areas are witnessing a resurgence in mixed use and commercial development. With this renewed interest in downtowns and central business districts, however, comes the issue of how to create and maintain a healthy mix of uses, including locally owned and locally serving businesses. Increasingly, communities are seeing an over-concentration of high-end uses (e.g., art galleries, boutiques, and expensive restaurants) and chain store businesses that can erode the qualities and ambiance that make downtowns unique and attractive.

Local governments are beginning to use zoning regulations as a powerful tool to create

a balanced mix of land uses downtown and in business districts. In doing so, they are correctly recognizing a vital component of creating and maintaining a vibrant and sustainable downtown.

Using zoning to regulate uses is nothing new, but there are some creative strategies emerging to address the thornier issue of how to achieve the appropriate mix of uses. After all, attractive downtowns and business districts are a source of identity that distinguishes one community from another. This source of identity comes from not only the history, architecture, and the built environment generally, but also the businesses located there. One of the most significant features of vibrant downtowns and central business dis-

tricts is diversity, or a robust mix of land uses, whether local, national, small, or large. In many cases, the businesses contributing to an ideal mix are the smaller, locally serving, and locally owned businesses. Local governments around the country are recognizing this fact and taking creative steps to protect these businesses through zoning regulations.

This issue of *Zoning Practice* reports on some innovative strategies being employed effectively in a diverse array of communities to create a healthy mix of uses from both economic and aesthetic standpoints. This issue also discusses potential zoning approaches to providing affordable commercial space, another component of creating and sustaining a balanced mix of uses.

Specifically, this issue discusses:

- zoning strategies to preserve and protect desirable uses downtown and in central business districts (often locally serving and locally owned uses);
- potential strategies to provide affordable commercial space for desirable businesses that may not be able to afford locating downtown or in central business districts; and
- legal implications and challenges of these strategies.

FROM UNIQUE TO HOMOGENIZED

Many downtowns and business districts are beginning to lose their diversity and the availability of affordable commercial space to chain retail/restaurants and high-volume or high-end users that can pay higher rents. They are also being elbowed out by upscale residential development. Stacy Mitchell, author of *Hometown Advantage: How to Defend Your Main Street Against Chain*

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About the Author

Jeff Hirt and Joe Sellars work for Clarion Associates, a national land-use and real estate consulting firm specializing in community planning, land-use law, zoning ordinance review, landscape architecture, real estate appraisal, urban design, and historic preservation. Clarion Associates works nationwide with a broad range of private- and public-sector clients. More information is at www.clarionassociates.com.

Stores . . . and Why it Matters, argues that large chains can reduce the diversity of locally owned shops, leaving the economy and the customer at the mercy of an absentee-owned firm that can raise prices or abandon the community in later years. Revenues from local businesses tend to circulate within and strengthen the local economy rather than flowing to distant suppliers or corporate headquarters. An increasing number of local governments agree with this assessment and are enacting regulations to curb this problem. Port Townsend, Washington, for example, enacted a “formula” business ordinance with a purpose statement that reflected this:

WHEREAS, the addition of formula retail businesses in the commercial areas, if not monitored and regulated could serve to frustrate the Comprehensive Development Plan goal of a diverse retail base with a unique retailing personality comprised of a mix of businesses ranging from small to medium to large and from local to regional to national.

While many communities have benefited from larger chain and formula retail and restaurants, others want to limit the proliferation of such uses, particularly in their downtowns and central business districts. From a local land-use perspective, an over-abundance of these uses in concentrated areas can erode the unique qualities associated with vibrant downtowns and central business districts. Some proactive communities have successfully counteracted the idea of a homogenized commercial core. Local governments are realizing that they do not have to be at the mercy of these retailers in regulating the uses in their downtowns and central business districts.

