

1 DAVID P. WAITE (STATE BAR NO. 129916)
 dwaite@coxcastle.com
 2 KENNETH B. BLEY (STATE BAR NO. 60600)
 kbley@coxcastle.com
 3 FREDERICK H. KRANZ (STATE BAR NO. 55815)
 rkranz@coxcastle.com
 4 TAMAR C. STEIN (STATE BAR NO. 78311)
 tstein@coxcastle.com
 5 ALEXANDER M. DEGOOD (STATE BAR NO. 249509)
 adegood@coxcastle.com
 6 COX, CASTLE & NICHOLSON LLP
 2049 CENTURY PARK EAST, 28th FLOOR
 7 LOS ANGELES, CA 90067-3284
 TELEPHONE: (310) 284-2200
 8 FACSIMILE: (310) 284-2100

9 ATTORNEYS FOR PLAINTIFFS
 10 THE PARK AT CROSS CREEK, LLC and
 MALIBU BAY COMPANY
 11

12 **UNITED STATES DISTRICT COURT**
 13 **CENTRAL DISTRICT OF CALIFORNIA - WESTERN DIVISION**

14 THE PARK AT CROSS CREEK, LLC
 and MALIBU BAY COMPANY,

15 PLAINIFFS,

16 vs.

17 CITY OF MALIBU, A MUNICIPAL
 18 CORPORATION, and Does 1-10,

19 DEFENDANTS.
 20

CASE NO.

**COMPLAINT FOR DECLARATORY
 AND INJUNCTIVE RELIEF FOR
 VIOLATIONS OF UNITED STATES
 AND CALIFORNIA
 CONSTITUTIONS, CALIFORNIA
 PLANNING AND ZONING LAW (42
 U.S.C. SEC. 1983, 28 U.S.C. SEC.
 1331)**

1 Plaintiffs The Park at Cross Creek, LLC and Malibu Bay Company (collectively
2 “Plaintiffs” or “PCC” and “MBC”), initiate this action to challenge the legality of
3 Measure R, entitled “Your Malibu, Your Decision Act,” a ballot initiative adopted by
4 City of Malibu (“Malibu” or “City”) voters on November 4, 2014. Plaintiffs seek to
5 have this Court declare Measure R invalid based on violations of the United States
6 Constitution, the Constitution of the State of California and California planning and
7 zoning law. Plaintiffs allege the following facts in support of this action.¹

8 **JURISDICTION AND VENUE**

9 1. This case presents federal questions arising under the Commerce, Equal
10 Protection and Due Process clauses of the Constitution of the United States, Art. I, § 8,
11 Cl.3, Amend. XIV, § 1 and 42 U.S.C. § 1983. This Court therefore has subject-matter
12 jurisdiction under 28 U.S.C. §§ 1331 and 1343(a)(3). The case further presents
13 questions arising under the California Constitution and California case and statutory
14 law. As the claims based in California law arise out of the same action and are part of
15 the same case or controversy as the federal claims, this Court has supplemental
16 jurisdiction over these claims under 28 U.S.C. § 1367.

17 2. Venue is proper in this Court under 28 U.S.C. § 1391(b)(2), as all of the
18 events giving rise to the claims occurred, and the property that is the subject of this
19 action is situated in this District.

20 **INTRODUCTION AND NATURE OF THE ACTION**

21 3. PCC is the owner of a 5.88-acre property located at 23401 Civic Center
22 Way, Malibu, California 90265. Since 2009, PCC has invested over \$11.4 million
23 dollars in acquisition, planning, design, architectural, engineering, environmental
24 studies, consultant and professional fees, and City fees to entitle and develop the
25 “Whole Foods and the Park” project, an approximately 38,424 square foot
26 neighborhood shopping center containing an approximately 24,549 square foot Whole

27 _____
28 ¹ A copy of the adopted version of Measure R is attached to this complaint as Exhibit “1” and is incorporated by reference in this complaint.

