



SAN FRANCISCO PLANNING DEPARTMENT

Letter of Determination

December 12, 2017

Chelsea Lewis
Klein Law Group
Four Embarcadero Center, Suite 3950
San Francisco, CA 94111

Site Address:	518 Taylor Street
Assessor's Block/Lot:	0306 / 015
Zoning District:	RC-4 (Residential-Commercial, High Density)
Staff Contact:	Seema Adina, (415) 575-8722 or seema.adina@sfgov.org
Record Number:	2017-008524ZAD

1650 Mission St.
Suite 400
San Francisco,
CA 94103-2479

Reception:
415.558.6378

Fax:
415.558.6409

Planning
Information:
415.558.6377

Dear Ms. Lewis:

This letter is in response to your request for a Letter of Determination regarding the property at 518 Taylor Street. The subject property is located in the RC-4 (Residential-Commercial, High Density) Zoning District, North of Market Residential Special Use District (SUD) and 80-T/130-T Height and Bulk District. The request states that the property owner was not notified by the Department of Public Health (DPH) that violations to Article 29 of the Health Code existed, and thus did not have the opportunity to cure any violations that existed on the property. The request seeks a determination that would abate the existing Planning Code violation preventing the operation of a Massage Establishment at this location for three years.

Violation Background and History

On December 21, 2016 and March 2, 2017, DPH staff conducted inspections of the subject Massage Establishment (dba Moulin Rouge/Les Nights de Paris Massage) at 518 Taylor Street and found numerous violations under Article 29 of the Health Code. DPH staff reported that the business operating from the subject property locked the door during business hours, and that several female massage providers at the business refused to provide identification or proof of massage licensure. In addition, the inspectors indicated, and at least one employee of the subject Massage Establishment confirmed, that one or more of the female employees was a minor and/or a high school aged student. Based upon information from DPH, your property manager (Jeffrey Polk) was present during both inspections, received reports of the inspections and was aware of the violations identified in the inspection reports.

On March 13, 2017, DPH and the owner of the subject Massage Establishment reached a settlement agreement in which the operator admitted that the establishment was operating in violation of Article 29 of the Health Code and the parties agreed that the establishment would be closed by DPH as a result of those violations. Per the settlement, the effective date of the closure was March 15, 2017.

Chelsea Lewis
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On March 16, 2017, DPH informed the Planning Department that the operator of a Massage Establishment at the subject property admitted to violation of Article 29 of the Health Code. On April 20, 2017, the Planning Department issued a Notice of Enforcement to the Property Owner indicating that due to the established violations of Article 29 of the Health Code, any subsequent applications to establish a Massage Establishment at the subject property cannot be approved for three years pursuant to Planning Code Section 202.2(a)(4).

Determination

Based on the information provided in your request for a Letter of Determination as well as review of the permit and enforcement history for the property, the Massage Establishment on the subject property was found to be in violation of Article 29 of the Health Code and ordered closed by DPH. As such, the Massage Establishment on this property is subject to Planning Code Section 202.2(a)(4), which states:

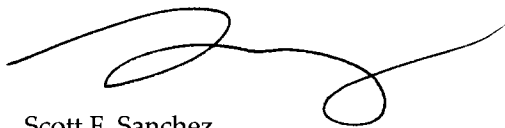
“Any Massage Establishment found to be operating, conducted, or maintained contrary to this Code or the Health Code Article 29 shall be found in violation of this Code and will be subject to enforcement as provided in Section 176 of the Planning Code. For three years following closure of a Massage Establishment for violations of this Code or the Health Code no new Massage Establishment shall be approved at the site where the former Massage Establishment was closed.”

Any Massage Establishment that violated Planning Code Section 202.2(a)(4) is a public nuisance subject to enforcement under Planning Code Section 176. The text of Planning Code Section 202.2(a)(4) is clear and unambiguous. Given that the subject Massage Establishment was closed by DPH for violations of the Health Code, no new Massage Establishment can be approved by the Planning Department on the site where the former Massage Establishment was closed.