STRATEGIES

Relatively few local governments have addressed this issue from a land-use regulatory standpoint, but there are some innovative strategies emerging. The majority of the strategies identified here involve amendments to the zoning code, one of the most powerful tools a local government has at its disposal. However, it is important to note that many of these regulations originate from and often reference comprehensive plan policies.

ZONE DISTRICTS

Several of the communities in our case studies have adopted zone districts in their commercial core areas with tailored use lists geared to exclude certain uses they feel are too numerous or that are not locally serving. Palm Beach, Florida, and Laguna Beach, California, are two good examples.

limit. Any businesses larger than 2,000 square feet must have an auditing firm document that more than 50 percent of receipts come from a local zip code.

Laguna Beach, California—Resident-Serving District

This upscale coastal community in Orange County enacted a resident-serving district in response to a growing concern that businesses in their commercial core increasingly catered to visitors, not locals. According to city planner Jenifer Murillo, residents in the downtown area have few affordable options for eating or shopping, and the few thriving locally owned, locally serving businesses are fortunate enough to own their buildings or have long-term leases.

In the resident-serving district, different types of uses are subject to specific criteria

Local governments are realizing that they do not have to be at the mercy of chain and formula retailers in regulating the uses in their downtowns and central business districts.

Palm Beach, Florida—Town-Serving Zone

A town-serving zone has been in place for over 15 years in this resort community located north of Miami. The intent of the district is to “create, preserve, and enhance areas of attractive, small-scale, retail, personal, and professional/business services providing for the needs of Townspeople.”

To accomplish this goal, the district imposes a 2,000-square-foot business size

relating to the “resident-serving” goal. The following are excerpts from the criteria used to evaluate uses:

- General Findings (all uses)—The proposed use will maintain a balanced mix of uses which serves the needs of both local and non-local populations.
- Formula-Based Business—The business offers merchandise and/or services that serve the current unmet needs of the resident population.



Matt Coebel

➔ South Congress in Austin, Texas, is an eclectic and thriving commercial corridor.

- Take-out Restaurants or Dessert Shops—No more than a total of 10 such establishments are to be located within the Downtown Specific Plan Boundaries.

NUMERICAL LIMITS ON SPECIFIC USES

Some communities have adopted numerical limits on certain uses (like restaurants) that they feel are overabundant and may drive out more desirable uses. This regulation has been used in communities such as Carmel, California, which adopted citywide caps on specific uses (hotel and motel units), and Laguna Beach, which adopted a cap on certain uses within a particular zone district (the resident-serving district discussed above). One large city, San Francisco (in its neighborhood commercial districts), has also utilized this tool. Now Portland, Maine, has followed suit.

Portland, Maine

An organization called Keep Portland Real in this historic seaside community lobbied successfully for the city to adopt a regulation in 2006 that puts a cap on formula businesses in

the downtown area. They argued that proliferation of such uses downtown and in the harbor area would erode the uniqueness of these areas and damage the local economy.

Portland's code allows 23 formula businesses in the Extended Pedestrian Activities Overlay District (PAD) downtown. These businesses cannot be larger 2,000 square feet in size, although the regulations exempt some formula businesses, including gas stations and pharmacies, from this standard.

SPACING REQUIREMENTS

Historically, many communities have used spacing requirements to prevent the clustering of unwanted uses (e.g., requiring adult businesses to be at least 1,000 feet from a similar use) or to separate certain uses from others (e.g., bars must be 500 feet from schools). Now some local governments are using this approach to protect the vitality of their downtowns and central business districts.

Warner, New Hampshire

This small community located in the south-central part of the state amended its zoning in

2001 to limit the concentration of fast-food and drive-in restaurants in the town, particularly along highway corridors (Route 103 and Interstate 89). Under this regulation, no such use may be located within 2,000 feet of another similar use.

SIZE RESTRICTIONS

Placing size restrictions on particular uses can also be an effective way to discourage the proliferation of unwanted uses. Such restrictions were touched on in the above examples for Palm Beach and Portland. Below are some additional policies and regulations aimed more specifically at limiting business size.

