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SAN FRANCISCO'S NEIGHBORHOOD COMMERCIAL SPECIAL USE DISTRICT ORDINANCE: AN INNOVATIVE APPROACH TO COMMERCIAL GENTRIFICATION

Mark Cohen*

The commercial street is perhaps the greatest source of vitality and character of a city neighborhood.¹ As the center of neighborhood activity and through the shared use of commercial facilities, the commercial street plays the vital sociological role of linking neighborhood residents to one another and to the neighborhood.² Indeed, the orientation and development of a commercial street is a significant factor in determining a successful and interesting neighborhood.

In San Francisco, most of the neighborhood commercial streets were initially laid out along street car lines and transportation corridors.³ These linear or "strip" commercial streets have long catered primarily to the frequent needs of local residents.⁴

In addition to locally oriented commerce as a significant sociological dimension of the San Francisco commercial street, a residential dimension exists as well. That is, most of San Francisco's neighborhood commercial streets contain ground floor storefronts with upper story residential flats and apartments.⁵

* J.D., Golden Gate University School of Law, 1981. The author would like to express his appreciation to Patrice Fambrini and the other staff members at the San Francisco Department of City Planning for their assistance in the research and preparation of this article.

1. J. JACOBS, *THE DEATH AND LIFE OF GREAT AMERICAN CITIES* 148 (1961).
2. S. KELLER, *THE URBAN NEIGHBORHOOD: A SOCIOLOGICAL PERSPECTIVE* 103 (1968).
3. SAN FRANCISCO DEPT. OF CITY PLANNING, *NEIGHBORHOOD COMMERCIAL CONSERVATION AND DEVELOPMENT* 2 (October 1979).
4. *Id.*
5. *Id.*

The combination of these two dimensions—local commercial orientation and residential use—has created a rather unique mixed-use character⁶ to the San Francisco neighborhood commercial street.

In recent years San Francisco's neighborhood districts experienced a rapid increase in commercial activity and growth. The growth orientation of many of these streets have shifted from local residents to citywide and regional clientele. This change is attributed primarily to increased automobile usage and improved public transit.⁷

While this economic revitalization was beneficial to most merchants on these neighborhood commercial streets, it did not come without its costs. In some cases, expansion has been too rapid and disorganized. Both merchants and residents complained that their district was losing its neighborhood orientation and suffering from growing pains.⁸

In view of the importance of the sociological function a locally-oriented commercial street performs, it can be said that such character and orientation should be preserved and encouraged. In recognition of this fact,⁹ upon recommendation of

6. *Id.* at 4-5.

7. *Id.* at 2.

8. *Id.*

9. Indeed one of the two goals of the San Francisco Planning Department when it conducted the Neighborhood Commercial Conservation and Development study was to implement a policy contained in the Commerce and Industry element of the Comprehensive Plan, which sought to:

[P]romote the multiple use of neighborhood commercial areas with priority given to neighborhood serving retail service industry. Essential goods and services should be within a convenient distance and readily accessible to all city residents. Encourage a variety of goods and services in each commercial district. Maintain an adequate supply of small neighborhood oriented business establishments. Community activity, including recreational, civic, and cultural functions as well as housing, should be encouraged in neighborhood shopping districts when they do not threaten the essential commercial viability of the district by occupying space which would otherwise be devoted to neighborhood serving commercial activity.

Id. at 7. See also SAN FRANCISCO DEPT. OF CITY PLANNING, NEIGHBORHOOD COMMERCIAL REZONING STUDY: PROPOSED ARTICLE OF THE PLANNING CODE FOR NEIGHBORHOOD COMMERCIAL DISTRICTS (January 1983); Department of City Planning, City and County of San Francisco, Memorandum of Dean Marcris (March 7, 1983).

the City Planning Commission,¹⁰ in September of 1980 the San Francisco Board of Supervisors added interim amendments to the planning code to include Neighborhood Commercial Special Use Districts.¹¹ These Neighborhood Commercial Special Use Districts cover ten different neighborhood commercial streets in San Francisco.¹²

The ordinance was on an interim basis so as to provide immediate relief from pressing trends in these neighborhood commercial streets.¹³ During this time, the San Francisco Department of City Planning was to continue its efforts to study the problems of commercial growth in all of San Francisco's neighborhood commercial districts and re-examine and update¹⁴ the zoning provisions that govern commercial streets. The principal

10. SAN FRANCISCO, CAL., BD. OF SUPERVISORS RES. 432-80, 451-80 through 457-80 (1980).

11. SAN FRANCISCO, CAL., PLAN. CODE § 242.1 covers Union Street. It was made a permanent part of the Planning Code in March of 1979. Planning Code §§ 242.2 through 242.10 cover nine other commercial streets. These interim amendments were approved in September of 1980 by the San Francisco Board of Supervisors for a one year period. (SAN FRANCISCO, CAL., ORDINANCE NOS. 446-80 through 454-80). The San Francisco Board of Supervisors renewed these amendments for an additional one year period in September of 1981 (SAN FRANCISCO, CAL., ORDINANCE NO. 554-81). A further extension was made for six additional months in October of 1982 (SAN FRANCISCO, CAL., ORDINANCE NO. 442-80).

12. SAN FRANCISCO, CAL., PLAN. CODE § 242.1 covers Union Street. SAN FRANCISCO, CAL., PLAN. CODE §§ 242.2 through 242.10 cover Sacramento Street, Upper Fillmore Street, Haight Street, Castro Street, Upper Market Street West, Upper Market Street East, 24th Street in Noe Valley, 24th Street in the Mission District, and Valencia Street respectively.

13. SAN FRANCISCO DEPT. OF CITY PLANNING, NEIGHBORHOOD COMMERCIAL CONSERVATION AND DEVELOPMENT, *supra* note 3, at 12.

14. Zoning provisions currently in effect for San Francisco's neighborhood commercial districts are the result of studies made by the [Department of City Planning] during the 1950's and were put into effect in 1960. The 1960 zoning ordinance is a traditional one, identifying and delimiting district boundaries according to prevailing uses and describing permitted activities primarily in terms of uses.

During the last twenty years, land use patterns have shifted somewhat and the amount of land needed for various activities has changed as a result of both local and regional economic trends. At the same time, changes in local population, retailing techniques, and other economic and social factors have altered the character of many of the City's neighborhood shopping districts. These changes in land use and demand indicate that a re-examination and update of zoning provisions is not appropriate.

