

CASE NOTE

Hernandez v. The City of Hanford: Abandoning the Fiction that Zoning Ordinances Cannot Have a Direct Impact on Economic Competition

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I. The Traditional Strength of Zoning Ordinances

Landowners do not often pay close attention when their property rights are altered by zoning ordinances. They complain when they are ready to develop and find that their intended use is not in conformity with the zoning ordinance and/or the general plan. Challenges to zoning ordinances are numerous, but rarely successful. California courts will usually uphold any ordinance that has been enacted for a legitimate government purpose.¹

In 2002, Adrian Hernandez claimed economic harm from a zoning amendment after he opened a new store. Hernandez owned a furniture store in Hanford's downtown commercial district and decided to open another branch in the new, planned commercial (PC) zone. The original ordinance creating the PC zone was passed in 1989. It allowed for the sale of "home furnishings," but did not include furniture stores or the sale of furniture within the permitted uses of the zone.² This restriction was created because the city wanted to protect the viability of the downtown commercial district where furniture sales were an important part of the economy.

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1. Steven Mayer, attorney for City of Hanford, in conversation on October 5, 2007, regarding his research inquiry into the history of California jurisprudence regarding zoning, economic competition, and equal protection.

2. *Hernandez v. City of Hanford*, 41 Cal. 4th 279, 284 (2007).

“In planning for the new store, [Hernandez] intended to sell mattresses, home accessories, and some bedroom furniture,”³ and he worked directly with the planning department to get a business license. During the 10 years since the zone’s development, large department stores in the PC zone sold furniture, so Hernandez thought it would be acceptable for him to sell some furniture as well. After opening his new store, however, a city inspector cited him for violating the zoning ordinance and instructed him to remove all of the furniture from the store.⁴ Hernandez complained to the City that it was unfair to allow department stores in the PC zone to sell furniture, but enforce the ordinance against his business. In response, the City amended the PC ordinance. The new ordinance allowed large stores to sell furniture within a single 2500 square foot area of their overall selling space. In smaller stores like the one Hernandez owned, however, furniture sales were still prohibited.

This unequal treatment offended those who have long held the belief that the government may not regulate economic competition through zoning. But the California Supreme Court abandoned this fiction in *Hernandez v. City of Hanford*, 41 Cal. 4th 279 (2007). Ordinances may directly affect economic competition, so long as they are based on a legitimate government purpose. *Hernandez v. City of Hanford* is important both for its discussion of what will constitute a legitimate government purpose, and for its commentary on whether and to what extent a zoning ordinance may impact competition.

II. Predecessor Cases: Direct vs. Indirect Impacts on Economic Competition

Hernandez claimed the PC ordinance was invalid because it directly impacted his ability to compete with the stores around him, and the traditional rule in California was that ordinances could not intend to directly impact economic competition. The California Supreme Court clarifies that his claim “is based on some ambiguous and at least potentially misleading language that appears in a number of zoning decisions of the Courts of Appeal.”⁵ They focus their analysis on three cases that form the precedents for modern California zoning law: *Van Sicklen v. Browne*, 15 Cal. App. 3d 122 (1971), *Ensign Bickford Realty Corporation v. City Council of City of Livermore*, 68 Cal. App. 3d 467 (1977), and *Wal-Mart Stores v. City of Turlock*, 138 Cal. App. 4th 273 (2006). Though the results in these cases were not overturned by the Court, the language of these cases was disapproved to the extent that it is used to claim that a zoning ordinance may not have a direct impact on economic competition.

3. *Id.* at 285.

4. *Id.* at 286.

5. *Id.* at 291.

A. *Van Sicklen v. Browne*

In 1971, a Milpitas landowner wanted to build an automobile service station in the Highway Service District (HS). The HS district allowed for automobile service stations, but required a conditional use permit. In the Milpitas ordinance, once a conditional use was approved by the Commission, that use became part of the Comprehensive Master Plan. Use permit applications were carefully evaluated, because a decision on one parcel could affect adjacent parcels. The Commission denied Van Sicklen's application because the area was already saturated with service stations and the proposed location was inappropriate for a service station based on existing traffic patterns.