Port Townsend, Washington

This historic Victorian seaport on the Olympic Peninsula adopted restrictions on formula retail and restaurants in 2005. The regulations came in response to community concern over a new chain video store opening in this small community of about 8,500.

The city's zoning states that in all but one of the city's commercial districts, formula retail and restaurants may not exceed 3,000 square feet nor occupy more than 50 feet of linear street frontage.

Kansas City, Missouri—Brookside Commercial Area

Widely regarded as one of Kansas City's most desirable neighborhoods, Brookside is a historic, compact neighborhood commercial district full of local and small-scale businesses. In order to help preserve its status as a unique and eclectic commercial area, the city in 2000 adopted size limitations for the Brookside Business District that include a 10,000-square-foot cap for all businesses, except for grocery stores, which are allowed up to 25,000 square feet.

COMPREHENSIVE PLAN POLICIES

Many of the regulations adopted reference comprehensive plan policies in their purpose statements. For example, Port Townsend's size cap on formula businesses references the comprehensive development plan's goal of establishing "a diverse retail base with a unique retailing personality comprised of a mix of businesses ranging from small to medium to large and from local to regional to national." Clear comprehensive plan policy statements can help local governments with-

An important component of achieving a healthy mix of locally oriented commercial uses is the issue of affordable commercial space.

stand legal challenges to these often controversial regulations. To illustrate, one of the Corvallis, Oregon, comprehensive plan policies states the city's goal to "support the establishment of locally owned, managed, or controlled small businesses." Similarly, in Manchester, Vermont, the town plan policies contain the following objectives:

- Create and maintain a business environment which is hospitable to locally owned and managed businesses.
- Create regulations to moderate the increased presence of retail businesses that . . . attract a nonresident customer base . . . whose presence in Manchester would tend to detract from the Town's uniqueness or distinctiveness as a place to visit.

CREATING AFFORDABLE COMMERCIAL SPACE

An important component of achieving a healthy mix of locally oriented commercial uses is the issue of affordable commercial space. Locally oriented businesses often cannot afford the high rents that characterize vibrant downtowns and successful central business districts. Many communities have implemented affordable housing requirements through inclusionary housing (i.e., a requirement that a certain percentage of new residential homes be affordable) and commercial linkage programs (a requirement that developers of nonresidential property pay a fee to the local government for the creation of affordable housing). Soon, these requirements may serve as models for creating affordable commercial space. The following are two potential strategies, one voluntary and the other mandatory, that could draw from affordable housing programs in order to create and sustain affordable commercial space in areas threatened by an overconcentration of high-end businesses and chain retailers. In some respects, these strategies may look as much like an economic development program as a zoning regulation. As land-use regulations, therefore, these approaches must seek to strike a balance in serving the public interest without being labeled an

anticompetitive policy that favors certain users with subsidized lease rates.

Incentives

Local governments frequently offer incentives to developers who agree to provide affordable housing, open space, and other community benefits. These incentives often take the form of density bonuses, expedited development review and permitting, and exemptions from certain land-use regulations or requirements. These incentives could be extended to commercial or mixed use developers in downtown and other key commercial areas who provide "affordable" commercial space on the ground floor of their projects. This space could take the form of units with limited leasable square footage or restrictive covenants that cap rents for certain properties. Incentives are more palatable to most developers than direct regulations requiring provision of affordable space. Also, affordable housing programs

already in place could be adapted to create additional incentives for an affordable commercial component. Incentives can help to keep residual land value (i.e., the land value remaining after regulatory restrictions such as zoning and development standards are considered) at a level that maintains project feasibility from the developer's standpoint. However, in some places incentives have proven ineffective in accomplishing goals like affordable housing. Thus, communities may want to consider imposing regulations to encourage affordable commercial space.