SAN FRANCISCO DEPT. OF CITY PLANNING, NEIGHBORHOOD COMMERCIAL REZONING STUDY: A PROPOSED ZONING FRAMEWORK 2 (March 1982).

objective of the study was to develop a city-wide neighborhood commercial zoning framework with the flexibility to address the unique needs of individual commercial streets.¹⁵

Because of the complexities involved in initiating legislation for the ten neighborhoods, the long range objective to comprehensively address the neighborhood commercial rezoning issue was interrupted for nearly two years.¹⁶ San Francisco planning officials have resumed consideration of neighborhood commercial districts in a comprehensive form and have made a number of recommendations for revising the planning code pertaining to neighborhood commercial districts.¹⁷ These recommendations include making permanent a number of the provisions that currently exist in the interim Neighborhood Commercial Special Use District ordinance.¹⁸

What follows in this article is a discussion of: (1) the problems that have resulted in ten of San Francisco's neighborhood commercial streets due to economic revitalization that has been rapid and disorganized;¹⁹ (2) the City of San Francisco's attempt to deal with these problems by means of the Neighborhood Commercial Special Use District ordinance currently in effect; (3) how the provisions of the ordinance work; (4) the legal issues involved; and, (5) the planning and sociological principles the ordinance seeks to advance.

THE PROBLEM

Due to the rapid and disorganized commercial revitalization occurring on the ten commercial streets²⁰ there were a number of discernable changes. Common among the majority of these ten streets was the increase in eating and drinking establishments, boutiques and shops that cater to a city-wide and, in some cases, regional clientele.²¹ Residential units on top of com-

15. *Id.* at 2-3.

16. *Id.* at 4.

17. These recommendations can be found in SAN FRANCISCO DEPT. OF CITY PLANNING, NEIGHBORHOOD COMMERCIAL REZONING STUDY: A PROPOSED ZONING FRAMEWORK, *supra* note 14.

18. *Id.* at 14, 26, 28.

19. SAN FRANCISCO DEPT. OF CITY PLANNING, NEIGHBORHOOD COMMERCIAL CONSERVATION AND DEVELOPMENT, *supra* note 3.

20. *See* note 12, *supra*.

21. *Id.* at 2.

mercial units were being converted to office and commercial space.²² There had been a proliferation of branch banks, savings & loan offices, and medical and professional offices.²³

These changes produced several effects and concomitant problems in the neighborhood. The commercial street was becoming dense with bars, restaurants, and financial offices, thereby moving away from diverse commercial development and only catering to a narrow spectrum of community need.²⁴ There were severe parking problems and increased noise and congestion as a result of city-wide attraction to the increasing number of bars and restaurants. Competition for commercial space inflated property values and rents, resulting in the displacement of smaller local-serving businesses.²⁵ The conversion of second and third story residential units took away from the remaining reasonably affordable rental units in the neighborhood and in the city.²⁶ As a result of this change in use, the residential dimension that is considered important to the character and vitality of the commercial district was being diluted.²⁷

THE SOLUTION: THE NEIGHBORHOOD COMMERCIAL SPECIAL USE DISTRICT CONTROLS

The Neighborhood Commercial Special Use District ordinance imposes various controls and prohibitions²⁸ on these ten

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.* at 2, 4.

26. *Id.* at 2, 25.

27. *Id.* at 5.

28. The Special Use District ordinance, in effect, is an overlay of the existing zoning classification of the commercial street. For example, 24th Street in Noe Valley is zoned RC-1. RC-1 is defined as a district which provided for a "mixture of low-density dwellings similar to those in RM-1 districts with certain commercial uses of a very limited nature. The commercial uses are those permitted in C-1 districts, located in or below the ground story only and designed primarily for walk-in trade to meet the frequent and recurring needs of nearby residents. Open spaces are required for dwelling in the same manner as in RM-1 districts, except that rear yards are somewhat smaller and front setback areas are not required." SAN FRANCISCO, CAL., PLAN. CODE § 206.3. The Special Use District ordinance provides controls and restrictions that supplement or are in addition to the general RC-1 classification. One of the proposals contained in the Neighborhood Commercial Rezoning Study is to do away with the RC or C classification and Special Use overlay. Instead, a new city-wide zoning framework would be imposed. This framework would have the flexibility to address the needs of each individual neighborhood commercial district through the application of controls tailored to these districts.

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neighborhood commercial streets.²⁹ These controls are set up to deal with the problems that have resulted from rapid commercial revitalization.³⁰ The ordinance imposes density thresholds for bars, restaurants, financial offices, fast food establishments, and businesses that sell alcoholic beverages for off-premises consumption.³¹ The density threshold section assumes that if these commercial uses go unchecked they could disrupt the balance of available goods and services in the neighborhood and could cause offensive congestion and noise.³²

The density thresholds roughly represent the number of uses for each type of those businesses that were in existence before special use controls were imposed.³³ A special use permit from the San Francisco Department of City Planning would be required before someone could open up a regulated business if there is already an overconcentration.³⁴

For example, if someone desired to open up a bar on 24th Street in Noe Valley a special use permit would be required if that bar would represent the fifth such business on 24th Street.³⁵ However, if it were the fifth or sixth bar on 24th Street it is possible that the zoning administrator could grant approval if certain conditions were met,³⁶ thus avoiding the requirement of

These controls would include the controls contained in the existing Neighborhood Commercial Special Use District ordinance. See SAN FRANCISCO DEPT. OF CITY PLANNING, SUMMARY OF NEIGHBORHOOD COMMERCIAL REZONING STUDY (July, 1982).

29. See Appendix A, *infra*. The table in Appendix A illustrates the types of controls and restrictions that are imposed in the Neighborhood Commercial Special Use Districts.

30. See text accompanying notes 24 through 27 *supra*.

31. See Appendix A for applicable regulation *infra*.

32. Memorandum of Rai Y. Okamoto, Director of City Planning on Neighborhood Commercial Rezoning Study (February 1980).

33. Discussions with San Francisco City Planning officials indicate that in some of the commercial districts the density thresholds were set slightly higher than what existed, thereby allowing slightly more commercial expansion of the particular type of business in question before restrictions would apply.

34. An overconcentration would be anything that exceeded the threshold of that particular use that was established for the particular neighborhood commercial district.

35. See Appendix A, *infra*.

36. SAN FRANCISCO, CAL., PLAN. CODE § 312(d) states:

(d) Determination by the Zoning Administrator. After review, the Zoning Administrator shall either approve or approve with conditions the application and authorize a special use of the facts presented are such as to establish:

(1) That the proposed use meets the standards of applicable sections of this Code; and

a hearing before the full Planning Commission and Commission approval. But if it were the seventh bar, Commission approval would be required.³⁷

(2) That the proposed use meets the standards of applicable guidelines adopted by the City Planning Commission for review of such applications; and

(3) That the proposed use complies with the following requirements:

(A) Upper Story Retail and Office Use.

(1) If the proposal is to convert an existing residential unit to commercial use, kitchen facilities will be retained to allow conversion back to residential use;

(2) No more than 67% of existing second story units are in commercial use (retail or office).

(B) Financial Office.

(1) No other financial office is within 300 feet;

(2) Proposed establishment does not exceed 2,500 square feet of gross floor area;

(3) No drive-up facilities are provided; and

(4) No off-street parking is provided on the site.

(C) Bar, fast-food outlet, restaurant, or store selling liquor for off-premises consumption.

(1) No other establishment of one of these types is within 100 feet;

(2) Proposed establishment does not exceed 1,500 square feet of gross floor area;

(3) No outdoor activity area abuts property with residential occupancy;

(4) No off-street parking is provided on the site; and

(5) No drive-up facilities are provided.

