



**SAN FRANCISCO'S
NICHE BUSINESSES:**

SMALL STORES, BIG LEGAL ISSUES?

Stephen Stanwood and Daniel Douglas

From handmade jewelry and artisanal baked goods to dining tables made from reclaimed wood, craft goods are having a moment. Craft brewing—probably the most famous niche industry—has grown from a curiosity of local hobbyists into a booming national juggernaut in almost no time at all. Third-wave coffee roasters have also experienced explosive growth in recent years, putting pressure on industry heavyweights like Starbucks to broaden their repertoire of caffeinated offerings.

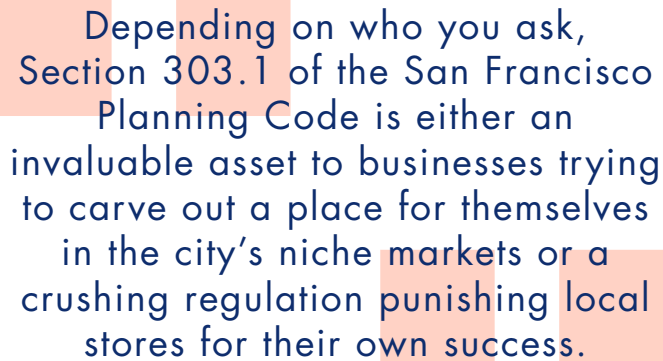
Given the strong economy and the enduring cultural appeal of craft products to Californians, niche businesses will likely remain a fixture of San Francisco’s economy for years to come. But success in these specialty markets can also come with legal headaches, such as securing a unique name in a crowded field and navigating San Francisco’s unique zoning laws. San Francisco-based niche businesses must appreciate some of these legal issues at the outset, lest they risk difficulties down the road.

SAN FRANCISCO’S RESTRICTION ON CHAIN STORES: PLANNING CODE § 303.1

In 2004, the San Francisco Board of Supervisors approved what eventually became Section 303.1 of the San Francisco Planning Code. This law places certain restrictions on “Formula Retail Use”—which, in ordinary terms, means that the city makes life more difficult for chain stores. Under Section 303.1, businesses with more than ten locations are subjected to a more rigorous vetting process than their smaller counterparts when they apply to open a location in certain parts of San Francisco. Depending on the area, a chain store might be required to secure a lengthy

conditional use authorization to operate, or may not be allowed to operate at all. San Francisco is the largest city in the United States to employ this type of regulatory scheme. And while Section 303.1 does not keep chain stores out of the city, it does markedly limit their existence and create a unique environment for the craft business community.

By its own terms, Section 303.1 is designed to “maintain the character and aesthetic qualities of San Francisco.” The law has certainly succeeded in limiting chain stores, as there are only 1,250 such establishments in San Francisco. That amounts to 12 percent of all retailers in the city, which is one-third the national average. In certain industries, the results of this regulatory scheme are even more dramatic.



Depending on who you ask, Section 303.1 of the San Francisco Planning Code is either an invaluable asset to businesses trying to carve out a place for themselves in the city's niche markets or a crushing regulation punishing local stores for their own success.

For instance, according to the San Francisco Planning Department, 51 percent of San Francisco's coffee shops and 89 percent of its restaurants are non-formula retail. The city's regulations have likely contributed to another unique trend as well: an unprecedented boom in niche manufacturing jobs. San Francisco is home to about 650 local manufacturers, employing some 5,000 workers and generating \$614 million to the economy, according to the nonprofit SFMade, which helps develop local products.

PLANNING CODE § 303.1'S EFFECTS ON GROWING BUSINESSES

Counterintuitively, this regulatory scheme does have some critics within the niche business community. Take Pet Food Express, which opened its flagship organic pet food operation in the West Portal neighborhood of San Francisco in 1980. Since then, business has boomed and the store has expanded to over sixty locations throughout California. But in 2013, when Pet Food Express tried to establish a fourth

location in its home city, it was unable to do so because of Section 303.1.

