

## MEMORANDUM OF LAW

DATE: July 17, 1992

TO: Mayor O'Connor

FROM: City Attorney

SUBJECT: Applicable Zoning and Building Regulations for Properties Under Control of the Federal Deposit Insurance Corporation (FDIC)

### BACKGROUND

At our meeting on June 17, 1992, with representatives from the FDIC you requested us to analyze the applicable zoning and building code requirements for these properties. The FDIC currently possess three properties in San Diego: (1) Greentree Plaza Apartments (47th and Logan); (2) Skyline Park Condominiums (Skyline and Woodman); and (3) Arizona Street Condominiums (4545 Arizona). All of these properties received their original building and zoning permits. Approximately 80% to 90% of the structures were completed according to plans before the failure of the financial institution which supported their loans. FDIC has maintained control of these three properties for the last two to three years in its receivership capacity. The original owners and developers no longer have any legal interest or involvement in the three properties. During FDIC's possession of the properties, new zoning and building regulations have been enacted. Therefore, this scenario poses the following legal issues:

1. What are the applicable zoning regulations for each of the three FDIC properties?
2. What are the applicable building code regulations for each of the three FDIC properties?

### CONCLUSIONS

1. Greentree Plaza: the new owner must comply with the Southeast San Diego Planned District Ordinance (PDO) because the previous nonconforming right was abandoned by lack of activity for the past three years.
2. Skyline Park: the new owner can complete Phase I of the project under the existing Planned Residential Development (PRD) permit, but Phase II would not be permitted because the previous nonconforming right was

abandoned by the failure to utilize the PRD permit.

3. Arizona Street: the new owner must comply with the Mid-City PDO because the previous nonconforming right was abandoned by lack of construction activity for the past three years.

4. Building Code: the Director of Building Inspection has the discretion to apply as to all three properties the version of the Uniform Building Code (UBC) in effect at the time the original building permits were issued.

#### ANALYSIS

##### I. Greentree Plaza Apartments

In early 1986, building permits were issued for construction of 116 units near the intersection of 47th Street and Logan Avenue. On August 3, 1987, the Southeast San Diego Planned District Ordinance (PDO) changed the applicable zoning regulations for this parcel. The new PDO imposed lower density and assorted design and landscaping restrictions. At this point, however, the new PDO did not apply to the Greentree Plaza project since they had obtained building permits and commenced construction prior to the effective date of the PDO.

On November 18, 1987, the building permits for Greentree expired on grounds of "abandonment" according to the records of the Building Inspection Department. From 1987 to 1989 the wooden framing, with contact paper and wire, was left exposed to the elements. Finally, the federal government obtained a new permit to finish the exterior and request a final inspection. The last official activity occurred on February 6, 1989, when the project failed its exterior plaster inspection. As of August 5, 1989, the new permit obtained by the federal government expired because of limitation.

The Greentree project has been virtually abandoned during the past three years. According to some reports, all plumbing fixtures have been vandalized and a recent arson fire caused \$60,000 in damage to two units. Although the FDIC has erected security fences and employed periodic security guards, vandalism and trespassing from children and transients is still prevalent.

##### A. Abandonment of Nonconforming Use

When the new PDO was enacted in August 1987 the original developer did have a right to proceed under the previously existing zoning regulations. This nonconforming right, however, was "abandoned" by the lack of activity over the past three years.

A nonconforming use is a lawful use in existence on the effective date of the new zoning restrictions and continuing thereafter in nonconformity to the new zoning law. *City of Los Angeles v. Gage*, 127 Cal. App. 2d 442, 453 (1954). In the instant case, the

original developer did obtain a right to proceed with construction of the apartments but never finished the project.

"Nonuse is not a nonconforming use." *Hill v. City of Manhattan Beach*, 6 Cal. 3d 279, 286 (1971) quoting *Morris v. City of Los Angeles*, 116 Cal. App. 2d 856 (1953). Reuse may be prohibited when a nonconforming use is voluntarily abandoned. *Id.*

A nonconforming use may terminate by abandonment if the use is discontinued for a certain period of time as prescribed in local ordinances. *City of Los Angeles v. Gage*, 127 Cal. App. 2d at 459 (upheld such restrictions as valid exercise of police power).

The current circumstances provide sufficient facts for abandonment.

San Diego Municipal Code (SDMC) section 101.0303 establishes a one year time period for the discontinuance of nonconforming rights, "any discontinuance of a nonconforming use for a continuous period of 12 months shall be deemed to constitute abandonment of any nonconforming rights existing at the time of the enactment of the ordinance." The original developer was unable to finish construction of the Greentree project; the apartments never came into existence. No building activity has occurred on the property since 1989, nearly three years ago.

These circumstances provide a strong case of abandonment.

The situation at Greentree is somewhat similar to the facts reported in the decision of *League to Save Lake Tahoe v. Crystal Enterprises*, 685 F.2d 1142 (1982). In that decision the developer had finished three floors and the entire parking garage of a 15 story hotel and casino complex. All construction ceased on the remaining floors for approximately four years. During this four year period, the Tahoe Regional Planning Agency imposed new land use restrictions. Similar to our ordinance, Tahoe's zoning laws permitted nonconforming uses to continue unless the use ceased for a period of one year.