(D) Place of Entertainment.

(1) No other place of entertainment is within 300 feet.

(2) Proposed establishment does not exceed 1,000 square feet of gross floor area;

(3) No outdoor activity area abuts property with residential occupancy;

(4) No electronic amplification equipment is used; and

(5) No off-street parking is provided on the site, or he or she shall refer the matter to the City Planning Commission for hearing as set forth in Subsection (e)

37. One of the proposals of the San Francisco Department of City Planning is to streamline the permit process in Neighborhood Commercial Districts. The proposal calls for the zoning administrator to review and recommend to the City Planning Commission for consent calendar approval or disapproval or refer the application to the City Planning Commission for full public review. This process would allow non-controversial permit applications to be processed with a minimal amount of delay. In the event that the zoning administrator decides against granting a permit, an appeal could be had by a merchant or residential organization, an owner or a lessor of contiguous property, or ten owners or lessors of property within 100 feet of the subject property. The case would then be heard before the City Planning Commission. See SAN FRANCISCO DEPT. OF CITY

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The vertical controls section³⁸ of the ordinance is concerned with upper story uses and is intended to allow for reasonable business expansion while retaining housing in Neighborhood Commercial districts.³⁹ In most Neighborhood Commercial Special Use Districts a special use permit is required before a residential unit on the second story or above is converted to office or commercial use.

The general controls section⁴⁰ of the ordinance imposes controls on floor area, frontage, drive-up uses, parking and outdoor activity. These controls are intended to maintain and protect the existing neighborhood scale of development.⁴¹ For example, a special use permit would be required if a person who owned a business on 24th Street in Noe Valley wanted to expand the square footage of his or her establishment beyond 2500 square feet.⁴² Additionally, in this district drive-up uses are not permitted at all.⁴³

Because no two commercial streets are exactly alike in size, character and in neighborhood orientation, the density thresholds are different for each of the special use districts. Additionally, the general and vertical controls and permitted uses are also different in the various special use districts.⁴⁴

PLANNING, SUMMARY OF NEIGHBORHOOD COMMERCIAL REZONING STUDY, *supra* note 9; SAN FRANCISCO DEPT. OF CITY PLANNING, NEIGHBORHOOD COMMERCIAL REZONING STUDY: A PROPOSED FRAMEWORK, *supra* note 14; SAN FRANCISCO DEPT. OF CITY PLANNING, NEIGHBORHOOD COMMERCIAL REZONING STUDY: PROPOSED ARTICLE OF THE PLANNING CODE FOR NEIGHBORHOOD COMMERCIAL DISTRICTS 48-53 (1983).

38. See Appendix A *infra*.

39. See note 32 *supra*.

40. See Appendix A *infra*.

41. See note 32 *supra*.

42. See Appendix A *infra*.

43. *Id.*

44. For example, on Union Street the second and third floors of commercial property can be used for a retail store, office, or as a residence without a special use permit. See SAN FRANCISCO, CAL., PLAN. CODE § 242.1, table 5A. A decision has been made to permit further commercial development on this street. Thus, there is no great desire to maintain a balance of residential-commercial use on Union Street.

However, the opposite is true for the Valencia Street, 24th Street in the Mission District, 24th Street in Noe Valley, Upper Market Street West, Haight Street, Castro Street, Upper Market Street East, Fillmore Street and Sacramento Street Special Use Districts (see SAN FRANCISCO, CAL., PLAN. CODE §§ 242.2 through 242.10, tables 5B through 5J). In all these districts a special use permit is required for office use on the second floor if it involves the elimination of an existing residential use. Additionally, except for Castro Street, there is a prohibition of retail operations on the second floor

Throughout the discussion on the controls in the Special Use District ordinance it has been stated that a special use permit is required if a person desires to use his or her property in a manner that is regulated by the ordinance. The next point of inquiry would thus be what is the meaning of the requirement of a special use permit? What are the criteria that are to be employed in determining whether a special use permit should be granted? An examination of the ordinance will reveal that it is structured in such a way that its various objectives and the determinative criteria are harmonious.

THE MEANING OF THE REQUIREMENT OF A SPECIAL USE PERMIT

Planning Code section 242(b)(3), entitled "Special Uses," states that "in reviewing applications for special use authorization, the Commission shall consider criteria set forth in § 312 of this code." Planning Code section 312 states the criteria to be employed for cases when the special use application can be determined by the zoning administrator,⁴⁵ and for cases when it must go before the full Planning Commission.

For those applications that must go before the full Planning Commission for review and decision, Planning Code section 312 states:

[N]o special use authorization may be approved . . . which is not consistent with the policies and objectives of the comprehensive plan of San Francisco, the purpose of this Code, the general purposes of Neighborhood Commercial Special Use Districts . . . , and the purposes of the particular special use district. In considering such authorizations, the zoning administrator and the Planning

and there is also a prohibition on any office or retail use for the third story or above. On Castro Street, retail businesses are permitted on the second story if a special use permit is obtained (*see* SAN FRANCISCO, CAL., PLAN. CODE § 242.5, table 5E). On Valencia Street, however, offices are permitted on the third floor if a special use permit is obtained (*see* SAN FRANCISCO, CAL., PLAN. CODE § 242.10, table 5J).

The preservation of neighborhood characteristics is reflected in the absolute prohibition of fast food establishments on Sacramento Street (*see* SAN FRANCISCO, CAL., PLAN. CODE § 242.2, table 5B). This is the only district that imposes an absolute ban on such establishments. The other districts set up density thresholds for the type of use (*see* SAN FRANCISCO, CAL., PLAN. CODE §§ 242.2 through 242.10, tables 5B through 5J).

45. *See* note 36 and accompanying text *supra* for an example of a situation where the zoning administrator may determine whether a special use permit should be issued.

Commission shall also consider the needs of the owners of property, operators of businesses, residents of surrounding areas, users of the area, and the community in general.⁴⁶

To discover the principles that guide the Planning Commission in determining whether a special use permit should be granted, one must turn to Planning Code section 242(a) and the section entitled, "Purposes," in the particular Commercial Special Use District ordinance. Planning Code section 242(a) states that:

In order to provide, maintain and strengthen viable neighborhood commercial districts readily accessible to city residents, promote the multiple use of neighborhood commercial areas with priority given to neighborhood-serving retail and service activity, promote neighborhood commercial revitalization, protect environmental quality in neighborhood commercial areas, prevent the establishment of major new commercial development except in conjunction with adequately supportive residential development and transportation capacity, encourage community based economic development, and control the rapid expansion of certain types of uses which if uncontrolled may adversely affect the character of certain neighborhood commercial districts, there shall be Neighborhood Commercial Special Use Districts⁴⁷

The emphasis in section 242(a) is on social, environmental, and economic viability; urban neighborhood ecological balance is the common denominator. This ordinance specifically recognizes the danger of rapid expansion of certain uses "which if uncontrolled may adversely affect the character of certain neighborhood commercial districts."⁴⁸

46. SAN FRANCISCO, CAL., PLAN. CODE § 312(b).

47. SAN FRANCISCO, CAL., PLAN. CODE § 242(a) (1980). Planning Code § 242.1(a) states the purpose of the Union Street ordinance. Planning Code §§ 242.2(b) through 242.10(b) state the purposes of the Sacramento Street, Fillmore Street, Haight Street, Castro Street, Upper Market Street West, Upper Market Street East, 24th Street in Noe Valley, 24th Street in the Mission, and Valencia Street ordinances respectively. All are virtually identical in content.