1 Foods, four small-scale retail spaces totaling 13,875 square feet, outdoor dining, a
2 central surface parking area, green walls, 80 new sycamore trees, landscaped islands,
3 walkways, benches, and other pedestrian and open space amenities, Shane's Park (a
4 park/playground for children, including special needs children), a community education
5 garden, and a public gathering space in the case of a wildfire (the "PCC Project").

6 4. MBC is the owner of an approximately 9.2-acre property located at 23575
7 Civic Center Way in Malibu, California. MBC has invested approximately \$6.6 million
8 dollars on acquisition, architectural, engineering, environmental and planning studies,
9 and consultant and City fees to entitle and develop the "Sycamore Village" project, a
10 project with two development alternatives ranging from 60,727 to 80,970 square feet of
11 mixed-use commercial development that will include office, retail and restaurant uses,
12 and under the larger development scenario, an urgent care medical facility as well as
13 community gathering spaces and children's play area, all in a pedestrian-oriented
14 village setting (the "MBC Project").

15 5. Framed in the broad vernacular of "preserving small town, rural
16 character," Measure R is an anti-development ballot initiative intentionally designed to
17 protect locally-owned businesses from competition by national out-of-state retailers.
18 Measure R clearly articulates its discriminatory purpose, stating in Section 3, "Purpose
19 and Intent", that it seeks to "Limit chain stores in our City."

20 6. Measure R impermissibly interferes with the rights of PCC, MBC and
21 other commercial property owners to own, develop and operate their commercial
22 properties in several fundamental ways. First, it dramatically limits the type and size of
23 retail tenants to which property owner may lease space, mandating that at least 70
24 percent of all retail leases must be given to local, non-formula retail merchants.
25 Second, it requires a conditional use permit ("CUP") for all new formula (national or
26 international) retail tenants. Third, it is discriminatory, creating special exemptions for
27 certain commercial properties located in Malibu's Civic Center. Fourth, for
28 commercial development proposals in excess of 20,000 square feet needing only

1 administrative approvals from the City, Measure R requires the preparation and
2 approval by the City of a comprehensive “specific plan” for each and every project.
3 Fifth, by requiring a specific plan, Measure R subjects each new commercial
4 development in Malibu in excess of 20,000 square feet to a legislative approval. Sixth,
5 Measure R requires that each and every specific plan for each new commercial
6 development in excess of 20,000 square feet be placed on the ballot and subject to a
7 popular vote of the residents of Malibu.

8 7. The Measure R restrictions placed on out-of-state retailers to protect local
9 merchants, and the arbitrary voter approval requirements for all new commercial
10 development have the stated goal of hobbling new commercial development in Malibu.

11 8. Malibu is a coastal suburb of the City of Los Angeles and is part of a
12 metropolitan region of more than 10 million people. Malibu has become increasingly
13 urbanized. The City’s commercially-zoned properties are not “rural.” The severe
14 restrictions and limitations Measure R places on commercial development cannot
15 advance that which no longer exists. Where no lawful or legitimate purpose exists,
16 there can be no justification for the discriminatory effects of Measure R.

17 9. Plaintiffs bring this facial challenge to have this Court declare Measure R
18 invalid. Plaintiffs seek a declaratory judgment that Measure R (i) violates the
19 Commerce Clause of the United States Constitution, Art. I, § 8, Cl. 3; (ii) violates
20 Plaintiffs’ rights to equal protection, pursuant to the United States Constitution, Amend.
21 XIV, § 1; (iii) violates Plaintiffs’ rights to substantive due process, pursuant to the
22 United States Constitution, Amend. XIV, § 1; (iv) violates the California Constitution’s
23 requirement that ballot initiatives may only concern a single subject matter; (v) violates
24 the scope of the initiative power in California by unlawfully requiring administrative
25 and adjudicative approvals to be the subject of a legislative approval and a popular
26 vote; (vi) creates a type of conditional use permit unrecognized in California law; (vii)
27 violates Plaintiffs’ rights to equal protection, pursuant to the California Constitution,
28 Art. I, § 7; and (viii) violates Plaintiffs’ rights to substantive due process, pursuant to

1 the California Constitution, Art. I, § 7. Plaintiffs also seek an injunction permanently
2 enjoining the City from enforcing Measure R.