Van Sicklen challenged the decision as an arbitrary and capricious application of the ordinance, exceeding the discretionary authority of the City.⁶ The City Council, Superior Court and Appellate Court all supported the denial of the conditional use permit. "Petitioners' final contention is that the City denied the use permit for economic rather than planning considerations resulting in an invalid attempt to regulate competition through zoning laws."⁷ The Appellate Court said,

land use and planning decisions cannot be made in any community without some impact on the economy of the community. . . . Whether. . . 'planning considerations' or 'economic considerations,' we hold so long as the primary purpose of the zoning ordinance is not to regulate competition, but to subserve a valid objective pursuant to a city's police powers, such ordinance is not invalid even though it might have an indirect impact on economic competition.⁸

The holding in *Van Sicklen v. Browne*, 15 Cal. App. 3d 122 (1971) was referenced for many years for the proposition that an ordinance should not directly affect economic competition. The courts in both *Ensign Bickford*, 68 Cal. App. 3d 467 and *Wal-Mart*, 138 Cal. App. 4th 273 relied on *Van Sicklen* to justify their decisions.

B. *Ensign Bickford Realty Corporation v. City Council of Livermore*

In Livermore in 1977, the Ensign Bickford Realty Corporation challenged the City's refusal to rezone a property back to "neighborhood commercial" (CN) after it was changed to a residential classification (RS-4). The landowner had a potential tenant ready to build a neighborhood store whose plans were now thwarted. Livermore justified the denial because they already had one CN zone in that area. There was sufficient population to support only one neighborhood commercial center at that time, and the situation was unlikely to change in the near future because of limited sewer

6. *Van Sicklen v. Browne*, 15 Cal. App. 3d 122, 125 (1971).

7. *Id.* at 128.

8. *Id.* at 127-28.

system capacity. Ensign Bickford claimed the City's actions amounted to a discriminatory regulation of economic competition.⁹

In *Ensign Bickford*, the court cited other California cases, insisting that:

[w]here the sole purpose of a zoning ordinance or decision is to regulate or restrict business competition, the regulation is subject to challenge. It is not the proper purpose of a zoning ordinance to restrict economic competition or to protect an enterprise which may have been encouraged by a prior zoning classification. (*Wilkins v. City of San Bernardino* (1946) 29 Cal.2d 332, 340, [175 P.2d 542]; *Pacific Palisades Association v. Huntington Beach* (1925) 196 Cal. 211, 216 [237 P. 538 40 A.L.R. 782]; *Bernstein v. Smutz* (1947) 83 Cal.App.2d 108, 119, [188 P.2d 148]).¹⁰

The City's zoning decisions were acceptable, however, because "so long as the primary purpose of the zoning ordinance is not to regulate economic competition, but to subserve a valid objective pursuant to a city's police powers, such ordinance is not invalid even though it might have an indirect impact on economic competition."¹¹

C. *Wal-Mart Stores, Inc. v. City of Turlock*

Litigation arose in 2003 when the City of Turlock passed an ordinance protecting grocery stores that "anchor neighborhood-serving commercial centers."¹² The ordinance prohibited the development of "big box" retail stores containing a full service grocery department.¹³ Wal-Mart challenged the ordinance, "claiming the City unconstitutionally exceeded its police powers,"¹⁴ and more specifically, that the ordinance "is designed to suppress economic competition, and is not reasonably related to the public welfare."¹⁵ Wal-Mart argued the City's police power did not give it authority to control competition among grocery stores in their jurisdiction. But the court disagreed.

[W]hile the Ordinance likely will have an anticompetitive effect on the grocery business in City, that incidental effect does not render arbitrary an Ordinance that was enacted for a valid purpose. . . . While zoning ordinances may not legitimately be used to control economic competition, they may be used to address the urban/suburban decay that can be its effect.¹⁶

These three cases, *Ensign Bickford*, *Van Sicklen*, and *Wal-Mart*, represent a long history of California jurisprudence holding that local government cannot zone for the purpose of regulating economic competition. In

9. *Ensign Bickford Realty Corp. v. City Council of Livermore*, 68 Cal. App. 3d 467, 471-72 (1977).

10. *Id.* at 475-76.

11. *Id.* at 476.

12. *Wal-Mart Stores, Inc. v. City of Turlock*, 138 Cal. App. 4th 273, 280 (2006).

13. *Id.* at 278.

14. *Id.* at 278.

15. *Id.* at 299.

16. *Id.* at 302.

respect of that history, the Court of Appeals ruled in favor of Hernandez, and overturned the Hanford ordinance. The California Supreme Court granted review of *Hernandez v. City of Hanford*, because it is rare to overturn a zoning ordinance and the situation deserved greater attention.