48. SAN FRANCISCO, CAL., PLAN. CODE § 242(a).

The language of the ten ordinances pertaining to the specific commercial streets are virtually identical. The purposes are stated as follows:

(b) Specific findings and purposes. This ordinance is intended to carry out the policies for orderly growth . . . through:

1. Preservation of the existing scale and mix of commercial use along [name of special use district street] in order to maintain the livability of the surrounding residential areas as well as the economic viability of the street.

2. Establishment of performance standards for certain types of commercial uses which are concentrated along the street in a manner potentially harmful to residential livability and the maintenance of small-scale, neighborhood-serving businesses.

3. Establishment of upper story controls to protect the existing housing stock and preserve the unique residential-commercial character of the street.

4. Establishment of certain businesses as special uses in order to allow for the orderly development of the street and to prevent any damage to the unique commercial character of the street with its special mix of food and beverage service, entertainment, specialty shops and professional services.

5. Establishment of density thresholds for certain commercial uses beyond which special review is required to assure maintenance of balance of sales and services to the neighborhoods, city-wide and regional customers, and users of the street and prevention of excess noise, traffic and parking congestion and other conditions disruptive of a neighborhood.

6. Prohibition of "drive-up" type uses, and establishment of review procedures for off-street parking facilities, which uses would cause interference with an already congested traffic flow and would be out of character with the special urban character of

this unique shopping area.⁴⁹

Rather than specify conditions⁵⁰ that the applicant must fulfill before a special use permit can be issued, the ordinance mandates policy considerations that the Planning Commission must employ in its decision-making process.

It is readily observed that the maintenance of the neighborhood's unique character and scale, the promotion of diverse commercial uses to serve the needs of the neighborhood, and the preservation of the residential-commercial character of the street are the predominant objectives of the ordinance. As stated before, it is designed to achieve urban neighborhood ecological balance through diverse use. This principle is the directive of the ordinance, and is the guiding principle of the Planning Commission in this area. Additionally, as Planning Code section 312 indicates, the Commission must also consider "the needs of the owners of property, operators of businesses, residents of surrounding areas, users of the area and the community in general."⁵¹

Furthermore, the controls, density thresholds, and prohibitions embodied in the ordinance were in response to unbalanced commercial development that was viewed as excessive. The ordinance presumes that additional growth is detrimental, and the burden is on the applicant to demonstrate otherwise.

When the zoning administrator has the power to decide on a special use application, the more conventional conditional use approach is employed.⁵² Planning Code section 312(d) sets out specific conditions, which, if met by the applicant, permit the zoning administrator to approve the special use application.⁵³

THE LEGAL DIMENSIONS OF THE NEIGHBORHOOD COMMERCIAL SPECIAL USE DISTRICT ORDINANCE

The technique of special use controls to preserve the quality

49. See note 47 *supra*.

50. Typically, a special use or conditional use ordinance sets out specific conditions. If the applicant meets those conditions, the permit must be issued.

51. See note 46 *supra* and accompanying text.

52. See note 50 *supra*.

53. See note 36 *supra*.

and character of a commercial street and neighborhood is a highly innovative means⁵⁴ to preserve neighborhood uniqueness and locally oriented commerce. Using policy principles rather than specific criteria to guide the Planning Commission in determining whether an application should be granted is a further innovation.⁵⁵ It is a bold and daring approach to the problem. However, there are constitutional as well as statutory considerations which must be examined to determine the legality of this innovative zoning approach.

One of the first zoning cases was *Euclid v. Amber Realty*.⁵⁶ In *Euclid* the Supreme Court held that before a zoning ordinance can be declared unconstitutional, "it must be said . . . that [its] provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare."⁵⁷

The *Euclid* case clearly established the constitutionality of zoning but it did not define the terms "health, safety, morals and general welfare." This uncertainty continued for twenty-eight years. In 1954 the High Court declared:

[T]he concept of public welfare is broad and inclusive. . . . The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.⁵⁸

Thus, it was pronounced that the concept of general welfare included the balance of uses and aesthetics of a community and were within the zoning and land use regulatory powers of the legislature.

Twenty years later the Supreme Court again explained the concept of public welfare and what interests local legislatures

54. "Certain aspects of the proposed controls represent a relatively new and as yet untested concept in commercial zoning." Memorandum from Rai Y. Okomoto, Director of San Francisco Department of City Planning (February 14, 1980).

55. *Id.*

56. 272 U.S. 365 (1926).

57. *Id.* at 395.

58. *Berman v. Parker*, 348 U.S. 26, 33 (1954).

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may ultimately seek to protect by exercising their police power through zoning regulations. It was said in *Village of Belle Terre v. Boraas*:

A quiet place where yards are wide, people are few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, and the blessing of quiet seclusion, and clean air make the area a sanctuary for people.⁵⁹

Even the dissent concurred in the Court's express holding that a local entity's zoning power is extremely broad. As Mr. Justice Marshall proclaimed:

Local zoning authorities may properly act in furtherance of the objectives asserted to be served by the ordinance at issue here: restricted uncontrolled growth, solving traffic problems, keeping rental costs at a reasonable level, and making the community attractive to families. The police power which provides justification for zoning is too narrowly confined. And it is appropriate that we afford zoning authorities considerable latitude in choosing the means by which to implement such purpose.⁶⁰

It was thus settled that the police power may be employed by a zoning entity to tackle problems that affect the quality of life in a community.

One year later, the Ninth Circuit stated that "the concept of public welfare is sufficiently broad to uphold Petaluma's desire to preserve its small town character, its open spaces and low density of population, and to grow at an orderly and deliberate pace."⁶¹ It therefore was proper to limit the number of building permits issued per year to effectuate such goals.⁶²

59. *Village of Belle Terre v. Boraas*, 416 U.S. 1, 9 (1974).

60. *Id.* at 13-14.

61. *Construction Industry Ass'n. of Sonoma County v. City of Petaluma*, 522 F.2d 897, 908, 909 (9th Cir. 1975).

62. *Id.* at 900-01.