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

Chelsea Lewis
Klein Law Group
Four Embarcadero Center, Suite 3950
San Francisco, CA 94111

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cc: Property Owner
Neighborhood Groups
Seema Adina, Planner
Matt Dito, Planner
Patrick Fosdahl, Department of Public Health



Four Embarcadero Center, Suite 3950
San Francisco, CA 94111

Tel: 415.693.9107 Fax: 415.693.9222
Email: clewis@sfbizlaw.com

Via U.S. Mail

June 15, 2017

R#2017-008524 ZAD
CK # 5056 \$ 664.-
M. LUELLEN (NE)

Scott Sanchez, Zoning Administrator
Office of the Zoning Administrator
1650 Mission Street, Ste. 400
San Francisco, CA 94103

**Re: Request for Letter of Determination for Property Located at
518 Taylor St., San Francisco, CA 94102**

(0306/015)

Dear Mr. Sanchez,

We represent the property owner of the above-referenced address regarding the use of this property as a massage establishment. This letter is in response to the Notice of Enforcement sent to the property owner, 520 Taylor Street LP, ("Property Owner") on April 20, 2017. It is also based on the property owner's Response to the Notice of Enforcement, which was sent to Matthew Dito in your office, and to which he responded, on May 3, 2017.

According to the Notice, there is a planning code violation under section 202.29(a)(4) that exists on the property at 518 Taylor Street. Pursuant to the statute, any violation of Article 29 of the Health Code results in a planning code violation which prohibits the location from housing a massage establishment for three years after a violation of Health Code Article 29 has been found.

It is the landlord's position that the application of Planning Code section 202.2(a)(4) is unconstitutional in this case since it violates the property owner's due process rights under the 14th Amendment: "...nor shall any State deprive any person of life, liberty, or property, without due process of law...". (U.S. Const. amend. XIV § 1.) Additionally, this constitutes an improper taking of private property by the government without just compensation, in violation of the 5th Amendment. (U.S. Const. amend. V § 1.) As such, the violation should be abated and the property owner should be allowed to rent the property free from this encumbrance.

I. Factual Background

In December 2016, San Francisco health department officials noted various violations of the Health Code Article 29 at a massage establishment known as Les Nights de Paris Massage and/or Moulin Rouge. This establishment was operated by a tenant on the property, Timothy Meade and/or his company, Moulin Rouge LLC.

Later, in March 2017, health department officials returned to the establishment and found additional violations, most notably, the fact that the front door of the premises was locked during business hours and that some masseuses were working without proper permits. After these violations were noted by officials, a hearing date was set and Timothy Meade received both a Notice of Violations for all violations and a Citation to Appear with a hearing date in front of the Directors of the Department of Public Health. Less than two weeks after receiving these documents, Timothy Meade and Moulin Rouge, LLC entered into a Settlement Agreement with the San Francisco Department of Public Health (“DPH”).

Notably, the Property Owner was not notified of the violations, not notified of the hearing and was not a participant in the settlement resulting in an encumbrance on the property.

In paragraph 7 of the Settlement Agreement (which is attached hereto as Exhibit A), the parties agreed as follows:

“Timothy Meade and Moulin Rouge LLC agree to hold no business interest in any massage establishment located in the City and County of San Francisco for a period of three (3) years beginning on March 15, 2017. Timothy Meade and Moulin Rouge LLC further agree that they will not be eligible for, and SFDPH will not issue to either of them, a permit to operate a Massage Establishment during the three (3) year period following the closure of the Establishment, on March 15, 2017.”

In speaking with Patrick Fosdahl, who is the Principal for the Massage & Body Art Program within the DPH and who signed the Settlement Agreement on behalf of the DPH, he stated that this is not a normal or standard settlement term for the DPH but rather specially tailored to the issues the case presented. Specifically, Timothy Meade and Moulin Rouge LLC had already recently faced an employment lawsuit brought by a former employee and the business was going under. As such, he asserted that he would be closing down the establishment, had no interest in staying on at the property, and was possibly attempting to relocate.