3 **PARTIES**

4 10. Plaintiff The Park at Cross Creek, LLC is a Delaware limited liability
5 company with its principal place of business at 1101 Montana Avenue, Suite A, Santa
6 Monica, California. PCC does business within the City of Malibu, within the Central
7 District of California.

8 11. In 2009, PCC began the process of preparing the project plans, reports and
9 studies necessary to develop the PCC Project consistent with the requirements of the
10 City's Local Coastal Program.

11 12. In May 2010, PCC (under its previous name, DB Malibu Holdco, Inc.)
12 applied to the City to develop the PCC Project.

13 13. After review by various City departments, the application was deemed
14 complete, and in September 2011, the Malibu City Council selected a consultant to
15 prepare an Environmental Impact Report ("EIR") for the PCC Project. On April 26,
16 2012, the City issued a Notice of Preparation for the EIR. The City's consultant then
17 prepared a draft EIR which the City's planning staff reviewed. As of the date of the
18 election and voter approval of Measure R, the draft EIR was near completion and ready
19 to be released for public comment, followed by public hearings on the EIR and the
20 proposed PCC Project before the Malibu Planning Commission and Malibu City
21 Council.

22 14. PCC is directly and negatively impacted by the passage of Measure R.
23 Measure R impermissibly limits the ability of PCC to operate its business, by (a)
24 imposing significant limitations on the type and size of retail tenants to which PCC can
25 lease its center, and (b) requiring that PCC obtain City Council and voter approval of
26 project legislation through an approved specific plan. The restrictions, limitations and
27 requirements of Measure R did not exist prior to voter approval of Measure R and now
28 place the viability of the PCC Project in jeopardy.

1 15. Plaintiff Malibu Bay Company is a Nevada corporation with its principal
2 place of business at 2370 West Malibu Road in Malibu, California. MBC does business
3 within the City of Malibu, within the Central District of California.

4 16. MBC is actively pursuing land use entitlements for the MBC Project. After
5 a substantial period of planning and design, in 2012 MBC submitted development
6 applications to the City for two versions of the MBC Project, one version of which
7 includes an urgent care facility.

8 17. Like PCC, MBC is directly and negatively impacted by the passage of
9 Measure R. The MBC Project will be subject to the same impermissible limitations;
10 i.e. the imposition of significant limitations on the tenants to which MBC may lease its
11 center, and a requirement that MBC obtain City Council and voter approval of project
12 legislation through an approved specific plan. The restrictions, limitations and
13 requirements of Measure R did not exist prior to voter approval of Measure R and now
14 place the viability of the MBC Project in jeopardy.

15 18. Defendant City of Malibu is a municipal corporation and general law city,
16 with the capacity to sue and be sued.

17 19. Plaintiffs PCC and MBC are unaware of the true names or capacities,
18 whether individual, corporate, associate, or otherwise of Defendants sued herein as
19 Does 1 through 10, inclusive, and therefore sues these Defendants by such fictitious
20 names. Plaintiffs will seek leave of the Court to amend this pleading to set forth the
21 true names and capacities of said Doe Defendants when the same are ascertained.
22 Plaintiffs are informed and believe and thereon allege that at all times herein mentioned
23 each of the defendants was the agent or employee of each of the remaining defendants,
24 and in doing the things alleged, was acting within the scope of such agency.

25 **MEASURE R IS PROMOTED AS “NIMBYISM WRIT LARGE”**

26 20. Measure R is the culmination of a campaign by a group of Malibu activists
27 known as “Preserve Malibu” to protect local merchants against what they view as
28 unfair competition from national retailers. Spurred by the closure (or threatened

1 closure) of a few local retail establishments, these activists began pressuring the City
2 Council to adopt legislation that would severely limit the ability of property owners to
3 lease retail space to national retailers.