The legal proposition that a state or local legislature is endowed with the power to regulate the use of land to promote and protect spiritual as well as physical values, and aesthetic as well as monetary values evolved over five-and-one-half decades. The regulatory power may promote a beautiful, healthy, spacious, clean, and well-balanced community.⁶³ It may promote a quiet place with wide yards to limit population and the use of motor vehicles. It may promote family needs.⁶⁴ It may restrict uncontrolled growth, solve traffic problems, and keep rental costs reasonable.⁶⁵ It may be used to preserve a small town character, and to allow a community to grow at an orderly and deliberate pace.⁶⁶ All are embraced by the concept of the public welfare. Even if by some chance the validity of the zoning regulation is fairly debatable, "the legislative judgment must be allowed to control."⁶⁷

The Special Use District ordinance deals with the control of commercial growth and the preservation of neighborhood character. Both these objectives appear well within the permissible scope of police power and are intimately related to the public welfare.⁶⁸ However, there exists the additional question of whether the special use permit system is a permissible zoning technique as employed with San Francisco's Special Use District ordinance.

It should first be noted that there is a very strong presumption of validity to any zoning ordinance. The California Court of Appeal in *Ensign Bickford Realty v. City Council*⁶⁹ discusses fully the basis of this presumption:

In *Lockard v. City of Los Angeles*, . . . the court stated: "In enacting zoning ordinances, the

63. *Berman v. Parker*, *supra* note 58.

64. *Village of Belle Terre v. Boraas*, *supra* note 59.

65. *Village of Belle Terre v. Boraas*, *supra* note 59.

66. *Construction Industry Ass'n. of Sonoma County v. City of Petaluma*, *supra* note 61.

67. *Euclid v. Amber Realty*, *supra* note 56, at 388.

68. See *Village of Belle Terre v. Boraas*, 416 U.S. at 13-14; *Berman v. Parker*, 348 U.S. at 33; *Construction Industry Ass'n of Sonoma County v. City of Petaluma*, 522 F.2d at 908, 909; *Ybarra v. City of Los Altos Hills*, 503 F.2d 250 (9th Cir. 1974); *Associated Home Builders of the Greater East Bay, Inc. v. City of Livermore*, 18 Cal. 3d 582. See also *Golden v. Planning Board of the Town of Ramapo*, 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138 (1972).

69. 68 Cal. App. 3d 467, 137 Cal. Rptr. 304 (1977).

municipality performs a legislative function, and every intendment is in favor the validity of such ordinances It is presumed that the enactment as a whole is justified under the police power and adapted to promote the public health, safety, morals and general welfare.”

. . . .
The court will, of course, inquire as to whether the scheme of classification and districting is arbitrary or unreasonable, but the decision of the zoning authorities as to matters of opinion and policy will not be set aside or disregarded by the courts unless the regulations have no reasonable relation to the public welfare or unless the physical facts show that there has been an unreasonable, oppressive, or unwarranted interference with property rights in the exercise of the police power.⁷⁰

There is deference to the wisdom of the legislature. Only if there is no reasonable relation to the public welfare will the ordinance be set aside.

The special use permit is well recognized as a legitimate zoning tool.⁷¹ Special use has also been known as conditional use,⁷² or a special exception.⁷³ Municipalities throughout the country have employed special use to accomplish a variety of “public welfare” purposes. State courts have had occasion to offer explanations as to this land use device’s purpose and what legal standards are applicable. Some typical comments follow:

A California Appeals Court stated that the device of a special use:

[P]ermits the inclusion in the zoning pattern of uses considered by the legislative body to be essentially desirable to the community, but which because of the nature thereof or their concomitants (noise, traffic, congestion, effect on values, etc.), militate against their existence in every lo-

70. *Id.* at 474-75, 137 Cal. Rptr. at 309.

71. *People v. Perez*, 214 Cal. App. 2d Supp. 881, 885, 29 Cal. Rptr. 781, 785 (1963); *Kotrich v. County of DuPage*, 19 Ill. 2d 181, 166 N.E.2d 601 (1960).

72. D. HAGMAN, J. LARSON & C. MARTIN, CALIFORNIA ZONING PRACTICES § 7.57, at 294 (1969) [hereinafter D. HAGMAN].

73. *Id.* § 7.78, at 311.

cation in a zone or in any location without restrictions tailored to fit the special problems which the uses permit.⁷⁴

An Oregon court observed that:

By providing that a given use will only be allowed conditionally in a given zone, a local government finds that there is a possible public need for that use in that zone, and simultaneously finds that introduction of that use into that zone may have disadvantages that outweigh the advantages.⁷⁵

The High Court of New York takes a different view and states that:

[A] special exception allows the property owner to put his property to a use expressly permitted by the ordinance. The inclusion of the permitted use in the ordinance is tantamount to a legislative finding that the permitted use is in harmony with the general zoning plan and will not adversely affect the neighborhood.⁷⁶

The New York court's position is that permitting a special use will not have an adverse impact on the neighborhood. Oregon and California articulate a different function of special use. Both of those states acknowledge that a particular use is designed in the ordinance as "special" because it might cause problems and should not be permitted in certain circumstances. Perhaps the Supreme Court of Minnesota put it best:

Special Use Permits . . . were introduced into zoning ordinances as flexibility devices that are designed to meet the problem which arises where certain uses, although generally compatible with the basic use classification of particular zone, should not be permitted to be located as a matter of right in every area included within the zone because of hazards inherent in the use itself or special problems which its proposed location may present. By this device, certain uses . . . which may be considered essentially desirable to the community, but which should not be authorized

74. *People v. Perez*, 214 Cal. App. 2d Supp. at 885, 29 Cal. Rptr. at 785.

75. *Anderson v. Pedan*, 569 P.2d 633, 637 (1977).

76. *North Shore Steak House v. Board of Appeals of Inc. Village of Thomaston*, 30 N.Y.2d 238, 243, 282 N.E.2d 606, 609, 311 N.Y.S.2d 645, 649 (1972).

generally in a particular zone because of considerations such as current and anticipated traffic congestion, population density, noise, effect on adjoining land values, or other considerations involving public health, safety, or general welfare, may be permitted upon a proposed site depending upon the facts and circumstances of the particular case.⁷⁷

The Minnesota Supreme Court presented a detailed overview of the function, design, and operation of the special use device. Basically, it is a flexible zoning device that can be used to screen out certain uses that might be beneficial to the community, but not necessarily in a specific location in the community.

The San Francisco Neighborhood Commercial Special Use District ordinance appears to follow the principles expounded by the Minnesota, Oregon, and California courts. It is utilized as a flexible land use device for purposes of precluding any uses that might cause further problems in the neighborhood.

The special use technique is clearly a permissible one. Employing this land use regulation is not novel. What distinguishes San Francisco's ordinance, however, is the number of different uses it regulates, the criteria employed, and the objectives it seeks to fulfill.

The preceding analysis demonstrates that the objectives of the Special Use District ordinance are within the legitimate scope of a municipality's police power. It also demonstrates that the device of special use is a legitimate zoning technique. It would necessarily follow that if the objectives are permissible and the device of a special use permit is a permissible one, then using such a device to fulfill the objectives is proper. However, due to the complex nature of this ordinance and the number of objectives it seeks to fulfill, a more detailed analysis will permit a clearer apprehension of its legality.