Philz Coffee, the well-known San Francisco-based specialty coffee shop, has run into similar problems despite its deep roots in the city. Opponents of Section 303.1 cite these types of expansion issues as examples of how a law designed the spread of multinational chains may be hurting local businesses instead. These critics suggest that businesses born and raised in San Francisco shouldn't be required to jump through the same regulatory hoops to open a new location that a new McDonald's or Wal-Mart might. There are arguments to be made on both sides of this issue, but for now, it is undeniable that even niche businesses need to keep Section 303.1 in mind as they grow.

TRADEMARK CONSIDERATIONS FOR NICHE BUSINESSES

Businesses in San Francisco also face a more extreme version of a problem shared by every business owner: the question of how to choose a unique name for their products. A high-profile article published in the Harvard Law Review earlier this year made the case that not only is competition for business names now fiercer than ever but that the problem is actually so bad that "the ecology of the trademark system is breaking down."¹

This problem is especially acute in craft industries, which feature a large number of businesses dedicated to selling a relatively limited number of products. Naming conflicts in the newly cutthroat craft beer industry, for instance, have spawned everything from Trademark Trial and Appeal Board proceedings to popular media articles with titles like "Craft Brewers Are Running Out of Names, and Into Legal Spats." San Francisco's unique hospitality to niche businesses also makes the city rife for potentially devastating disputes over product names.

Indeed, Philz Coffee has already run into such a problem. The company applied to register one of its brand names, TANTALIZING TURKISH, for coffee in late 2015. The

trademark office refused to register the mark, citing an existing registration for TANTALIZING TEA owned by a Florida-based online tea store as likely to cause confusion among consumers. Philz fought back, submitting multiple rounds of arguments to the examining attorney reviewing its application. When those efforts failed, it escalated the issue by filing an ex parte appeal with the Trademark Trial and Appeal Board (TTAB). But the TTAB saw the same likelihood of confusion that the examining attorney did, so the refusal stuck. Two years and thousands of dollars' worth of attorney's fees after submitting its application, Philz abandoned the name.

This is a cautionary tale for any craft entrepreneur dead set on a specific company or product name. Even with a good deal of patience and a large Silicon Valley intellectual property firm on its side, Philz couldn't argue its way to the exclusive right to use TANTALIZING TURKISH. Of course, new niche businesses won't have the budget to fund a Philz-style trademark crusade in the first place, so the process of picking and sticking with a unique name becomes that much more important.

Decades ago, a new entrepreneur looking to name a new coffee brand would mainly have to worry about navigating major players like Folgers or Maxwell House. But in today's competitive national marketplace, all it takes is one website on the other side of the country to turn a potentially strong product name into a possibly infringing one. Now that niche markets are taking off and specialty products are a hot commodity, businesses selling such products should stop and evaluate whether their product names are in fact as unique as they seem to be.

THE PATH FORWARD: NAVIGATING UNCERTAINTY

There's nothing new about zoning ordinances, which have been a staple of property law in every major American city since the Supreme Court green-lit them back in 1926. See *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365

(1926). San Francisco's approach to zoning, though, is unique. Depending on who you ask, Section 303.1 of the San Francisco Planning Code is either an invaluable asset to businesses trying to carve out a place for themselves in the city's niche markets or a crushing regulation punishing local stores for their own success. Policy arguments aside, the bottom line for existing San Francisco small businesses is clear: expanding within the city becomes much more difficult once the business hits its eleventh location.

And as long as San Francisco's small business density remains the highest in the country, naming conflicts are sure to follow. Entrepreneurs should evaluate the names of their companies and products as early as possible, especially if they think those names are unique. It is hard to know what made consumers switch from Coors to craft or from Folgers to Philz, but the explosive growth of both of these niche industries has proven time and again the importance of developing an intellectual property strategy at the outset. As quirky and niche markets continue to boom in the Bay Area, business owners will increasingly be forced to jockey for position in a crowded field of competitors.

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Note:

Barton Beebe & Jeanne C. Fromer, *Are We Running Out of Trademarks? An Empirical Study of Trademark Depletion and Congestion*. 131 Harv. L. Rev. 945 (2018).