4 21. The City Council first considered a formula retail ordinance in late 2006,
5 eventually tabling consideration in July 2009. A City formula retail ordinance was
6 revived in May 2011, resulting in numerous public meetings and Planning Commission
7 and City Council hearings, culminating in the adoption of a City formula retail
8 ordinance in August 2014 (the "City Ordinance").

9 22. The City Ordinance permitted individual formula retail stores of up to
10 3,500 square feet, did not require a CUP for formula retail tenants, and contained a 45
11 percent limit on formula retail tenants per shopping center. Further, the City Ordinance
12 exempted certain formula retail uses, such as banks, and did not count the square
13 footage of the exempt uses against the 45 percent formula retail cap calculation. In
14 addition, the City Ordinance considered a retail establishment "formula" if it maintains
15 10 or more stores nationally. The City Ordinance contains no provision requiring a
16 specific plan or public vote for commercial development.

17 23. The City Ordinance did not satisfy Preserve Malibu, which had lobbied the
18 City for strict protection of local merchants against competition from national retailers.
19 The public record is replete with statements by Preserve Malibu members and
20 supporters explicitly demanding such restrictions and limitations and rejecting the City
21 Ordinance as inadequate. The comments, delivered in multiple City hearings on the
22 City Ordinance, bristle with the language of explicit economic protectionism in favor of
23 local merchants.

24 24. Unsatisfied with the City's actions, the activists crafted a ballot measure
25 that is, in the words stated by Measure R proponent Rob Reiner during a public debate
26 on Measure R held at City Hall on October 26, 2014, "NIMBYism [not in my back
27 yard] writ large baby!" Mr. Reiner explained that the entire purpose of Measure R was
28

1 to limit commercial development and keep undesirable formula retail stores from
2 locating in Malibu.

3 25. During the debate at City Hall, Mr. Reiner was questioned regarding a
4 change made to Measure R between its original release, submitted to the City on
5 February 28, 2014, and the revised, second version presented to voters, originally
6 submitted to the City on March 26, 2014. This change to the Measure created a special
7 interest exemption for existing retail spaces that are between 1,400 and 5,000 square
8 feet, located in the Malibu Civic Center as of April 1, 2014. Mr. Reiner responded that
9 Preserve Malibu made a “deal” with unnamed parties to craft the existing formula store
10 exemption.

11 **FIRST CLAIM FOR RELIEF**

12 **DORMANT COMMERCE CLAUSE**

13 **(Discrimination Against Interstate Commerce)**

14 26. PCC and MBC reallege and incorporate by reference paragraphs 1-25 of
15 this Complaint.

16 27. Measure R discriminates against interstate commerce in violation of the
17 Commerce Clause, Art. I, § 8, Cl. 3 of the United States Constitution. Measure R
18 imposes substantial burdens and limitations on the ability of commercial property
19 owners to lease to out-of-state formula retail tenants through leasing restrictions that
20 protect local merchants and discriminate against out-of-state formula retailers. Measure
21 R (i) limits individual formula retail tenants (defined as those retailers with 10 or more
22 stores worldwide) to no more than 2,500 square feet (subject to certain exceptions, as
23 detailed below), (ii) requires a CUP for all formula retail tenancies, including existing
24 tenants that move within a center or expand service area by 50 square feet and (iii)
25 limits the total formula retail percentage of a shopping center to 30 percent, measured
26 either by total square footage or number of stores by floor.

27 28. While Measure R exempts certain uses, such as grocery stores, from its
28 CUP and square footage limitations, it counts those “exempt” uses for purposes of

1 calculating the 30 percent formula retail limitation. Thus, one grocery store, such as the
2 Whole Foods proposed to anchor the PCC Project, can completely eliminate the ability
3 of a property owner such as PCC to lease any other retail space in its shopping center to
4 a formula retail tenant.