As indicated above, Planning Code section 242(a) discusses the purposes of the Neighborhood Commercial Special Use Districts.⁷⁸ Planning Code section 242.1 describes the purposes of

77. *Zyller v. City of Crystal*, 283 Minn. 192, 196, 167 N.W. 45, 49 (1969).

78. See note 48 *supra* and accompanying text.

the Union Street ordinance, and sections 242.2(b) through 242.10(b) describe the purposes of each of the remaining nine neighborhood ordinances.⁷⁹ As was also noted before, the purposes of each neighborhood ordinance are virtually identical: the control of commercial growth and the preservation of the unique character and quality of the neighborhood.⁸⁰

The California Court of Appeal in *Tustin Heights Association v. Board of Supervisors*⁸¹ sustained an ordinance with similar criteria and purposes:

The primary requirement is that conditional uses and variance must be such that they will preserve the integrity and character of the district, the utility and value of adjacent property and the general welfare of the neighborhood. The ordinance then vests in the discretion and judgment of the planning commission the determination of when the applicant has presented a request for a use which is an exception but which will nonetheless preserve the integrity and character of the district, the utility and value of adjacent property, and the general welfare of the neighborhood.⁸²

The court then made an important observation: “[T]he courts of this state have repeatedly upheld zoning ordinances containing provisions governing conditional use permits and variance permits similar to the ordinance before us.”⁸³

The ordinance in *Tustin Heights* was being attacked on the grounds that the standards, as were articulated above by the court, violated due process in that they were not specific enough and permitted the planning commission to act in an arbitrary and discriminatory manner. The court dismissed this argument and stated: “The essential requirement of due process is met when the administrative body is required to determine the existence or nonexistence of the necessary facts before any decision is made. Such a discretion is not arbitrary or so unguided as to

79. See note 47 *supra* and accompanying text.

80. *Id.*

81. 170 Cal. App. 2d 619, 339 P.2d 714 (1959).

82. *Id.* at 634, 339 P.2d at 729.

83. *Id.* at 635, 339 P.2d at 730.

invalidate the statute or ordinance."⁸⁴

Indeed, in California the most general statement of standards is sufficient.⁸⁵ The California Government Code permits the planning commission to issue special use permits only if the ordinance establishes criteria for determining such matters.⁸⁶ However, the standard could even be a "general welfare standard." That is, the ordinance could merely require that the permit not be issued unless the use is consistent and in "harmony with the general welfare of the community."⁸⁷ The San Francisco ordinance has standards that are specific statements of general land use policies. From the preceding review of the law, these standards appear legally sufficient.

The ordinance also has specific controls such as special uses which set up threshold limits, vertical controls, and general controls on special commercial uses. This is perhaps the most unique feature of the ordinance.

The growth control cases of *The Associated Homebuilders of the Greater East Bay v. City of Livermore*⁸⁸ and *Construction Industry Association of Sonoma County v. City of Petaluma*⁸⁹ provide a foundation to consider whether there is any reason why there cannot be a minimum threshold for a specific use.

Both cases involve limits on the number of permits that can be issued for building in the municipality. In *Associated Homebuilders*, there was an absolute prohibition on the issuance of any permits unless certain conditions in its community were met concerning the use of educational facilities, sewage, and water supply. *Construction Industry* involved an absolute limit of five hundred building permits to be issued per year. In both cases the court sustained the ordinance, finding the objectives within the broad definition of the public welfare. Both cases

84. *Id.* quoting *Wheeler v. Gregg*, 90 Cal. App. 2d 348, 362, 203 P.2d 37, 51 (1949).

85. D. HAGMAN, *supra* note 72, § 7.67, at 303.

86. CAL. GOV. CODE § 65901 (West 1966). See also *Stoddard v. Edelman*, 4 Cal. App. 3d 544, 84 Cal. Rptr. 443 (1970).

87. 4 Cal. App. 3d at 548, 84 Cal. Rptr. at 447; *Van Sicklin v. Browne*, 15 Cal. App. 3d 122, 126-27, 92 Cal. Rptr. 786, 790 (1971).

88. 18 Cal. 3d 582.

89. 522 F.2d 897.

seem to support the proposition that absolute numerical limits are permissible if the limitation serves the public welfare.

Other states have decided the issue of numerical limits for particular uses. In *Metro 500, Inc. v. City of Brooklyn Park*,⁹⁰ a city council denied a special use permit for a gas station and passed a resolution which indicated that there was a need for other commercial uses. Filling stations take away the opportunity for such uses and "the number of filling stations in the area is completely unbalanced with other commercial uses."⁹¹

The state supreme court reversed the city council and held that the limitations of the number of one type of use in a particular area does not bear a sufficient relationship to the public health, safety or general welfare of a community, and denial of a special use permit was thereby arbitrary.⁹² However, the real reason for the court's reversal appears to be that the city's zoning code did not empower the city council to deny permits based on an imbalance of uses. The court implied that the decision might have been different if the code so empowered the city council. As the court stated:

We make no prediction as to what our decision might be if the city's zoning code empowered the city council to deny permits because of imbalances that might be created by having too many filling stations, restaurants, night clubs, grocery stores, or whatever, in a given area, assuming reasonable standards for such decisions were contained in the code and that a comprehensive plan for the future development was adopted by the city.⁹³

No similar problem exists with the San Francisco ordinance, for the ordinance empowers the Planning Commission to prevent commercial imbalances.⁹⁴

A New York court also faced the numerical issue when a

90. 297 Minn. 294, 211 N.W.2d 358 (1973).

91. *Id.* at 297, 211 N.W.2d at 361.

92. *Id.* at 299, 211 N.W.2d at 363.

93. *Id.* at 300, 211 N.W.2d at 364.

94. See note 47 *supra* and correlating text, stating the purposes of SAN FRANCISCO, CAL., PLAN. CODE §§ 242(a), 242.2(b) through 242.10(b).

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town board denied a special use permit for a gas station because there was one across the street:

It has been properly said that business competition is no concern of zoning. This misses the point. The question here is: Is the reasonable regulation of the number of gas stations to be concentrated in a particular locality so unrelated to the public welfare, that it can be said as a matter of law to have no substantial relation to it? I am not prepared to say that it cannot have such a relationship, no matter what the circumstances.⁹⁵

The court went on to reverse the denial of the permit because it involved only one station across from another, but indicated that a third or fourth station might present different questions and that the town board's discretion is very broad.⁹⁶

The California Court of Appeal has had occasion to decide this question in *Van Sicklen v. Browne*.⁹⁷ There the city council denied a conditional use permit for a gas station because "approval would create a further proliferation of this type of land use in a neighborhood already adequately served by service stations located more logically at a major intersection and that approval would establish a service station use too close to a developed residential area."⁹⁸

The court held that this denial was a legitimate exercise of the discretionary power vested in its Planning Commission by the zoning ordinance and observed that "the traditional purpose of the conditional use permit is to enable a municipality to exercise some measure of control over the extent of certain uses, such as service stations, which, although desirable in limited numbers, could have a detrimental effect on the community in large numbers."⁹⁹

The case affirms the purposes underlying the San Francisco ordinance. It is permissible to limit certain uses to prevent an over-proliferation that will be detrimental to the community.

