



SAN FRANCISCO PLANNING DEPARTMENT

Letter of Determination

October 2, 2017

Jenny D. Smith
Law Offices of Dek Ketchum
900 Veterans Boulevard, Suite 600
Redwood City, CA 94063

Site Address: 800 Clement Street (aka 289-291 9th Avenue)
Assessor's Block/Lot: 1424/017
Zoning District: Inner Clement Neighborhood Commercial District (NCD)
Staff Contact: Matt Dito, (415) 575-9164, or matthew.dito@sfgov.org
Record Number: 2017-008526ZAD

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Dear Ms. Smith:

This letter is in response to your request for a Letter of Determination regarding the property at 800 Clement Street (also known as 289-291 9th Avenue). This parcel is located in the Inner Clement Neighborhood Commercial District (NCD) Zoning District. The request is to clarify the status of conditions and limitations placed on the property as a result of Case No. 85.317EV and Building Permit Application No. 8311396. Specifically, the request has five inquiries regarding Notice of Special Restrictions (NSR) No. D936971 (Exhibit F of your request), which was recorded to document conditions of approval related to the aforementioned applications.

BACKGROUND

On November 8, 1983, Building Permit Application No. 8311936 (Exhibit D of your request) was filed to construct a horizontal addition to the rear of the existing building at 800 Clement Street. The subject addition would contain 14 units of senior housing and would become known as 289-291 9th Avenue. Under then-applicable Planning Code requirements, the proposed units could only be approved as senior housing given the density limitations of the underlying zoning district. The proposal required a Variance from the rear yard and usable open space requirements of the Planning Code. On August 16, 1985, the Planning Department issued an environmental determination (Negative Declaration) under the California Environmental Quality Act (CEQA) for the subject project. On October 21, 1986, the Zoning Administrator granted the required variances (Case No. 85.317V) as outlined in the associated Variance Decision Letter (Exhibit E of your request). On January 29, 1987, NSR No. D936971 was recorded on the subject property outlining six conditions attached to the Planning Department's approval of the subject building permit application in order to allow the permit to be approved under the Planning Code. On January 30, 1987, the Planning Department approved the building permit subject to the conditions of approval, noting the environmental review determination, the variance decision and NSR No. D936971. On July 29, 1987, the subject building permit was issued, with work completed on February 22, 1989 (as noted on the Certificate of Final Completion for the project).

Of the six conditions outlined in NSR No. D936971, it is noted that Condition No. 5 states:

“That the 14 unit senior citizen housing addition fronting on 9th Avenue shall be specifically designed for and occupied by senior citizens or physically handicapped persons, and shall be limited to such occupancy for the actual lifetime of the building by the requirements of State or Federal programs for housing for senior citizens or physically handicapped persons or otherwise by design features and by legal arrangements approved as to form by the City Attorney and satisfactory to the Department of City Planning, as required by Section 209.1(m) of the City Planning Code”

In your request, you state that the NSR was not recorded by the property owner, but by the leaseholder (Bank of Canton) which holds a 50 year lease on the subject property. Also noted in your request is that East West Bank has assumed the lease established by Bank of Canton.

DETERMINATION

The five inquiries, as well as my determinations for each inquiry, are as follows:

1. *Do the conditions and limitations set forth in the Notice of Special Restrictions apply to the ground, to both the original building at 800-810 Clement Street and the newly constructed improvement known as 289-291 9th Avenue, or only to the newly constructed improvement known as 289-291 9th Avenue?*

As the original building at 800 Clement and the addition at 289-291 9th Avenue are situated on the same lot, with a single parcel number, the NSR applies to both. It should be noted that the NSR contains specific conditions for each individual building and limiting the senior housing restriction to the building at 289-291 9th Avenue.

