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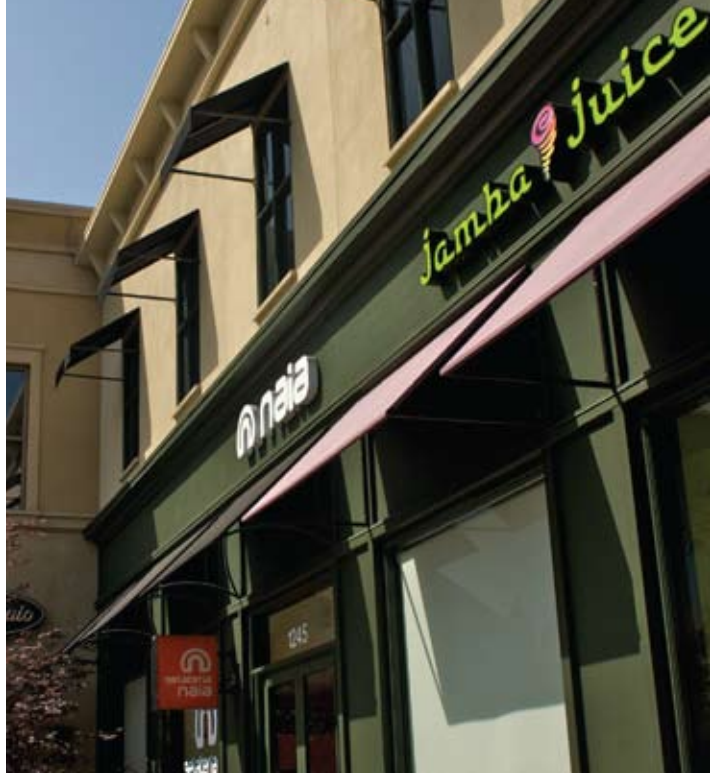

Prop G: Coming To a Neighborhood Near You

Cities may adopt legislation that discriminates among competitors to further a legitimate legislative purpose.

By **David C. Longinotti**

At the time of its adoption by San Francisco voters in 2006, Proposition G, or Prop G, pushed the envelope of neighborhood preservationist zoning by regulating so called formula retailers in specified neighborhoods. At the time, few but the most prescient would have foreseen a California Supreme Court decision that broadened the inherent powers of cities to regulate commerce beyond Prop G, even to extent of adopting legislation that results in discrimination among types of competitors in certain circumstances. But in Hernandez v. City of Hanford, the California high court did just that, establishing that cities may adopt legislation that treats competing retailers differently within a single use district when that action is in furtherance of a valid public purpose. The Hernandez decision opens the door for a reconsideration and expansion of San Francisco's formula retail ordinance. It is a harbinger of the next Prop G.

As codified in San Francisco's Planning Code, Prop G requires applicants seeking to establish a formula retail use within neighborhood commercial districts to notify all local residents of the proposed use and obtain approval of the planning commission after a public hearing on it. A formula retail use is a retail sales activity or establishment (e.g. Jamba Juice, Starbucks) that along with eleven or more other establishments in the United States maintains two or more standard features, e.g., standardized façade, décor, color scheme, trademark,

etc. Neighborhood commercial districts are those that are established in the Zoning Map of San Francisco, e.g., the Western Addition, Cole Valley, etc.

One stated public policy underpinning Prop G, is "to guide development toward the production of a satisfying and urbane living and working environment preserving and enhancing the unique social, cultural and esthetic qualities of the City." Whether this policy has actually been advanced by Prop G's implementation is beyond the realm, but the record reflects that Prop G has acted as an effective deterrent against formula retail. Since its adoption in 2006, only fourteen (14) applications have been made to the City of San Francisco, and of these, only four (4) have been approved, all with conditions of one sort or another. All other applications are either pending (6), cancelled (2), rejected (1) or found to be exempt from the ordinance (1) (excluding grocery stores from formula retail). Despite this quelling effect on commercial enterprise, Prop G is relatively benign both in its aspect and application when compared to what the Hernandez decision may allow.

In Hernandez v. the City of Hanford, Hanford established a planned commercial district (PC District) for the public purpose of accommodating and encouraging development of large retail stores. The enabling ordinance for the PC District prohibited sales of furniture within it, however, on the grounds that it would impair the economic vitality of Hanford's downtown district. Plaintiff Hernandez leased space within the PC District to establish a stand-alone home furnishings and mattress store, including bedroom furniture. After opening for business, Hanford building inspectors cited Hernandez for zoning violations, namely selling furniture in the PC District. Hernandez complained to the City that the PC District furniture sales prohibition was being applied in a discriminatory fashion because numerous department stores in the PC District were being permitted to sell furniture. In response, the City subsequently amended its ordinance to allow the department stores to sell furniture subject to a 2,500 square foot space limitation, but provided no relief to Hernandez.

Hernandez sued the City on the grounds that (a) the City lacked the power to prohibit a particular use within a planned district, and that in any event, (b) the City's permitting of furniture sales in the PC District solely by department stores violated Hernandez' equal protection rights. Hernandez lost on both counts in the trial court, but the California Court of Appeals reversed, finding that a violation of Hernandez' equal protection rights did occur. The Court of Appeals

decision found that the furniture sales to be conducted by Hernandez posed the same potential threat, if any, to Hanford's downtown merchants as the threat posed by furniture sales to be conducted by the larger department stores. The ordinance amendment adopted by the City did not meet constitutional muster because there was no rational basis for allowing department stores to sell furniture while prohibiting smaller stores from doing so.

The California Supreme Court reversed the Court of Appeals ruling that Hernandez' equal protection rights were violated. The Supreme Court held that cities may adopt laws that have the effect of regulating competition, including laws that discriminate among competitors and that ban certain types of development altogether, when that discrimination is in furtherance of a legitimate public purpose. The Supreme Court did make a point to distinguish between ordinances intended to advance a legitimate public purpose and ordinances that are adopted for impermissible anticompetitive private purposes such as investing a favored private business with monopoly power or excluding an unpopular company from the municipality. Still, the Court clarified that only a "rational basis" will be needed to justify these discriminatory regulations unless the regulation involves a suspect classification under Constitutional analysis (race, gender, etc). With respect to the Hernandez equal protection claim, the Court ruled that, although a rational basis to advancing the public policy of protecting Hanford's downtown district may or may not have existed, a rational basis to advancing the policy underlying the PC District, namely accommodating and encouraging development of large retail stores, did exist.

One has to wonder what may come of the Hernandez decision. It is now clear that, if rationally related to the furtherance of a valid public purpose, a new Prop G could establish a ban of formula retail throughout the City altogether, or more likely, in specified neighborhood commercial districts. Or, à la Hernandez, a new Prop G could effectively preclude formula retail by certain industry types (e.g. coffee houses) in neighborhood commercial districts, while permitting local retailers to provide those same services. And al-

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though both Prop G and the Supreme Court's rationale in Hernandez involved retail sales, there is nothing in the Hernandez decision that precludes discrimination in zoning matters among competitors in other industries (e.g. oil change services) so long as a valid rationally related public purpose is served. One such public purpose expressly validated by the California Supreme Court—the furthering of a municipality's general plan for localized commercial development—would seem to support this idea. As Russell Ryan, counsel for Hernandez, stated after issuance of the Hernandez decision, "Equal protection arguments will become impossible as long as a legislative body states a public reason for its actions." ■

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