95. *Hempturn Realty Corp. v. Larkin*, 197 N.Y.S.2d 644, 647 (1959).

96. *Id.* at 648.

97. *Van Sicklin v. Browne*, 15 Cal. App. 3d 122, 92 Cal. Rptr. 786 (1971).

98. *Id.* at 125-26, 92 Cal. Rptr. 789.

99. *Id.*

Additionally, it is permissible to deny a use permit because the proposed commercial use is too close to a residential area. This can be viewed as affirming the purposes of the vertical controls in the Special Use District ordinance. The vertical controls are designed to retain residential uses in the neighborhood commercial districts so as to maintain the livability of the surrounding residential area.¹⁰⁰

It could be contended that limiting the number of uses for a particular type of business in a particular area is an attempt to regulate economic competition and is not a permissible objective. However, the court in *Van Sicklin* held that "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."¹⁰¹ Because the primary objective of the San Francisco ordinance is to preserve the character of the neighborhood and maintain commercial balance, it would not be invalidated because it might have a secondary effect of regulating competition.

Section 242 of the Planning Code states that one of the purposes of the Special Use ordinance is to "promote the multiple use of neighborhood commercial areas with priority given to neighborhood-serving retail and service activity."¹⁰² Explicit in this policy statement is a desire to accommodate the needs of the neighborhood by giving priority to neighborhood-serving retail and service activity. Implicit in the special use controls and, to a fair extent, in the general and vertical controls, is a decision that in some circumstances there is not a need for any additional uses. Is there any reason why neighborhood need cannot be a purpose of the ordinance and used as a guideline in evaluating special use permit applications?

The California Court of Appeal in *Ensign Bickford Realty Corp. v. City Council*¹⁰³ dealt with this question when a property owner's request to rezone his property so that he could build a shopping center was denied. The denial was based on the fact

100. See text accompanying note 49.

101. *Stoddard v. Edelman*, 15 Cal. App. 3d at 128.

102. See note 48 *supra* and accompanying text.

103. 68 Cal. App. 3d 467, 137 Cal. Rptr. 304 (1977).

that there already was a neighborhood commercial area, there was no need for a shopping center in the proposed location, and the city's population base could not support two shopping centers.¹⁰⁴ The court noted that the regulation of where a business will be developed was a legitimate end, stating that: "here the city is attempting to regulate *where*, within the city, business will be developed. In furtherance of the legitimate end, it is necessary to permit business development in one area before attempting commercial development in another The primary purpose is clearly the reasonable regulation of land use."¹⁰⁵

In *Van Sicklin* the Court of Appeal affirmed the planning commission's decision to deny a conditional use permit for a gas station because the "neighborhood [was] already adequately served by service stations located more logically at a major intersection. . . ." ¹⁰⁶ There was no need for another gas station. In affirming the planning commission, the court noted that it was within the power of the municipality to exercise such control by means of a conditional use permit.¹⁰⁷

There appears to be some disagreement in other states as to how community need should influence the decision to issue a special use permit. The Maryland court follows a view similar to that of the California court. Need, or the lack of it, can be an important factor in deciding whether or not to grant a special use permit. In *Lucky Stores v. Board of Appeals of Montgomery County*,¹⁰⁸ the court of appeal affirmed the denial of a special use permit for a gas station because the applicant failed to demonstrate a need for one in the area proposed. The provisions of the special use ordinance required a finding that from "a preponderance of the evidence of the record that for the public convenience and service a need exists for the proposed use for service to the population in the general neighborhood considering the present availability of such uses to that neighborhood" ¹⁰⁹ In upholding the denial of the special use permit the court first noted that: "We have in our prior decisions indicated

104. *Id.* at 471-72, 137 Cal. Rptr. at 307.

105. *Id.* at 477-78, 137 Cal. Rptr. at 314-15.

106. *Van Sicklin v. Browne*, 15 Cal. App. 3d at 125-26, 92 Cal. Rptr. at 791.

107. *See* text accompanying notes 97 & 98.

108. 270 Md. 513, 312 A.2d 758 (1973).

109. *Id.* at 519, 312 A.2d at 764.

that the use of the words 'neighborhood' and 'need' in ordinances delegating to zoning administrative bodies the power to grant special exceptions gave a sufficiently definite guide for those bodies."¹¹⁰ The court went on to state later in the opinion that:

The majority view and, in our opinion, the better view, is to the effect that lack of need for another gasoline filling station in the vicinity of other stations is, as we have previously noted, an important factor that courts have relied upon in refusing a permit for a filling station.¹¹¹

The Illinois court's view is that absence of public necessity alone is not sufficient to require the denial of a special use permit.¹¹² Rhode Island courts concur with those of Illinois. They follow the view that "[a] zoning board of review, . . . may not deny granting a special [use permit] to a permitted use on the ground that the applicant has failed to prove that there is a community need for its establishment."¹¹³

In California and Maryland, failure to establish need can alone serve as the basis for denial of a use permit, but in Illinois and Rhode Island something more is needed if a use permit is to be denied.

From the preceding analysis of the various characteristics of San Francisco's Neighborhood Commercial Special Use District ordinance, it appears that its objectives as well as the means employed in effectuating them are legally sufficient.

ZONING FOR DIVERSITY: THE SAN FRANCISCO ORDINANCE EMBODIES AN OLD IDEA

The idea of zoning to maintain the character of a neighborhood and to prevent an overconcentration of a few uses on a commercial street is not a new one.¹¹⁴ The concept of zoning for commercial diversity is premised on the idea that neighborhood

110. *Id.* at 520, 312 A.2d at 765.

111. *Id.* at 524, 312 A.2d at 768.

112. *Pioneer Trust & Savings Bank v. County of McHenry*, 241 N.E.2d 454, 459-60, 4 Ill. 2d 77, 85 (1968); *LaSalle National Bank v. County of Lake*, 215 N.E.2d 849, 69 Ill. App. 2d 179 (1975).

113. *Toohey v. Kilday*, 415 A.2d 732, 735 (1980).

114. *See J. JACOBS, THE DEATH AND LIFE OF GREAT AMERICAN CITIES* (1961).

character is intimately related to variety of commercial use, for more often than not they go hand in hand, generating each other. As Jane Jacobs, the author of *The Death and Life of Great American Cities*, observes:

Whenever we find a city district with an exuberant variety and plenty of commerce, we are apt to find that it contains a good many kinds of diversity also, including variety of its population and other uses. This is more than a coincidence. The same physical and economic conditions that generate diverse commerce are intimately related to the production, or the presence of other kinds of city variety.¹¹⁵

These observations are implicitly, if not directly, recognized in the San Francisco ordinance.