5 29. Measure R exempts from its formula retail restrictions existing formula
6 retail spaces between 1,400 and 5,000 square feet in existence as of April 1, 2014,
7 located in the Malibu Civic Center, the City's most prominent and visible commercial
8 area. In other words, if the existing formula retail tenants in these designated space
9 configurations vacate, a center owner can lease the spaces to other formula retail
10 tenants without those tenants obtaining a CUP, being subject to the Measure's 2,500
11 square foot limitation, or being subject to the overall 30 percent per center maximum
12 cap. Newly developed shopping centers cannot avail themselves of this exemption.

13 30. An alternative interpretation of the exemption detailed above is that it
14 exempts all retail spaces between 1,400 and 5,000 square feet in existence as of April 1,
15 2014, located in the Civic Center, regardless of whether a formula retail tenant
16 occupied such space as of that date.

17 31. Based on either interpretation of the exemption, Measure R exempts some
18 retail spaces of between 1,400 and 5,000 square feet in existing Civic Center shopping
19 centers, thereby discriminating against properties without such spaces, both within and
20 outside of the Civic Center.

21 32. The provision is antithetical to Measure R's stated purpose. The City's
22 analysis of existing Civic Center shopping centers found that the special exemption
23 contained in version 2 of Measure R (the version adopted by the voters) would permit
24 existing centers of between 70 percent and 91 percent formula retail. As such, in these
25 prominent high visibility centers located in the Civic Center, Measure R does not
26 impose any meaningful limitation on formula retail tenancies, undercutting its central
27 stated purpose of preserving any claimed "rural character," while discriminating against
28 numerous other similarly situated property owners, including the Plaintiffs.

1 33. Measure R asserts that current City planning denies Malibu residents “a
2 diverse commercial base.” Under the restrictions of Measure R, “diverse” effectively
3 means “local.”

4 34. The 2,500 square foot maximum store limitation cannot accommodate the
5 minimum requirements of out-of-state nationally branded formula retail stores and
6 effectively eliminates the ability of many national retailers to operate in Malibu.

7 35. The 30 percent not to exceed cap effectively eliminates the ability of many
8 out-of-state national retailers from entering the Malibu market.

9 36. These restrictions do not promote diversity. They limit choice and wall off
10 national chains from Malibu customers.

11 37. Measure R violates the Commerce Clause of the United States
12 Constitution because it discriminates against interstate commerce and favors in-state
13 economic interests while substantially burdening out of state competitors. Measure R
14 seeks to radically regulate and discriminate against out-of-state national formula retail
15 stores, the vast majority of which are headquartered and do the majority of their
16 business outside of the State of California, for the purpose of protecting local retail
17 merchants. Measure R not only directly discriminates against out-of-state formula
18 retailers, its regulatory restrictions have the effect of eliminating out-of-state national
19 formula retail tenants from establishing new formula retail stores in Malibu.

20 38. Local retailers are subject to no restrictions whatsoever under the Measure
21 and can operate any type of store, of any size, in any location, with any kind of design,
22 whereas a national competitor seeking to operate the same type of store (e.g. selling
23 jeans) is subject to onerous restrictions.

24 39. Measure R also violates the Commerce Clause because it does not present
25 a reasonable, non-discriminatory alternative to advance its claimed goal. Measure R
26 purports to seek to preserve the City’s “unique, small-town, rural character,” and avoid
27 “generic development” yet imposes no design standards or other planning process by
28 which the City could ensure that its commercial areas are not “generic.” Prior to the

1 passage of Measure R, the City Council passed resolutions in December 2013 to begin
2 developing design guidelines and a specific plan for the City's Civic Center area.
3 Measure R substitutes its strict limitations and restrictions and imposes them on out-of-
4 state national formula retailers and commercial property owners without regard to
5 City's planned implementation of design guidelines and development standards for the
6 Civic Center. Measure R provides no opportunity to implement reasonable, non-
7 discriminatory alternatives to achieve its claimed goals.