Under the analysis of abandonment, the Ninth Circuit Court of Appeals concluded that *Crystal Enterprises* had lost its nonconforming status by stopping construction for nearly four years. "The ordinances at issue should not be given an interpretation which fosters an indefinite continuation of a nonconforming use. Furthermore, there is no reason for treating projects under construction less stringently than completed structures." *Id.* at 1145. The court further commented that it was not necessary to prove an "intent to abandon." *Id.* at 1146. *Contra*, see *Pardee Construction Co. v. Calif Coastal Commission*, 95 Cal. App. 3d 471 (1979)(developer did not lose his right to complete project when building permits lapsed on the remaining 33% of the project due to economic recession; insufficient evidence of abandonment).

The Pardee decision does not apply in the instant case. In Pardee, the applicable version of the Coastal Act expressly prevented continuation only if substantial changes occurred to the original project. It was silent as to abandonment by expiration of the underlying approvals (i.e., building permits). (Also note distinction that original developer was still involved in the project not so with any of FDIC properties.) Therefore, SDMC section 101.0303 would require the new owner of the Greentree Plaza project to abide by the terms of the current Southeast San Diego PDO. Such a result is also supported by the general land use public policy that seeks to eventually end all nonconforming uses. *City of Los Angeles v. Gage*, 127 Cal. App. 2d at 454. "The presence of any nonconforming use endangers the benefits to be derived from a comprehensive zoning plan." *Id.* at 459.

#### B. Impact of Southeast San Diego PDO

Pursuant to SDMC section 103.1703, the new owner of Greentree Plaza will need to revise plans in accord with the Southeast San Diego PDO and resubmit a PDO permit application. One of the significant changes will be the density of the project. Under the PDO the maximum density would be 55 units plus 14 units per the existing bonus density with the Housing Commission for low-income units; thus, a total of 69 units instead of the current 116 units.

In addition to density, the new owner will need to comply with other development regulations of the PDO, i.e., landscaping, parking, fencing, design criteria. Pursuant to SDMC section 103.1703, the Planning Director must ensure that each project complies not only with the specific regulations but also with the purpose and intent of the PDO. (Section 103.1701 states that the purpose of this PDO is to "provide reasonable development criteria.") The PDO is silent, however, in a situation like Greentree Plaza where the project is nearly 90% built under previous zoning laws. Strict application of the design criteria might require demolition of more buildings. In light of this unique situation, the Planning Director should exercise discretion to avoid unreasonable results. As part of the PDO permit review process and any applicable variance hearings, the Planning Director should evaluate the merits of the revised Greentree project in consideration of these unusual circumstances.

#### II. SKYLINE PARK CONDOMINIUMS

On March 7, 1983, a Planned Residential Development (PRD) permit was approved for the construction of 101 units in the vicinity of Skyline Drive and Woodman Avenue. Construction was to start with 68 units in Phase I on the westside of Woodman and 33 units in

Phase II on the eastside. The original developer had 24 months to utilize this PRD permit. Before expiration of the PRD permit, the developer obtained building permits on February 15, 1986. A change in ownership and developers was noted by the Building Inspection Department on June 24, 1986.

The developers completed approximately 80% of Phase I, consisting of two-story, two and three bedroom townhouses. No construction occurred with respect to the 33 units in Phase II. The building permits for Phase I expired on November 30, 1987 for abandonment. FDIC renewed the permits on May 17, 1988, but this renewal expired a year later on May 21, 1989. FDIC requested a final inspection on December 21, 1989, but no official action was ever taken.

As to Phase II, the building permits expired on March 11, 1986. Except for preparatory soil tests, no construction was ever started for Phase II. A confirming letter from the Building Inspection Director on November 12, 1986, informed Glenhaven Developers about the expiration of building approvals.

Skyline Park is basically in the same physical condition as Greentree Plaza. No construction activity has happened for nearly three years. The premises are boarded and fenced to deter vandalism. All plumbing fixtures have been stolen. The property serves as an attractive nuisance for children and transients.

#### A. Applicable Zoning Regulations

The situation for Skyline Park is somewhat different than Greentree Plaza because this project was approved through the PRD permit process. Thus, the terms and conditions of the PRD permit will determine the applicable zoning regulations. If the original PRD permit is still valid, then the new owner of Skyline Park can complete the project under the zoning regulations in effect when the PRD was issued.

Since the issuance of the PRD permit for Skyline Park, the Southeast San Diego PDO changed the density for the respective parcels. Phase I was changed from R-1-5000 to MF-5000 on August 3, 1987. Phase II was rezoned to single family (R-1-5000) on June 8, 1988.

As a matter of course, discretionary land use permits (conditional use permits, variances and PRD's) can bind successors in the property. See generally *Imperial County v. McDougal*, 19 Cal. 3d 505, 510 (1971). A PRD would not automatically expire unless the municipality provided the owner with reasonable notice and a hearing to revoke the permit. *Community Development Commission v. City of Ft. Bragg*, 204 Cal. App. 3d 1124 (1988). Based on our evaluation, the PRD issued to the original developer for Skyline Plaza is still valid until the Planning Director initiates official action to revoke or modify

its terms and conditions.