In each of the special use districts in San Francisco there was a commercial resurgence which promoted the special use controls. Because of the increased commercial potential, over-concentration of a few uses threatened the character of the street. Exactly this process occurred on Eighth Street in the Greenwich Village section of New York City in the late 1950's. As Ms. Jacobs observed, "Among all the enterprises of Eighth Street, it happened that restaurants became the largest moneymakers per square foot of space. Naturally it followed that Eighth Street went more and more to restaurants."¹¹⁶ Fortunately one person, who happened to be a planner and housing expert, owned a good portion of the property on Eighth Street and was sensitive to the problem. He saw to his dismay bookstores, galleries, clubs, craftsmen, and one of a kind shops being pushed out. What he did was to deliberately search out tenants who would add something other than restaurants to the mixture.¹¹⁷ Thus, the process that is taking place in many San Francisco's neighborhoods is nothing new. While the market creates opportunity for business, often the most profitable use of a street is not to the advantage of the entire street and the community, for it often breeds duplication.

[D]uplication of the most profitable use [under-

115. *Id.* at 148.

116. *Id.* at 294.

117. *Id.* at 244-45.

mines] the base of its own attraction, as disproportionate duplication and exaggeration of some single use always does in cities When whole neighborhoods of streets and entire districts embark on excessive duplication of the most profitable or prestigious uses, the problem is . . . serious.¹¹⁸

It is uncommon to have as a major property owner a person sensitive to the need for a street to be diverse. This is especially the case when property values increase and the opportunity for a higher profit presents itself. Therefore, outside controls are needed to assure diversity. One suggestion is the employment of a feedback system to "hamper excess duplications at one place and divert them instead to other places in which they will not be excess duplications, but healthy additions."¹¹⁹ This feedback system is a major part of zoning for diversity and is almost exactly what the density thresholds are in the San Francisco ordinance. While it does not directly divert the regulated businesses into other areas, it does accomplish this indirectly by creating a disincentive to open in a regulated district when it would represent an excessive duplication.

Inherent in San Francisco's Special Use ordinance is the assumption that there is going to be commercial development in the regulated districts. The controls seek to impose certain limitations as to uses so that commercial growth is in conformity with the character of the neighborhood and positively reinforces it. It does not have as its primary purpose the objective of freezing all conditions and uses. "The purpose of zoning for deliberate diversity should not be to freeze conditions and uses as they stand. Rather, the point is to insure that changes or replacements as they occur cannot be overwhelmingly of one kind."¹²⁰

Another author has explored the idea of diverse use districts, and suggested an approach that would effectuate the goals of such zoning. This suggested approach is remarkably similar to that of the San Francisco ordinance:

The district could be zoned "controlled di-

118. *Id.* at 245-46.

119. *Id.* at 252.

120. *Id.* at 253.

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verse use district" in an ordinance which articulated the diverse uses goal, spelling out uses to be permitted and excluded from the district. The ordinance could state general guidelines for diversity, including whatever feedback percentages may have been developed for primary uses. Existing nonconforming uses would be eliminated if not within the list of permitted uses. New construction or any change in use would have to be approved by an authoritative control body designated in the ordinance. The authoritative control body would administer the diverse use section of the zoning ordinance by screening each application for new construction or a change in use so as to keep a proper balance of uses in the district. The feedback guideline could be used as a general standard for decision, and this procedure would allow continuing, lot-by-lot supervision over the district. The district would benefit from entrepreneurial initiative because impetus for use changes would come from landowners.¹²¹

The San Francisco Neighborhood Commercial Special Use District ordinance is not a simple one. It represents a pioneering effort to deal with problems that have resulted from uncontrolled growth and commercial gentrification. Such problems have dictated a need for an ordinance that was multifaceted in design and purpose.

The ordinance is, however, structured rather awkwardly. One must refer to Planning Code sections 242, 242.1 through 242.10 (depending on the commercial street in question) and 312 to determine how the ordinance works and what is regulated. This problem presumably will be alleviated when the neighborhood commercial zoning provisions of the San Francisco Planning Code are revised.

In the next few years when these Planning Code revisions take place, the needs and problems of each neighborhood commercial street in San Francisco will be addressed as best as possible. It is important to point out that each commercial street

121. *Mixon, Jane Jacobs and the Law—Zoning for Diversity Examined*, 62 *Nw. U.L. REV.* 314, 335 (1967).

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does not suffer from the problems of commercial gentrification. Some neighborhood commercial streets need further commercial development. This presumably will be reflected in the planning code by regulations that give much greater latitude than those in the existing special use districts.

Hopefully, by developing zoning provisions based on the needs of each individual neighborhood commercial street and on the principle of commercial diversity, the City of San Francisco will be fostering the development of interesting neighborhoods and a sense of identity and pride among its inhabitants.

**APPENDIX A: SAN FRANCISCO, CALIFORNIA
PLANNING CODE § 242.8, TABLE 5H**

**NEIGHBORHOOD COMMERCIAL SPECIAL USE DISTRICTS
24TH STREET—NOE VALLEY CONTROLS AND USE TABLE**

	<i>Principal permitted use</i>	<i>Special use which may be approved by Zoning Administrator if requirements met</i>	<i>Special use which may be approved by Commission</i>	<i>Not Permitted</i>
<i>General Controls</i>				
Retail, personal service or other commercial establishment permitted as a principal use in a C-2 district, which has a gross floor area not exceeding 2,500 sq. feet, and a frontage not exceeding 30 feet.	X			
Retail, personal service or other commercial establishment permitted as a principal use in a C-2 district, which has a gross floor area exceeding 2,500 sq. feet, and has a frontage exceeding 30 feet.		X	X	
Accessory outdoor commercial activity along frontage and within property line.	X			
Accessory outdoor commercial activity on interior of lot.		X	X	
<i>Drive-up uses</i>				
Parking Accessory to non-residential use.			X	X
<i>Vertical Controls</i>				
<i>Ground story and below</i>				
Retail	X			
Office	X			
Residential	X			

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APPENDIX A (Continued)

<i>Second story</i>				
Retail				X
*Office	X			
Office		X	X	
Residential	X			
<i>Third Story and above</i>				
Retail				X
Office				X
Residential	X			
<i>Special Use Controls</i>				
Financial Institution	1-3	4-5	6 or more establishments	
Bar	1-4	5-6	7 or more establishments	
Restaurant	1-10	11-15	16 or more establishments	
Fast-food Establishments	1-3	4-5	6 or more establishments	
Sale of liquor for off-premises consumption	1-4	5-6	7 or more establishments	
<p>(For the five uses listed above [Financial institutions, Bars, Restaurants, Fast-food establishments, and establishments for the sale of liquor for off-premises consumption], ranges of numbers of establishments are shown. For example, an application for a fourth bar in the 24th Street-Noe Valley Special Use District may be approved as a principal use; an application for a sixth bar may be approved by the Zoning Administrator as a special use if all requirements are met; an application for a seventh bar may be approved as a special use only by the Commission. Expansion or enlargement of the uses listed above shall be subject to the same procedures as new special uses.)</p>				
Place of entertainment			X	
Cabaret			X	
Dance Hall			X	
Hotel			X	

*Offices on the second story shall be permitted as a principal use where it would not involve the elimination of existing residential units.