The fact that Timothy Meade and Moulin Rouge LLC have already permanently vacated the property has created a frustration of purpose then for the enforcement of San Francisco Planning Code section 202.2(a)(4). According to Matthew Dito of the SF Planning

Department, section 202.2(a)(4) was originally added to the planning code in order to prevent owners of massage establishments found guilty of violations of Article 29 of the Health Code from simply closing down one entity and opening another in the same location but under a different corporate name or with a different owner. Timothy Meade and Moulin Rouge LLC wanted to do the opposite of what the code section was designed to prevent—they wanted to leave the location and open again.

Because of this intent on the part of Timothy Meade and Moulin Rouge LLC, the DPH added paragraph 7 to the Settlement Agreement in order to prevent Timothy Meade and Moulin Rouge LLC from opening another massage establishment anywhere in the city or county of San Francisco, since section 202.2(a)(4) only attaches to property and not to individuals or business entities.

Only after Timothy Meade and Moulin Rouge LLC vacated the property and the owner attempted to lease it again to a new tenant who was seeking to open a massage establishment, did the owner learn of this new encumbrance to her property based on Timothy Meade's poor business practices and the DPH's failure to notify the property owner of violations on the property that could irreparably damage the property's value to the property owner.

As such, this code section is being used to punish a property owner and future tenant for the actions of a third party who no longer has any connection to the property or the owner. It is not being used to accomplish the original goals of the statute and in fact is not accomplishing them. The application of this section to the property at 518 Taylor Street thus violates the property owner's due process rights and constitutes an unlawful government taking without compensation which is prohibited by the Fifth Amendment.

II. Due Process Issues

On April 20, 2017, the property owner received a copy of the Notice of Enforcement from the San Francisco Planning Department regarding the DPH Article 29 violations as well as the newly applicable section 202.2(a)(4) of the San Francisco Planning Code. This code section states:

“Any Massage Establishment found to be operating, conducted, or maintained contrary to this Code or Health Code Article 29 shall be found to be in violation of this Code and will be subject to enforcement as provided in Section 176 of the Planning Code. For three years following closure of a Massage Establishment for violations of this Code or the Health Code no new Massage Establishment shall be approved at the site where the former Massage Establishment was closed.”
(S.F. Planning Code § 202.2(a)(4).)

Specifically, the property owner takes issue with the phrase “found to be” in the first line of the statute, as it has been applied in this case. The “finding” referenced necessarily refers to a finding on the part of a governmental agency, in this case, the Department of Public Health. Here, that finding was made without any notice to the property owner that any violations existed on the property such that the property owner had no opportunity to cure any violations that may have existed.

Under Article 29.33(b) and 29.45(a), a person in violation of Article 29 will be given notice of the violation with the opportunity to be heard informally and/or through a noticed hearing. The property owner, by virtue of the DPH’s failure to notify, was not given the opportunities afforded under this code section and as a result, her due process rights have been violated.

At no time during the months between December and March did the property owner receive any notice from the DPH nor from her tenant as to any violations of the Health Code. Had the property owner received notice, she would have been able to vacate the tenant and cure the violations promptly.

Here, the former tenant received notice of the violations and entered into the above-referenced Settlement Agreement with the DPH in order to avoid paying costly fines. As such, the DPH’s duty to notify was satisfied with respect to the tenant; however, with respect to the way in which Article 29 of the Health Code and section 202.2(a)(4) of the Planning Code punitively work together, the DPH was constitutionally required to provide notice to the property owner as well since it would be her property that would be encumbered by any findings made by the DPH under Article 29.

III. Improper Taking

“An ordinance regulating the use of property effects a taking if it does not substantially advance legitimate state interests or if it denies the owner economically viable use of his or her land.” (66 Cal.Jur.3d, Zoning and Other Land Controls § 134.) We do not argue that this section 202.2(a)(4) is facially unconstitutional or constitutes a taking on its face, but rather that here as it is being applied, it is unconstitutional. As such, we must look to how specifically the statute is functioning in this case to determine whether it is being used unconstitutionally.

Here, the statute as applied is not advancing, let alone substantially advancing, the legitimate state interests involved with the statute. As shown above, the purpose of this statute was to prevent multiple abuses from the same parties on the same piece of property. However, here it is being used against the property owner who had nothing to do with the violations and the violators are being separately punished within the meaning of the statute by virtue of their Settlement Agreement.

