



SAN FRANCISCO PLANNING DEPARTMENT

Letter of Determination

June 10, 2010

Miles Imwalle
Morrison & Foerster, LLP
425 Market Street
San Francisco CA 94105

**RE: 188 Henry Adams Street
Block: 3916 Lot: 018**

Dear Mr. Imwalle,

This letter is in response to your request for a letter of determination regarding the property at 188 Henry Adams Street. This parcel is located in the PDR-1-D (Production, Distribution and Repair, Design) District with a 45-X height and bulk limitation. The request is whether the outdoor courtyard on the subject lot may be used for the display of retail home furnishing merchandise given the area limitations for retail uses within the PDR-1-D district and the current use, retail sales, of the existing 5,000 square foot structure.

Planning Code Section 218(b) limits the total area per lot that can be devoted to the use of retail sales and personal services. For lots within the PDR-1-D zoning district, this limit is 5,000 gross square feet. The Zoning Administrator has determined that it is the intent of this Section to limit retail sales and personal service uses to 5,000 square feet per lot, including areas within and without structures.

Given that the current retail sales use is in excess of the limits prescribed under Planning Code Section 218(b), as indicated in your May 10, 2010 letter, and that the current retail sales use was established legally prior to the enactment of the controls under the PDR-1-D zoning district, the Planning Department considers the use as a legal nonconforming use in accordance with Planning Code Section 180(a)(1).

Please note that Planning Code Sections 181, 182 and 183 also regulate the enlargement, alteration, change in use, discontinuance and abandonment of said nonconforming use. A nonconforming use cannot be enlarged, altered or changed so as to increase the intensity of nonconformity and should the portion of said nonconforming use operated outside of the existing structure be discontinued for a period of six months or more the Planning Department will consider such use as abandoned and will not permit the nonconforming use to be reestablished.

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Miles Imwalle
Morrison & Foerster LLP
425 Market Street
San Francisco CA 94105

Letter of Determination
188 Henry Adams Street

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 Sánchez
Acting Zoning Administrator

cc: Diego R Sánchez, Planner

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MORRISON | FOERSTER

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May 10, 2010

Writer's Direct Contact
415.268.6523
MImwalle@mofo.com

By Overnight Delivery

Larry Badiner, Zoning Administrator
Planning Department
1650 Mission Street, Suite 400
San Francisco, CA 94103

RECEIVED

MAY 10 2010

**CITY & COUNTY OF S.F.
PLANNING DEPARTMENT**

**Re: Request for Zoning Determination Letter
188 Henry Adams Street, San Francisco, California**

Dear Mr. Badiner:

I am writing on behalf of a potential purchaser ("Purchaser") in regards to its potential acquisition of the building located at 188 Henry Adams Street (Assessor's Block Number 3916, Lot 18) (the "Property") for use as a retail outlet. In particular, the Purchaser is seeking a Letter of Determination confirming that it can use the outdoor courtyards for display of retail home furnishing merchandise, even though that would result in the Purchaser occupying more than 5,000 square feet for retail purposes. Enclosed with this letter is a check in the amount of \$549.50 to cover required fees.

For the reasons set forth below, we believe that when determining gross square footage for purposes of the 5,000 gross square foot (gsf) limitation on retail in the PDR-1-D District, outdoor courtyards such as those at the Property are not included. As a result, we seek a determination that the Purchaser can utilize the outdoor courtyards for retail space, even though the gross square footage of the building itself approaches 5,000 square feet.¹ Alternatively, if the City's view is that the courtyard space counts toward the 5,000 gsf limitation and the use of any area in excess of that amount would be unlawful under current Planning Code provisions, then we seek confirmation that because the current owner has legally used the courtyard to display merchandise since 1994, the Purchaser can continue that use as a legal nonconforming use.

¹ Although the building slightly exceeds 5,000 square feet, we understand from the architect that once areas such as light wells are subtracted, the building's "gross square feet," as that term is defined in the Planning Code, is less than 5,000 square feet.

Larry Badiner, Zoning Administrator
May 10, 2010
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Courtyards Are Excluded when Determining Gross Square Feet

The Property is located within the PDR-1-D District, Production, Distribution, and Repair: Design. The PDR-1-D District permits retail uses, provided that such use is under 5,000 gsf per lot. (§ 218). Although the Planning Code does not define the term “gross square feet,” we understand that the City determines gross square feet the same way it determines “gross floor area,” or GFA, a term that is defined in the Planning Code.

As a general matter, any floor space that is not specifically excluded from the definition of “gross floor area” is included, *i.e.*, counts toward GFA. (§ 102.9(a)(8)). Under the Planning Code, “‘gross floor area’ shall not include . . . [b]alconies, porches, roof decks, terraces, *courts and similar features*” (unless more than 70% of the perimeter is enclosed and the clear space is less than 15 feet in either direction and it is not fully open to the sky). (§ 102.9(b)(8)). Here, the two courtyards are fully open to the sky and otherwise meet the definition for exclusion. Thus, it is our view that when determining compliance with the 5,000 gsf cap for the Property, the City should not count the courtyard areas, even if such areas are used to display retail merchandise.