#### B. Phase I

As to Phase I, it appears that a new owner could finish the project pursuant to the terms of the original permit. Condition No. 16 of PRD permit No. 20-259-0 gave the original developer 24 months merely to "utilize" this permit, otherwise it would automatically expire. The developer obtained building permits for Phase I and completed 80% of the construction. Thus, a strong argument can be made that this permit was indeed "utilized." (Subsequent amendments to the PRD ordinance now impose additional expiration criteria; the permit must not only be utilized, but the developer has a duty to diligently complete the project as well.) Since the PRD permit was utilized in accord with the applicable terms and laws in effect at the time it was issued, it did not automatically expire and is still valid.

#### C. Phase II

Unlike Phase I, it appears that the developer never "utilized" the PRD for Phase II. Although building permits were obtained for the second phase, no construction took place on site. Consequently, condition No. 16 of the original PRD permit would automatically invalidate the permit with respect to Phase II. Moreover, a developer cannot obtain a right to proceed with the second phase of a project based on expenditures incurred in the first phase. Under the current zoning regulations the new owner could build only 19 single family units. Expenditures must be in reliance upon active, and not expired permits for the developer to obtain a right to complete the second phase. See generally *Court House Plaza Company v. City of Palo Alto*, 117 Cal. App. 3d 871, 886-887 (1981).

Although this interpretation in theory prohibits the original development scheme of Phase II, the original PRD permit must be officially modified to reflect this interpretation and permit the completion of the 68 units as part of Phase I. This would require a noticed public hearing before the Planning Director to amend the original PRD.

### III. ARIZONA STREET CONDOMINIUMS

Building permits were issued for a 50 unit condominium project at 4545 Arizona Street on February 5, 1985. The last inspection was February 26, 1986, for framing and insulation. According to Building Inspection records, the permits expired on September 5, 1987, for "abandonment." On August 31, 1988, a new building permit was issued for final inspection. As of February 6, 1989, the project failed final inspection. On February 27, 1989, the second building permit expired.

Arizona Street project is closer to completion than Greentree

Plaza or Skyline Park. It has remained, however, in basically the same condition as the other FDIC properties. No construction activity has occurred for over three years. The buildings are partially boarded and a fence secures the premises. This project, like the others, is an attractive nuisance and eyesore in the community.

#### A. Applicable Zoning Regulations

Arizona Street is similar to Greentree Plaza. This condominium project was originally approved as of right under the zoning regulations in existence when building permits were issued in 1985. Since issuance of the building permits, the Mid-City Planned District Ordinance (PDO) was enacted on January 21, 1986. Given the similarities with Greentree Plaza, it also appears that abandonment would apply to Arizona Street. No activity has occurred for over three years. The original developer is no longer involved in this project. Consequently, a new owner would need to comply with the requirements of the Mid-City PDO.

#### B. Mid-City PDO

Pursuant to the Mid-City PDO this site is currently zoned MR-1750 which would permit a maximum of 23 units with the possibility of six additional units if the new owner obtained a bonus density--a possible total of 29 units instead of the current 50 units. Like Greentree Plaza this project would also have to comply with additional landscaping, parking and design criteria. The new owner will need to submit an application for a Mid-City PDO permit with revised plans and proceed through the public hearing process. The Planning Director's exercise of discretion will be critical in evaluating the new PDO permit application for the redesign of this project and any applicable variance requests.

#### IV. APPLICABLE BUILDING CODE REGULATIONS

In a memorandum issued by Chief Deputy Fred Conrad to Deputy Director Terry Marshall of the Building Inspection Department in April 1991, this office concluded that the version of the Uniform Building Code (UBC) in existence at the time the permits were issued would be the applicable version for subsequent owners of Greentree Plaza. Since the facts and circumstances have changed dramatically over the past 14 months, the issue of abandonment must be analyzed in the context of this previous opinion.

In determining the applicable version of the UBC in light of abandonment, we must first analyze the applicable procedural rules for the expiration of building permits in effect at the time the original permits were issued. With respect to Greentree, permits were issued in July 3, 1986. At Skyline Park the building permits were issued on February 15, 1986. On February 5, 1986, the building permits were issued for the Arizona Street. Thus, it is the 1982 building ordinance that

governs this issue of expiration for all three properties. This 1982 ordinance, however, was silent regarding the procedural requirements for expiration of building permits. While it required a new permit fee, it did not mention which version of the UBC should apply for the subsequent renewal of expired permits. (In comparison, the current ordinance establishes specific time limits (i.e., 540 days) for the renewal of building permits.) Given this ambiguity, it is within the authority of the Building Inspection Director to determine which edition of the UBC applies to renewals. The Director has the authority to permit a new owner to complete any new work consistent with either the version of the UBC in effect when the permits were issued or impose more restrictive requirements of the current version of the UBC.

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