Scott Sanchez

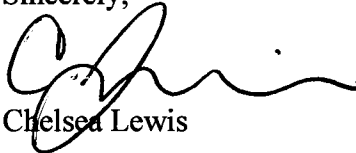
June 15, 2017

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Additionally, this statute as applied is denying the property owner from the economically viable use of her land. If the property owner is forced to rent the property to a tenant who will open a business that is not a massage establishment, major structural changes will have to be made to the inside of the property. As it stands now, the property is set up to house a massage establishment and any other use will cost the property owner and/or prospective tenant thousands of dollars to fix. As such, the application of this statute in this case constitutes an improper taking under the 5th Amendment and the property owner should either receive just compensation from the Planning Department or the encumbrance should be lifted from the property.

The property owner in this case did nothing wrong and is now being punished unconstitutionally through the application of this statute. She has had both her due process rights violated and her 5th Amendment rights violated and as such, we request a Letter of Determination stating that the violation is abated and that the property owner be allowed to rent to massage establishment tenants as soon as possible.

Sincerely,

A handwritten signature in black ink, appearing to read 'Chelsea Lewis', with a long, sweeping horizontal stroke extending to the right.

Chelsea Lewis



SETTLEMENT AGREEMENT

Date: March 13, 2017

Responsible Party: Timothy Meade, Moulin Rouge LLC, AKA Les Nights de Paris Massage

WHEREAS, Timothy Meade and Moulin Rouge LLC are the Responsible Parties and the owners of the Moulin Rouge also known as Les Nights de Paris Massage (“the Establishment”), a massage establishment subject to Article 29 of the San Francisco Health Code (SFHC).

WHEREAS, on December 21, 2016, inspectors from the San Francisco Health Department (DPH) conducted an inspection at the Establishment during which the front door was found to be locked which denied them access to the establishment. Having the front door locked during business hours is a violation of the San Francisco Health Code, Article 29, §29.31(g). In addition, employees of the establishment were present and practicing massage without a valid permit. Practicing massage without a permit is a violation of the San Francisco Health Code, Article 29, §29.10(a) and §29.31(e). Further, the Department of Public Health inspectors were impeded from conducting a reasonable inspection when an employee of the establishment shoved a DPH Investigator. Interfering with a reasonable inspection is a violation of San Francisco Health Code, Article 29, §29.32.

WHEREAS, on March 2, 2017, a subsequent inspection was conducted of the establishment and found the following repeat violations: The front door was again found to be locked during business hours in violation of the San Francisco Health Code, Article 29, §29.31(g). In addition, employees of the establishment were present and practicing massage without a valid permit. Practicing massage without a permit is a violation of the San Francisco Health Code, Article 29, §29.10(a) and §29.31(e). Further, the Department of Public Health inspectors were impeded from conducting a reasonable inspection when an employee of the establishment closed and locked the front door after being instructed by DPH inspectors that they were there to conduct an inspection. Interfering with a reasonable inspection is a violation of San Francisco Health Code, Article 29, §29.32.

WHEREAS, the Timothy Meade, Moulin Rouge, LLC and DPH (collectively, the “Parties”) wish to resolve this matter expeditiously to avoid the costs of litigation.

The Parties therefore agree to the following conditions of this Settlement Agreement pursuant to a compromise and settlement of disputed claims for the purpose of the furthering the public interest.