2. *Are the conditions and limitations set forth in the Notice of Special Restrictions binding on the owner of the real property who neither requested nor consented to the Notice of Special Restrictions?*

Yes. The conditions stipulated in the NSR reflect those which were contained in the Variance Decision Letter and those which were required for the Planning Department as conditions of approval for approval of Building Permit Application No. 8311396. Like the variance issued permitting construction of the improvement known as 289-291 9th Avenue, once issued, the building permit and all its conditions of approval runs with the land and binds successor owners. (See *Anza Parking Corp. v. City of Burlingame* (1987) 195 Cal.App.3d 855, 858.) Moreover, “[a] landowner cannot challenge a condition imposed upon the granting of a permit after acquiescence in the condition by either specifically agreeing to the condition or failing to challenge its validity, and accepting the benefits afforded by the permit.” [Citation.]” (*City of Berkeley v. 1080 Delaware, LLC* (2015) 234 Cal.App.4th 1144, 1150, as modified (Feb. 26, 2015); see also *Lynch v. California Coastal Commission* (2017) 3 Cal.5th 470, 478, reh'g denied (Aug. 9, 2017) [in general, permit holders are obliged to accept the burdens of a permit along with its benefits].) The approval of the project and related conditions of approval were not appealed within the timeframes allowed by law and are final and in full effect.

3. *Will the conditions and limitations set forth in the Notice of Special Restrictions survive termination of the Lease and continue to restrict use of the real property after the Lease expires on February 29, 2032?*

Yes. See Response No. 3, above. The conditions outlined in the NSR are associated with the project approved and constructed under Building Permit Application No. 8311936. The

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conditions are not related to the terms of any specific lease. As noted in the Condition No. 5, the condition related to senior housing applies for the actual lifetime of the building.

4. *Will the conditions and limitations set forth in the Notice of Special Restrictions, or any other applicable local law, prevent the owner of the real property from seeking to demolish the new constructed improvement at 289-291 9th Avenue following expiration or termination of the Lease?*

The conditions and limitations referenced in the NSR do not prevent the demolition of the building at 289-291 9th Avenue. If the property owner wishes to seek authorization for the demolition of the building, Conditional Use Authorization is required pursuant to Planning Code Section 317(c)(1), which states: "Any application for a permit that would result in the Removal of one or more Residential Units or Unauthorized Units is required to obtain Conditional Use authorization. The application for a replacement building or alteration permit shall also be subject to Conditional Use requirements."

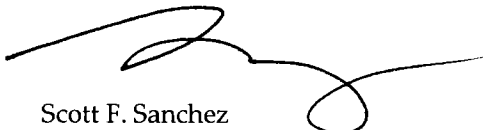
5. *Will the Zoning Administrator exercise its authority to release the real property from the conditions and restrictions contained in the Notice of Special Restrictions when the Lease expires and the ground and improvements revert to Mrs. Mohr on March 1, 2032?*

No. As indicated previously, the conditions and limitations referenced in the NSR are not tied to the terms of any specific lease, or to any particular party to that lease. Rather, they run with the land. The conditions shall be valid for the actual lifetime of the building, as approval of the subject building permit application to develop the parcel was dependent upon the use being restricted to senior housing to comply with the density limits of the Planning Code.

Please note that a Letter of Determination is a determination regarding the classification of uses and interpretation and applicability of the provisions of the Planning Code. This Letter of Determination is not a permit to commence any work or change occupancy. Permits from appropriate Departments must be secured before work is started or occupancy is changed.

APPEAL: If you believe this determination represents an error in interpretation of the Planning Code or abuse in discretion by the Zoning Administrator, an appeal may be filed with the Board of Appeals within 15 days of the date of this letter. For information regarding the appeals process, please contact the Board of Appeals located at 1650 Mission Street, Room 304, San Francisco, or call (415) 575-6880.

Sincerely,



Scott F. Sanchez
Zoning Administrator

cc: Property Owner
Neighborhood Groups
Amy Chan, San Francisco Mayor's Office of Housing and Community Development
Matt Dito, Planner