8 **SECOND CLAIM FOR RELIEF**

9 **DORMANT COMMERCE CLAUSE**

10 **(Excessive Burden on Interstate Commerce)**

11 40. PCC and MBC reallege and incorporate by reference paragraphs 1-25, 27-
12 36 and 38 of this Complaint.

13 41. The discriminatory formula retail restrictions in Measure R impose a
14 substantial burden on interstate commerce in excess of the alleged benefits to the City
15 in violation of the Commerce Clause of the United States Constitution, Art. I, § 8, Cl. 3.

16 **THIRD CLAIM FOR RELIEF**

17 **EQUAL PROTECTION - UNITED STATES CONSTITUTION**

18 **(Discrimination Against Non-Exempt Property Owners)**

19 42. PCC and MBC reallege and incorporate by reference paragraphs 1-25 and
20 29-32 of this Complaint.

21 43. Measure R violates Equal Protection because it arbitrarily creates two
22 classes of shopping centers subject to its formula retail restrictions, in violation of the
23 United States Constitution, Amend. XIV, § 1. It exempts, with no rational basis,
24 existing formula retail spaces (or, in the alternative, all retail spaces) between 1,400 and
25 5,000 square feet in the Civic Center, subject to minor qualifications.

26 44. The effect of such a carve-out is to significantly prejudice properties not
27 already fully developed with retail spaces of this size. Plaintiffs, who are in the process
28 of developing their shopping centers, own such properties, and thus will be placed at a

1 significant competitive disadvantage in comparison to existing shopping centers with
2 existing formula retail tenants of this size.

3 45. Notably, this formula retail carve-out appeared in the second version of
4 Measure R after Measure R proponents made a “deal” to “help” certain shopping center
5 owners. This exception to Measure R’s formula retail limitations is overt favoritism for
6 particular property owners at the expense of other similarly situated property owners
7 operating under the same commercial zoning standards. The United States Constitution
8 prohibits such arbitrarily different, unequal and discriminatory regulation of similarly
9 situated properties.

10 **FOURTH CLAIM FOR RELIEF**

11 **SUBSTANTIVE DUE PROCESS – UNITED STATES CONSTITUTION**

12 **(Arbitrary Legislation)**

13 46. PCC and MBC reallege and incorporate by reference paragraphs 1-25, 29-
14 36, 38 and 44-45 of this Complaint.

15 47. Measure R violates the United States Constitution, Amend. XIV, § 1.
16 Measure R is a contradictory, internally inconsistent measure rife with competing
17 components, and fails the most basic requirement of lawful legislation.

18 48. Measure R claims as one of its many goals to protect the “small-town,
19 rural character” of the City, and posits that “chain stores” are inimical to such a
20 community. However, Measure R seeks to limit such stores in a completely haphazard
21 manner that fatally undercuts the goal it allegedly seeks to accomplish. Measure R’s
22 exemption of existing retail spaces in the Civic Center between 1,400 and 5,000 that
23 currently house a formula retail tenant is directly inapposite to its purpose and goals.

24 49. Measure R also states that developments over 20,000 square feet would, by
25 definition, “change the small-town, rural character of [Malibu].” Measure R therefore
26 would permit (after an onerous process requiring adoption and voter approval of a
27 specific plan) development that (according to the Measure itself) undercuts the
28 Measure’s entire purpose.

1 50. Measure R’s specific plan requirement for projects over 20,000 square feet
2 impermissibly divests the City’s duly elected leaders who serve on the City Council
3 (and their appointees who serve on the City Planning Commission) of their proper and
4 lawful administrative functions pertaining to local land use and development. In doing
5 so, Measure R creates an additional unlawful functional requirement on projects that
6 are fully compliant and consistent with the City’s zoning standards and land use
7 policies, and thereby eliminates the defined standards by which land use entitlements
8 are reviewed and approved or denied.