Regulation

One approach might be to emulate mandatory affordable housing linkage programs. Developers of commercial space, or any development that eliminated commercial space, could be required to provide off-site affordable commercial space or make a payment-in-lieu into a city affordable commercial space fund. This fund would be used by the local government to purchase or build commercial space that would be leased out to "desirable" businesses at reduced rates. Affordable housing programs could serve as a model, particularly in the areas of administration and enforcement.



⊕ A national chain restaurant across the street from a local restaurant in Denver's Highlands neighborhood.

JEFF HITT

For multiunit commercial development, some communities may consider establishing a mandatory use list. Based on community objectives for the downtown or central business district, a use list may be drafted to implement a desired mix. So, for example, a new commercial development with 10 units must have two units with uses from

help offset rent revenues that are below market rate.

LEGAL ISSUES

Like any zoning or land-use regulation, special provisions aimed at creating vibrant yet affordable downtowns and central business districts must be sensitive to a number of legal issues.

legal ground if they are legislatively adopted and uniformly applied, as opposed to being applied on an ad hoc, discretionary basis. Affordable-space requirements should also have a sufficient nexus to the community's need to accommodate a variety of commercial users and should be roughly proportional to such need.



Jeff Hirt

➡ In recent years, new bridges have made the Highlands more accessible to downtown Denver. Now the neighborhood is one of the most desirable areas in the city. Without careful planning, local retailers, like this small market, may be threatened by chain competitors or forced out by escalating rents.

use list A (that may include desired uses such as pharmacies or grocery stores, or affordable commercial space) and the rest may be from the more open commercial category (use list B). This could be a straightforward, effective approach if planners carefully consider local market conditions.

As with a strictly incentives-based approach, the success of a linkage or mandatory approach likely will depend on the degree to which it can help the developer recoup some of the costs of compliance. For example, local governments might draft regulations so that projects required to provide affordable commercial space or pay an in-lieu fee also receive an increase in density. If increased density is not feasible on-site, then perhaps affordable commercial regulations could be tied to a transferable development rights program. Similarly, local governments may need to provide owner incentives such as property tax breaks to

Fortunately, these legal issues are not difficult to address. For example, constitutional issues such as substantive due process and equal protection require that land-use regulations be rationally related to legitimate objectives and not discriminatory. Another constitutional concern is the “takings” issue. However, regulations like the ones discussed above should not pose takings problems since they do not threaten to wipe out all economically viable use of the subject property. With respect to takings, however, these regulations are on safer

Interstate Commerce

As discussed above, several communities have implemented formula or chain business restrictions to protect community character. The courts, however, have a long history of striking down state laws and local ordinances that discriminate against out-of-state businesses. The reasoning behind such cases is that Congress has exclusive authority to regulate interstate commerce. If local governments were free to create disadvantages for out-of-state businesses, interstate commerce would suffer overall. As a result, zoning regulations must be aimed at creating a healthy mix of commercial uses rather than simply prohibiting national chain restaurants on the belief that there are quite enough Starbucks coffee shops in the world. The goal should be to assure that key areas such as downtowns and business districts feature a variety of uses that serve local residents and visitors, as well as people of various income groups.

Case Law

A 2003 case from California, *Coronadans Organized for Retail Enhancement v. City of Coronado*, demonstrates the importance of regulating local and out-of-state businesses with an even hand. The City of Coronado adopted certain restrictions on formula retail businesses, defined as “a type of retail sales activity or retail sales establishment (other than a ‘formula fast food restaurant’) that is required by contractual or other arrangement to maintain any of the following: standardized (‘formula’) array of services and/or merchandise, trademark, logo, service mark, symbol,

The goal should be to assure that key areas such as downtowns and business districts feature a variety of uses that serve local residents and visitors, as well as people of various income groups.

decor, architecture, layout, uniform, or similar standardized feature.” The ordinance requires these businesses to obtain a Major Special Use Permit to open a business or expand more than 500 square feet. In addition, the establishment may not have a street-level frontage of greater than 50 linear feet nor have its retail space occupy more than two stories (except for grocery stores, banks, savings and loans, restaurants, and theaters). The required special use permit may be approved only after the planning commission and city council make certain findings regarding the establishment’s compatibility with existing surroundings and community character. Other findings include the establishment’s contribution to an appropriate balance of local, regional, or

tions not unlike those in Coronado. Formula retail businesses were allowed as conditional uses, provided that the street-level frontage did not exceed 50 linear feet and the floor area did not exceed 2,000 square feet.