EXHIBIT A

AGREEMENT

1. The Parties acknowledge and understand that this Settlement Agreement fully and finally resolves the enforcement action against Moulin Rouge, LLC by DPH based on the specific violations cited in the Notice of Hearing issued by DPH to the Establishment on December 21, 2016 and March 2, 2017.
2. Timothy Meade and Moulin Rouge, LLC agrees that the December 21, 2016 violation of Article 29, Section 29.32 prohibition on interfering with or preventing the Department from conducting a reasonable inspection constitutes an adjudicated violation of this provision of the law.
3. Timothy Meade and Moulin Rouge, LLC agrees that the December 21, 2016 violation of SFHC, Article 29, Section 29.10(a) and 29.31(e) prohibition on employing massage therapist or administering massage for compensation without first obtaining a massage practitioner permit constitutes an adjudicated violation of this provision of the law.
4. Timothy Meade and Moulin Rouge, LLC agrees that the March 2, 2017 violation of Article 29, Section 29.32 prohibition on interfering with or preventing the Department from conducting a reasonable inspection constitutes a second adjudicated and repeat violation of this provision of the law.
5. Timothy Meade and Moulin Rouge, LLC agrees that the March 2, 2017 violation of SFHC, Article 29, Section 29.10(a) and 29.31(e) prohibition on employing massage therapist or administering massage for compensation without first obtaining a massage practitioner permit constitutes a second adjudicated and repeat violation of this provision of the law.
6. The Parties agree that the Establishment has been found to be operating in violation of Article 29 of the SFHC and is being closed by SFDPH as a result of that violation. The closure will be effective March 15, 2017.
7. Timothy Meade and Moulin Rouge LLC agree to hold no business ownership interest in any massage establishment located in the City and County of San Francisco for a period of three (3) years beginning on March 15, 2017. Timothy Meade and Moulin Rouge LLC further agree that they will not be eligible for, and SFDPH will not issue to either of them, a permit to operate a Massage Establishment during the three (3) year period following the closure of the Establishment, on March 15, 2017.
8. Nothing in this Settlement Agreement shall in any way limit or alter the obligations of Moulin Rouge, LLC to comply with all applicable laws, statutes, regulations and ordinances from and after the date hereof.

9. Nothing in this Settlement Agreement shall in any way limit or alter DPH's authority to monitor Moulin Rouge, LLC compliance with Article 29 of the SFHC and the regulations promulgated thereto, and any other applicable public health regulations for alleged failure to comply with these laws, to the extent such laws are applicable to the Moulin Rouge, LLC. In addition, nothing in this Settlement Agreement shall in any way limit or preclude DPH from imposing appropriate penalties and sanctions and recovering attorney's fees and costs for any future violation of law, as well as seeking any other remedy available at law or in equity in respect of such future violations.
10. Each undersigned representative of a party to this Settlement Agreement certifies that he or she is fully authorized to enter into the terms and conditions of Settlement Agreement and to execute and legally bind such party to this document.
11. This Settlement Agreement constitutes the entire agreement between DPH and the Moulin Rouge, LLC and it is expressly understood and agreed that this Settlement Agreement may not be altered, amended, modified, or otherwise changed in any respect except by written instrument duly executed by the Parties, or authorized representatives.
12. In the event that any provision, section or sentence of this Settlement Agreement is held by a court of competent jurisdiction to be unenforceable, the validity of the enforceable provisions shall not be adversely affected.
13. This Settlement Agreement may be executed in counterparts and/or by electronic transmission, which taken together shall be deemed to constitute one and the same document.
14. The Parties agree that San Francisco Superior Court shall have jurisdiction to enforce this Settlement Agreement. All disputes arising out of this Settlement Agreement shall be resolved by the San Francisco Superior Court. Nothing in this Settlement Agreement shall preclude the Parties from taking any steps, including but not limited to, filing a civil action, to enforce this Settlement Agreement.
15. This Settlement Agreement shall be enforceable and binding on the Parties, as well as their successors and assigns, and shall inure to the benefit of the Parties, as well as their successors an assigns.
16. The effective date of this Settlement Agreement is the date of the last signature executed below.

Signed by:

Timothy Meade, dba Moulin Rouge, LLC,

John F Lee SBA 154323

John F. Lee

Attorney for Timothy Meade

Timothy Meade

Authorized Signatory

3-15-17

Date

3-15-17

Date

John F Lee *John F-Lee*
154323

Moulin Rouge, LLC

Authorized Signatory

Attorney for Timothy Meade

DEPARTMENT OF PUBLIC HEALTH

Environmental Health Branch

3-15-17

Date

Patrick Fosdahl

Patrick Fosdahl

Principal, Massage & Body Art Program