III. *Hernandez v. The City of Hanford:* Defending the Hanford Ordinance

When the City of Hanford amended its General Plan in 1989, it allowed for the development a new commercial district (the Planned Commercial, or PC, district).¹⁷ This district would consist of malls and “big box” stores that were beneficial to the tax base. But the City also wanted to protect the economic viability of their downtown business district. Because one of the important elements of the downtown district was the furniture stores, Hanford passed an ordinance prohibiting the sale of furniture in the new PC district.¹⁸

When Hernandez opened his business he was aware of the prohibition on furniture sales. Perhaps relying on the vague definition of “furniture” in the ordinance, and on the apparent lack of enforcement of the ban, he decided to sell furniture anyway.¹⁹ When a city inspector cited the Hernandez business for violating the ordinance, he complained that the ordinance was applied in a discriminatory fashion because many of the other stores in the zone were also selling furniture and had not been cited.²⁰

Upon this realization, the City held a series of study sessions to discuss the problem.²¹ Representatives from the downtown district insisted that the restriction on furniture sales in the PC district was essential to the economic vitality of the downtown district. Representatives from the PC district argued that the kind of furniture they sold was different than that sold in full scale furniture stores, and that their furniture offerings had not diminished sales at downtown furniture stores in the years since the PC district had been open for business.²² The City finally concluded that a balance must be struck between the needs of businesses in both districts. The ordinance was

17. *Hernandez*, 41 Cal. 4th at 284.

18. *Id.* at 284.

19. *Id.* at 286.

20. *Id.* at 286.

21. *Id.* at 286-89.

22. *Hernandez*, 41 Cal. 4th at 286-89. In response to the Hernandez claim that the Ordinance had an anti-competitive effect, the City argued that Hernandez failed to overcome the trial court’s finding that the ordinance was not enacted to stifle competition. In fact, in oral argument before the Court, counsel pointed out that the opposite had occurred – the ordinance stimulated competition. Since the Ordinance was enacted, both purposes had been achieved – an increase in competition with furniture stores in the downtown and department stores in the PC zone. The number of stores selling furniture in the downtown area had increased from 9 to 14, and the city now had 5-6 department stores in the PC zone, for a net growth of stores selling furniture in the community from 9 to 20. Thus the Ordinance served multiple purposes and promoted, rather than restricting, economic competition.

amended to provide a limited exception to the ban on furniture sales only for stores whose total selling space was over 50,000 square feet.²³ These stores would be allowed to display and sell furniture in 2500 square feet of their overall space, while stores with total selling space of under 50,000 square feet would still be prohibited from selling furniture.²⁴

Shortly after the new ordinance was enacted, Hernandez filed his action.²⁵ He asserted that the ordinance served the improper primary purpose of regulating economic competition, and that it violated equal protection principles because the distinction it drew based on total square footage was not rationally related to any legitimate government purpose.²⁶

The central issue for both the trial court and the appellate court was whether the ordinance violated equal protection principles. But both courts also addressed the longstanding rules from *Van Sicklen* and *Ensign-Bickford* regarding impact on economic competition. The trial court decided that the primary purpose of the ordinance was not to regulate competition, but rather to “preserv[e] the vitality of Hanford’s downtown district while not discouraging large department stores from locating or remaining in the PC district.”²⁷ The court found no equal protection violation. The “rational basis for the ordinance’s disparate treatment of large department stores and smaller retail stores . . . [was] the city’s expressed interest in encouraging large department stores to locate and remain within the PC district [which] did not extend to smaller stores.”²⁸

The California Court of Appeal reversed. While agreeing that the general prohibition of furniture from the PC district was rationally related to the City’s stated purpose for the ordinance, they did not agree that the exception allowing larger stores to sell furniture created a rational distinction.²⁹ They concluded that “with the blanket 2,500-square-foot restrictions on furniture in the PC zone, the small retailer poses the same potential threat, if any, to the downtown merchants as the larger store. Thus, limiting the furniture sales exception to stores with more than 50,000 square feet is arbitrary.”³⁰

On review, the California Supreme Court agreed with the trial court. The appellate court erred because their analysis of whether the ordinance furthered a legitimate government purpose failed to consider a second purpose for the ordinance.³¹ The purpose of the ordinance was: 1) protecting the economic viability of the furniture stores in the downtown business dis-

23. *Hernandez*, 41 Cal. 4th at 289.

24. *Id.* at 289.

25. *Id.* at 290.

26. *Id.* at 290.

27. *Id.* at 290.

28. *Id.* at 290.

29. *Id.* at 290.

30. *Id.* at 290.