9 51. Further, given the clear anti-development nature of Measure R, coupled
10 with the purposely extreme process is mandates for developments over 20,000 square
11 feet, it is difficult to conceive how, if ever, such projects will be approved by a popular
12 vote of Malibu residents. These are of the very type of projects Measure R was enacted
13 to prevent, and as such, Measure R creates an illusory entitlement process, with no
14 certainty as to any particular result or within any reasonably predictable timeframe for
15 commercial development in Malibu.

16 52. The specific plan requirement contains no substantive policy or
17 development standards to advance its goal of protecting Malibu’s claimed “rural” or
18 “small town” character. Developments of over 20,000 square feet are subject to no new
19 zoning standards or regulations to advance the claimed goal of Measure R. Projects
20 subject to Measure R are to be evaluated based on the arbitrary and transient whims and
21 vicissitudes of the Malibu electorate.

22 53. The absence of defined standards between Measure R’s purported
23 objectives and the methods by which it attempts to achieve those objectives is fatal.
24 Measure R is arbitrary, discriminatory, without any standards and lacks a proper
25 legislative purpose.

FIFTH CLAIM FOR RELIEF

SINGLE SUBJECT MATTER

(Violation of California Constitution)

1
2
3
4 54. PCC and MBC reallege and incorporate by reference paragraphs 1-20, 23-
5 25 and 49-53 of this Complaint.

6 55. By its stated terms, the disparate goals, objectives and subject matters of
7 Measure R include, (i) protecting natural resources and natural habitat, (ii) placing
8 limits on increased traffic and congestion, (iii) placing strict limits on chain store
9 development, (iv) preserving small town rural character, (v) avoiding a “sense of
10 familiarity or sameness,” (vi) creating a diverse commercial retail base, (vii) addressing
11 impacts police and fire protection, (viii) addressing inadequate wastewater treatment
12 facilities, (ix) avoiding suburban sprawl, and (x) maintaining view corridors and vistas.

13 56. To address these disparate goals, Measure R contains two distinct,
14 independent, diverse and unrelated regulatory components, and therefore violates the
15 California Constitution, Art. II, § 8(d) (the “single subject matter” limitation).

16 57. Section 4 of Measure R requires that any commercial or mixed-use
17 development over 20,000 square feet may only be permitted pursuant to the adoption of
18 a specific plan approved both by the Malibu City Council and then Malibu voters.

19 58. Section 6 of the Measure R places significant limitations on the ability of
20 commercial property owners to lease retail spaces to formula retail tenants as detailed
21 above. Measure R’s two components are distinct and entirely severable.

22 59. Measure R’s formula retail restrictions could be imposed regardless of
23 whether shopping centers of a certain size required a voter-approved specific plan. The
24 formula retail restrictions are intended to avoid “promoting a sense of familiarity and
25 sameness.” Measure R, § 6(b)(2). The formula retail restrictions of Measure R could
26 be implemented absent any requirement for a specific plan for commercial development
27 in excess of 20,000 square feet of voter approval.

28

1 Measure R mandates that each and every new commercial development in Malibu in
2 excess of 20,000 square feet remains subject to a legislative specific plan approval,
3 even if the project would otherwise require only adjudicative approvals from the City.
4 Once the specific plan is approved by the City Council, Measure R requires it to be
5 placed on the ballot for approval by a popular vote of the residents of Malibu.

6 65. The initiative power under California law is limited to legislative actions.
7 Measure R mandates that projects that would otherwise be subject only to adjudicative
8 approvals by the City, such as the City's approval of a grading permit, variance, site
9 plan review, or a parcel map, and unlawfully removes those approvals from the City's
10 adjudicative functions and requires the legislative approval of a specific plan and voter
11 approval, thereby exceeding the initiative power under California law.

