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Appelante Court Says Measure R Doesn't Measure Up

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Malibu voters passed Measure R in 2014 in an effort to place certain limitations on developments and chain establishments within the city. The Measure R initiative was described as the “Your Malibu, Your Decision Act.” However, on June 21, 2017, the California Court of Appeals for the Second Appellate District affirmed an earlier trial court’s decision and concluded that “Measure R exceeds the initiative power and is illegal.”

Under Measure R, the Malibu City Council is required to prepare a specific plan for every proposed commercial or mixed-use development that exceeds 20,000 square feet. Once that specific plan is approved by City Council, the plan must be placed on the ballot for voter approval. City Council is not permitted to take any action until the proposed development is either approved or denied by voters. Additionally, Measure R restricts formula retail establishments, meaning those that have ten or more retail locations in the world and satisfy at least two other conditions including offering a standardized selection of merchandise or menu; implementing a standardized color scheme; using of standardized décor, façade, layout or signage; owning and using a service mark or trademark; and requiring employee uniforms. However, formula retail establishments may obtain a conditional use permit ("CUP"). A CUP is an alternative to the aforementioned requirements and may be issued when the city finds that a particular formula retail establishment does not "impair the city's unique, small-town community character by promoting a predominant sense of familiarity or sameness, with consideration for all existing formula retail establishments." Once a CUP has been issued by city council, that CUP remains valid upon change in ownership of the business or change in the ownership of land or any property attached to the land.

Developers of proposed projects, The Park at Cross Creek and Malibu Bay, brought a complaint in trial court seeking to have Measure R declared facially invalid. The Park and Malibu Bay alleged that Measure R subjects' administrative acts to a public vote. In other words, The Park and Malibu Bay argue that when the city prepares the specific plan required by Measure R, which is then placed on the ballot, the administrative processes that take place at city hall are hindered and administrative power and responsibilities are delegated to voters. Referendums and initiatives that hinder administrative processes have not fared well in previous court decisions. The trial court found that Measure R did, in fact, exceed the scope of the initiative power.

Local citizens are ensured the right to initiative and referendum in the California Constitution and that right relates directly to the legislative power, meaning the power to make laws. However, the initiative and referendum power is not absolute, especially when it infringes on the powers of the executive (in this case the City of Malibu) or the judicial branches. The court explained the rationale for this rule by stating: "to allow the referendum or initiative to be invoked to annul or delay the executive or administrative conduct would destroy the efficient administration of the business affairs of a city or municipality." Thus, the court's underlying message regarding Measure R was that the initial ballot proposition was legal, but the provisions that the measure created were not allowed to slow down the efficiency of the administrative processes at city hall. The court stated that "[t]here is a difference between, on the one hand, voter approval of a specific plan and, on the other, requiring a city council to prepare a specific plan and report, to hold a public hearing about the specific plan and report, and then requiring the plan to be submitted to voters for approval."

The Park and Malibu Bay also alleged that Measure R created an illegal CUP. The trial court held that Measure R created an illegal CUP, because it was "establishment specific and did not run with the land." This simply means that the decision of whether or not to issue the CUP relates to the characteristic of a particular business and does not relate to land use. Because of this, the trial court declared that Measure R was facially invalid and enjoined the city from enforcing it.

In making its decision, the appellate court focused on the difference between a CUP and a condition. A CUP does not attach to the person, but, rather, attaches to the land. The appellate court noted that "a condition regulates the person rather than the land, improperly turning a CUP into an 'ad hominem

privilege rather than a decision regulating the use of property.” The court illustrated this principle when it specified, “Starbucks is not a land use. ‘Coffee shop’ or restaurant is the land use.”

Intervenors in the case and proponents of Measure R say, “if the City is unable to consider the identity of the particular restaurant or retail shop seeking a CUP in a particular neighborhood, it will be unable to ensure a diverse group of businesses exists to meet the needs of residents and visitors”