31. *Id.* at 283.

trict, and 2) attracting to and retaining within the PC district the sort of large department stores (which tend to sell furniture) that are critical to the economic viability of the PC district.³² Granting a limited exception to such department stores is reasonably related to the second purpose of the ordinance and is therefore a constitutional exercise of government power.³³ The court could have stopped here, but Hernandez's urging of the *Van Sicklen* language regarding competition gave the Supreme Court the opportunity to reassess precedent.³⁴

Recasting *Van Sicklen* and its Progeny

The *Hernandez* court first takes on the notion that "cities may not use zoning powers to regulate economic competition." This is "quite clearly overbroad."³⁵ Zoning powers, by their very nature, impact competition.³⁶

Next, the court addresses the assertion that "so long as the primary purpose of the zoning ordinance is not to regulate economic competition, . . . such an ordinance is not invalid even though it might have an indirect impact on economic competition."³⁷ This is "ambiguous and at least potentially misleading" because it could be interpreted to suggest that an ordinance is "*only* valid when it merely has an indirect impact on economic competition, and *never* when the regulation of economic competition is a direct and intended effect of the ordinance. . . ."³⁸ This, they claim, would be an overstatement of the rule. Essentially, the court does not consider the impact on economic competition, be it intended or unintended, direct or indirect, to be the pertinent question when analyzing the validity of an ordinance. We need look only at the "primary purpose" of the ordinance.³⁹

This is not a new rule. The court points out the outcomes in *Van Sicklen* and its progeny have been consistent with the primary purpose analysis. In *Ensign Bickford*, the City's zoning decisions arguably had an intended impact on economic competition.⁴⁰ They clearly favored one landowner's plans to develop a shopping center over Ensign-Bickford's competing plans.⁴¹ But since the City's primary purpose was to encourage residential and commercial development in an area that they believed would

32. *Id.* at 283.

33. *Id.* at 283.

34. The language of *Van Sicklen* had not controlled appellate court decisions, but Hernandez nonetheless urged in his argument that the language must limit the government's ability to directly impact competition.

35. *Hernandez*, 41 Cal. 4th at 292.

36. *Boone v. Redevelopment Agency of San Jose*, 841 F.2d 886 (9th Cir. 1988); Anderson's American Law of Zoning.

37. *Hernandez*, 41 Cal. 4th at 292.

38. *Id.* at 293.

39. *Id.* at 293.

40. *Id.* at 294.

41. *Id.* at 294.

only support one shopping center, the ordinance was valid. The fact that actions serving this purpose included placing limits on competition does not make the decision invalid.⁴²

The *Wal-Mart* ordinance prohibiting “discount superstores” throughout the city and limiting development of “big box” stores to one commercial district even more clearly intends to impact competition.⁴³ The ordinance was upheld, however, because the intent of the ordinance was to “further the city’s legitimate public interest [or primary purpose] in avoiding the . . . ‘decay’ that may result [from allowing this development] in an outlying area of a municipality.”⁴⁴

The court does not quibble with the outcomes in these cases, and does not contend that reliance on *Van Sicklen* was misplaced. The same circumstances presented today would result in the same holding. One can infer, however, that the court felt it was unnecessary to justify the ordinances based on a notion of incidental and unintended impacts on economic competition. Impacts are not the issue. Primary purposes are.

IV. Equal Protection Issues: Zoning Ordinances Can Be Based on Multiple, Even Conflicting, Purposes to Meet the Rational Basis Test

The other major issue addressed by the court is the equal protection claim. Hernandez argued that the City had no rational basis for its amended ordinance. He claimed that the ordinance’s differential treatment of smaller retail stores in favor of larger ones was improper and that all stores should be treated equally.

Both the Fourteenth Amendment of the United States Constitution and Article I, section 7 of the California Constitution require government to treat equally those persons similarly situated with respect to the legitimate purposes of the law.⁴⁵ Hernandez argued that if the Ordinance was intended to protect downtown furniture stores then it should not allow any furniture sales in the PC district, and if it did allow limited sales of furniture, there should not be any distinctions drawn between stores based merely on their total square footage. The City countered Hernandez by pointing out that he was ignoring two of the three rational bases for the distinctions made in the ordinance.

The Court of Appeal agreed with Hernandez and found that “the small mattress store and the large department store are similarly situated with respect to limited sales of furniture in the PC zone. Moreover, the disparate

42. *Id.* at 294.

43. *Id.* at 295.

44. *Id.* at 296.