If Courtyards are Included in the GSF Calculation, the Purchaser May Use Courtyards for Retail Display as a Legal Nonconforming Use

Under the Planning Code, nonconforming uses are those that are lawfully in existence at the time of the effective date of Code adoption or amendment, but which later become prohibited under subsequently enacted amendments. (§ 180(a)). Further, if a nonconforming use has been lawfully established, then a change in ownership or occupancy of the property does not affect the status of the use. (§ 180(d)). Subject to certain limitations, legal nonconforming uses may continue in perpetuity.

Prior to the Eastern Neighborhoods rezoning in 2009, the Property was zoned M-2 (Heavy Industrial), which permits retail uses as of right with no restrictions on the square footage devoted to such use. (§ 218). We understand that there is no requirement to obtain a permit for outdoor display areas within a courtyard in any City zoning district. As such, prior to the rezoning, there were no restrictions on using the courtyards to display retail merchandise.

As described in the attached letter from Ed Hardy, the current owner, the entire courtyard areas have been used for display of retail merchandise since the store’s opening in 1994. The Purchaser’s intention is to continue this same type of use (displays of home furnishings) without expansion or significant alteration. Thus, even if the City’s position is that the courtyards must be counted when determining compliance with the 5,000 gsf cap, the Purchaser may continue to use this area as a legal nonconforming use.

As further support of this position, we note that the updated General Plan adopted as a part of the Eastern Neighborhoods planning process favors a broad interpretation of

Larry Badiner, Zoning Administrator
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nonconforming use for the Showplace Square/Potrero Area Plan. Objective 1.3 is particularly relevant:

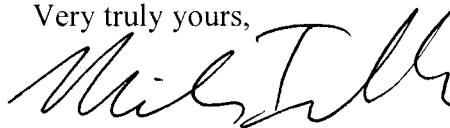
Objective 1.3: Institute flexible “legal nonconforming use” provisions to ensure a continued mix of uses in Showplace Square/ Potrero.

Policy 1.3.1: Continue existing legal nonconforming rules, which permit pre-existing establishments to remain legally even if they no longer conform to new zoning provisions, as long as the use was legally established in the first place.

In particular, the General Plan explains “Property owners whose office and retail tenants leave should be allowed to replace them with similar tenants.” Thus, if the City’s position is use of the courtyard area for retail use would violate the current zoning designation, this General Plan Objective and implementing Policy, along with the facts above, lend strong support for allowing the Purchaser to continue using the courtyard area for display of merchandise as a legal nonconforming use.

Once completed, please send a facsimile copy of the Letter of Determination to my attention at 415-276-7493 and mail the original to the address above. If an in person meeting or telephone call would be helpful, please do not hesitate to contact me. We very much appreciate your attention to this request.

Very truly yours,



Miles Imwalle

Enclosure

ED HARDY
SAN FRANCISCO

May 10, 2010

Lawrence Badiner, Zoning Administrator
San Francisco Planning Department
1650 Mission Street, Suite 400
San Francisco, CA 94103

Re: Retail Use at 188 Henry Adams Street

Dear Mr. Badiner,

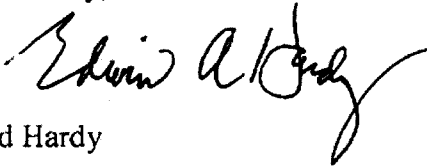
As the owner of the property located at 188 Henry Adams Street in San Francisco, I am writing to confirm the extent of retail use on the property, in connection with a potential sale of the building to another retailer of home furnishings.

My business, Ed Hardy San Francisco, occupies the 5,238 square foot building on the property as an antique furniture and decorative arts gallery. We offer a retail showroom that is open to the public and provide a courtesy discount to design professionals. The showroom has been in operation continuously since construction on the building was completed in 1994.

In addition to our indoor showroom, the property contains two enclosed exterior courtyards which are fully open to the sky. The front South courtyard, which is irregularly shaped, is approximately 65 feet at its longest point by 40 feet; and the rear North courtyard is approximately 40 by 40 feet. The property also contains two smaller East patios, fully open to the sky, which are each approximately 14 by 4 feet. Both courtyards and both patios have consistently displayed outdoor and garden furniture and decorations that have been available as merchandise for sale through our gallery. Displays have included wood, stone, terra cotta and glass merchandise in the form of furniture, tables, chairs, urns, fountains, pedestals, and wall fountain masks. Merchandise has consistently been displayed throughout the majority of these "exterior rooms," which were part of the original design concept for the property.

In all, the entire useable area of the 9,540 square foot premises (exclusive of storage, mechanical equipment, and employee amenity areas) has supported the retail use on an ongoing basis since 1994. Retail was a permitted use in the applicable district (M-2) under the zoning regulations in effect prior to the Eastern Neighborhoods rezoning, and is still a permitted use in the PDR-1-D district under the revised zoning provisions. When the use was established, there were no restrictions in the Planning Code on the size of the retail use or on the use of outdoor space for display of merchandise.

Sincerely,

A handwritten signature in black ink, appearing to read "Edwin A. Hardy". The signature is written in a cursive style with a large, sweeping flourish at the end.

Ed Hardy