Because of the regulations, a property owner was not able to sell a building to buyers who wanted to open a Walgreens drug store. Even though the intent of the ordinance was to retain a small-town community and prevent formula businesses from eroding the village’s uniqueness, the court found that the village had no historic or unique area that warranted limitations on formula businesses. Small formula retail was not subject to the ordinance, and existing large formula retail businesses were allowed to continue as nonconforming uses,

Formula business restrictions that discriminate against out-of-state businesses, intentionally or unintentionally, are much less likely to survive a legal challenge.

national businesses in the community, and an appropriate balance of small, medium, and large businesses. The stated purpose of the ordinance was to maintain Coronado’s “unique village character, the diversity and vitality of the City’s Commercial Districts, and the quality of life of Coronado residents.”

In upholding Coronado’s formula business restrictions, the court observed that the ordinance “does not impose different regulations on interstate as opposed to intrastate businesses, nor does it distinguish between those businesses that are locally owned and those that are owned by out-of-state interests. Instead, its regulations are uniformly applied—any business that meets the definition of a Formula Retail is required to obtain a permit before it opens a business or expands the specified amount, and is subject to the specified space limitations.” The court also found no intent to discriminate against out-of-state businesses. Instead, the court concluded that the city council’s primary purpose was to “provide for an economically viable and diverse commercial area that is consistent with the ambiance of the city.”

Contrast the California case with *Island Silver & Spice, Inc. v. Islamorada, Village of Islands*, where in 2007 a federal court in Florida reached a very different conclusion. The village had adopted formula retail restric-

tions both of which undermined the ordinance’s objective of preserving community character. In addition, the court found that the ordinance was tailored to serve local business interests by preventing competition from national chains. Even though the regulations, like Coronado’s, treated local and out-of-state chain stores the same, the court found that the resulting damage to interstate commerce outweighed any local zoning benefits created by the regulations.

Legal Dos and Don’ts

These two cases illustrate that planners and local officials must carefully draft regulations so that they are specifically designed to achieve their stated purpose. Below are five key points to assist local governments in avoiding legal troubles when amending their zoning to encourage a balanced mix of uses in downtowns and business districts:

- Generally applicable regulations that are legislatively adopted are less likely to receive legal scrutiny than those that are imposed on an ad hoc or administrative basis.
- Formula business restrictions that discriminate against out-of-state businesses, intentionally or unintentionally, are much less likely to survive a legal challenge.
- Formula business restrictions should be limited to key areas where commercial diver-

sity is needed to retain a vibrant mix of uses, unique character, etc..

- Affordable-space requirements must be rationally related to the stated zoning or land-use regulatory objectives and must not be out of proportion to the needs created by a proposed development.
- Staff reports, ordinance intent statements, public hearing records, and the like should not suggest any intent to discriminate against out-of-state businesses or chain stores/restaurants.

CONCLUSION

Increasingly, many downtowns and central business districts must contend with a lack of affordable commercial space and difficulties in maintaining a healthy mix of uses. Fortunately, there are proven, legally defensible land-use regulatory solutions being used effectively in some progressive communities around the country to meet these challenges. Drawing from these examples, with careful attention to legal issues and market conditions, local governments can craft regulations to further the goal of vibrant, sustainable downtowns and central business districts.

A mix of retailers thrive in the restored buildings lining St. Joseph Avenue in downtown Brewton, Alabama. © iStockphoto.com/Perry Watson.

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