45. *Hernandez v. City of Hanford*, 41 Cal. 4th 279 (2007) (No. F047536) (Brief of Appellant at 24).

treatment of these two retailers does not bear a rational relationship to the goal of preserving downtown Hanford.”⁴⁶ But the Supreme Court concluded that this ruling was in error.⁴⁷

The Court looked closely at the classification that was the basis for the discrimination claim and applied the rational basis standard in its review. In a prior case, *Warden v. State Bar*, 21 Cal. 4th 628 (1999), the Court found this standard presumes constitutionality and “‘requir[es] merely that distinctions drawn by a challenged statute bear some rational relationship to a conceivable legitimate state purpose.’[Citation] . . . Moreover, the burden of demonstrating the invalidity of a classification under this standard rests squarely upon the party who assails it.”⁴⁸

The court continued, stating that “[t]he Court of Appeal’s conclusion effectively rests on the premise that there was only a single purpose underlying the challenged ordinance – the protection of furniture stores located in the downtown business district from potential competition by retail establishments conducting business within the PC district.”⁴⁹

Both the terms and legislative history of the measure at issue disclose, however, that the ordinance was intended to serve *multiple* purposes: to protect the economic health and viability of the city’s downtown furniture stores, but to do so in a manner that did not threaten or detract from the city’s ability to attract and retain large department stores in the PC district. Past cases establish that the equal protection clause does not preclude a governmental entity from adopting a legislative measure that is aimed at achieving multiple objectives, even when such objectives in some respects may be in tension or conflict.⁵⁰

The Court turned to a higher authority for this proposition. The United States Supreme Court held in *Fitzgerald v. Racing Association of Central Iowa*, 539 U.S. 103 (2003), that an ordinance could serve more than one objective. In 1994, an Iowa statute allowed racetracks to operate slot machines to ease their economic distress. But these slot machine profits were taxed at a higher rate than the slot machines on riverboats. The racetracks claimed the differential tax was a violation of equal protection principles, but the U.S. Supreme Court did not agree. The Court explained,

the Iowa law, like most laws, might predominantly serve one general objective, say, helping the racetracks, while containing subsidiary provisions that seek to achieve other desirable (perhaps even contrary) ends as well, thereby producing a law that balances objectives but still serves the general objective when seen as a whole. . . . Once one realizes that not every provision in a law must share a single objective, one has no difficulty

46. *Hernandez v. City of Hanford*, 131 Cal. App. 4th 1397, 1402 (2006), rev’d, 41 Cal. 4th 279 (2007).

47. *Hernandez*, 41 Cal. 4th at 284.

48. *Hernandez v. City of Hanford*, 41 Cal. 4th 279, 299 (2007) (citing *Warden v. State Bar*, 21 Cal. 4th 628, 640-41 (1999)).

49. *Hernandez*, 41 Cal. 4th at 299-300.

50. *Hernandez*, 41 Cal. 4th at 300.

finding the necessary rational support for the . . . differential here at issue.⁵¹

In *Fitzgerald*, the U.S. Supreme Court points to its previous posture: “[W]e will not overturn such a statute unless the varying treatment of different groups or persons is so unrelated to the achievement of *any combination of legitimate purposes* that we can only conclude that the legislature’s actions were irrational.”⁵² As applied to *Hernandez*, “it was rational for the city to . . . provide an exception. . . for such large department stores and only such stores.”⁵³

V. What Does This Decision Mean for California?

Since 1971, California courts and the government entities that have crafted zoning legislation have had to contend with the wording in *Van Sicklen*. Going forward, there should be more freedom for local government to write zoning ordinances that focus on all the legitimate purpose(s) they are striving to achieve. There should be less fear that impacting economic competition may invalidate the ordinance.

Some would argue that nothing has changed with *Hernandez*. The results of *Ensign Bickford*, *Van Sicklen*, and *Wal-Mart* remain the same - it was merely a semantic clarification. Only the wording regarding impact on economic competition was disapproved by the Court. They found that a zoning ordinance with a direct impact on economic competition was not “invalid as an improper limitation on competition.”⁵⁴

But if you look more carefully, both the reference to *Fitzgerald* as applied to zoning and the court’s defense of government’s broad ability to impact competition will have far reaching effects. How many legitimate purposes may a single ordinance serve? At what point might the intended impacts on competition be so central to the ordinance that they cease to be analyzed as merely impacts and become improper primary purposes?

There is strong tradition in the U.S. that disapproves of government interference with economic competition. The goals of *laissez faire* supporters are complicated, and perhaps weakened, by the *Hernandez* decision. But government’s broad authority to regulate land use within its jurisdiction is also a tradition. Disapproving courts cannot, at least for now, curtail this government power even if the direct and intended impacts are clearly anti-competitive. Only a vigilant and voting citizenry can do that.

51. *Hernandez v. City of Hanford*, 41 Cal. 4th 279, 301 (2007) (citation omitted) (citing *Fitzgerald v. Racing Ass’n of Cent. Iowa*, 539 U.S. 103, 108-109 (2003)).

52. *U.S. R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 181 (1980).

53. *Hernandez*, 41 Cal. 4th at 302.

54. *Id.* at 298.