12 66. While California reserves to the people the right to enact legislation
13 through the initiative process, California law is clear that an initiative may not withdraw
14 a city's inherent adjudicative powers to review and approve non-legislative land use
15 projects.

16 67. Measure R forces the City to legislatively approve a specific plan for
17 projects that would otherwise only require adjudicative approvals pursuant to existing
18 regulations. The City Attorney described this this as a "sleight of hand" by the drafters
19 of Measure R.

20 68. The required voter approval of these specific plans directly and
21 impermissibly interferes with the City's ability to approve adjudicatory permits, which
22 are not evaluated and acted upon as a function of the City's legislative power.

23 **SEVENTH CLAIM FOR RELIEF**

24 **PLANNING AND ZONING LAW**

25 **(Illegal Conditional Use Permit Requirement)**

26 69. PCC and MBC reallege and incorporate by reference paragraphs 1-20 and
27 23-25 of this Complaint.

1 **NINTH CLAIM FOR RELIEF**

2 **SUBSTANTIVE DUE PROCESS CALIFORNIA CONSTITUTION**

3 **(Arbitrary Legislation)**

4 76. PCC and MBC reallege and incorporate by reference paragraphs 1-25, 29-
5 36, 38, 44-45 and 48-53 of this Complaint.

6 77. Measure R violates the California Constitution, Art. I, § 7. Measure R
7 denies Plaintiffs the right to substantive due process because it is clearly arbitrary and
8 unreasonable. Measure R's components and structure lack a reasonable relation to a
9 proper legislative purpose.

10 78. Plaintiffs, which do not have existing formula retail tenants in such spaces,
11 are directly discriminated against and damaged by this unequal application of the law.

12 **PRAYER FOR RELIEF**

13 Plaintiffs PCC and MBC respectfully request a judgment against Defendants on
14 each and every claim for relief and request on an expedited basis pursuant to Fed. R.
15 Civ. P. 57, a declaration that Measure R:

16 (1) On the first and second causes of action, a declaration that Measure R's
17 formula retail restrictions violate the Commerce Clause, United States Constitution,
18 Art. I, § 8, Cl. 3;

19 (2) On the third cause of action, a declaration that Measure R's formula retail
20 restrictions violate Plaintiffs' rights to Equal Protection, United States Constitution,
21 Amend. XIV, § 1;

22 (3) On the fourth cause of action, a declaration that Measure R violates
23 Plaintiffs' rights to substantive due process, United States Constitution, Amend. XIV, §
24 1;

25 (4) On the fifth cause of action, a declaration that Measure R contains two or
26 more distinct, independent subjects, and therefore violates the California Constitution,
27 Art. II, § 8(d);

28

1 (5) On the sixth cause of action, a declaration that Measure R’s specific plan
2 requirement forces the City and voters to approve a legislative act for projects that
3 would otherwise only require adjudicative approvals pursuant to existing regulations
4 and therefore exceeds the initiative power reserved to the people in California;

5 (6) On the seventh case of action, a declaration that Measure R’s conditional
6 use permit requirement is in violation of California law;

7 (7) On the eighth cause of action, a declaration that Measure R’s formula retail
8 restrictions violate Plaintiffs’ rights to Equal Protection, California Constitution, Art. I,
9 § 7;

10 (8) On the ninth cause of action, a declaration that Measure R violates
11 Plaintiffs’ rights to substantive due process, California Constitution, Art. I, § 7;

12 (9) For all causes of action, an injunction enjoining Defendants from enforcing
13 Measure R;

14 (10) Awarding Plaintiffs their costs and expenses, including reasonable
15 attorneys’ fees pursuant to 42 U.S.C. § 1988 and any other applicable laws; and

16 (11) For such other relief the Court deems just and proper.

17 DATED: January 5, 2015

COX, CASTLE & NICHOLSON LLP

19 By: /s/ David P. Waite

20 David P. Waite
21 Attorneys for Plaintiffs The Park at Cross
22 Creek, LLC and Malibu Bay Company