BRUCE BARTRAM
DEPUTY CITY ATTORNEY

OFFICE OF
THE CITY ATTORNEY
CITY OF SAN DIEGO

Michael J. Aguirre
CITY ATTORNEY

1200 THIRD AVENUE, SUITE 1620
SAN DIEGO, CALIFORNIA 92101-4178
TELEPHONE (619) 236-6220
FAX (619) 236-7215

MEMORANDUM OF LAW

DATE: August 16, 2006

TO: Brad Richter, Principal Planner, Centre City Development Corporation

FROM: City Attorney

SUBJECT: Redevelopment Agency authority to permit further development on Beech Street under the El Cortez Agreement Affecting Real Property

INTRODUCTION

You have requested an opinion on whether the Redevelopment Agency (Agency) may permit development in Lot 2 of the El Cortez block under the Agreement Affecting Real Property recorded against the entire block without consent of the condominium owners in the El Cortez.

In July1998, the Agency entered into a Rehabilitation Loan Agreement (Loan Agreement) with Janopaul Block S.D (Developer). No. 1 providing for part of the financing for the rehabilitation of the historic El Cortez Hotel. An Agreement Affecting Real Property (AARP) was recorded which affected the entire block on which the El Cortez was located which was bounded by Beech and Ash Streets and 7th and 8th Avenues. The AARP limited the permitted uses on the block which included apartments, retail and parking until 2025.

The Agency and Developer executed a Third Implementation Agreement in January, 2003 pursuant to which the Agency consented to the proposed conversion of the project from residential apartments to for sale condominiums by providing for an amendment to the AARP to be recorded upon prepayment in full of the Agency loan. The Agency loan was paid in full and in April, 2004 the Amendment was recorded. However, the Amendment stated that except as provided the AARP remained in full force and effect, enforceable in accordance with its terms.

In August, 2004 the Developer recorded a Map subdividing block into Lot 1(consisting of the southern part of the block, including the El Cortez), and Lot 2 (consisting of the northern part of the development block). However, the AARP was not amended to reflect the division of property into Lot 1 and Lot 2 and title reports continue to show the AARP along with the use restrictions to be of record as to both Lot 1 and Lot 2.The Developer later sold Lot 2 to JBSD 4, LLC.

Subsequently, in September, 2004 the Declaration of Covenants, Conditions and Restrictions for the El Cortez Owners Association (CC&Rs) were recorded after which the apartment units were sold as condominiums. Recently, Peter Janopaul owner of JBSD 4 has submitted an application to develop Lot 2 and has requested an amendment to the AARP. The El Cortez Homeowners Associations (HOA) has sent correspondence to the Agency claiming that any change in the use of Lot 2 requires approval by every residential condominium owner located on Lot 1. According to the HOA attorney the AARP is covenant that runs with the land and is enforceable by the HOA as successors in interest to the Developer. Consequently, the Agency cannot permit development of Lot 2 without HOA approval.

QUESTIONS PRESENTED

1. Can the Agency permit the development of Lot 2 without the consent of the El Cortez HOA or any of the owners of condominiums in the El Cortez?

SHORT ANSWERS

1. Yes. The general rule is that the intention of parties creating the covenant restricting the use of property determines whether enforcement runs with the land or extends to third parties. The AARP expressly stated the agreement's benefits were solely for the Developer and Agency and that any use change requires Agency approval alone. Additionally, the CC&Rs put condominium owners on notice of the potential future development of Lot 2.

ANALYSIS

I

Land Use Restrictions

Enforcement of restrictive covenants or agreements as to use of real property may be achieved by successors in interest to the original interests, i.e., individuals who were not parties to the original agreement upon which the covenant was imposed, because the covenant becomes appurtenant to the land with reference to which it was created. In order to establish the binding effect of such covenant upon subsequent land owners, it is necessary that certain essential requisites be met. One of these is that the covenant must "touch or concern the land," meaning that it must relate to the use of both the benefited and burdened land. Civil Code §§ 1460, 1468.

Agreements restricting land use may be enforced, even though not meeting all the requisites of a common law covenant running with the land, by classifying them as equitable easements or servitudes, enforceable by injunctive relief. Most common of this type of agreement are land use restrictions contained in declarations establishing a common plan for ownership in subdivisions, that is, covenants, conditions and restrictions, meant to bind all

purchasers and successors. Citizens for Covenant Compliance v. Anderson, 12 Cal. 4th 345 (1995).

Regardless of the type of agreement restricting land use their enforceability by successors or other parties rests on determination of the intention of those creating the covenant. That intention is typically determined by an examination in the original deed restrictions contained in the agreement. B.C.E. Development v. Smith, 215 Cal. App. 3d 1142, (1989). In the present case, the Loan Agreement between the Agency and Developer provided that the Developer would use the property for certain uses. Section 401 provided:

> "Borrower (Developer) covenants and agrees for itself, its successors, its assigns and every successor in interest to the Property or any part thereof, that Borrower, such successors and such assignees shall use the Property only for the uses specified in the Agreement Affecting Real Property attached to this Agreement as attachment No. 6. No change in the use of the Property shall be permitted without the prior written approval of the Agency."

Further, Section 612 of the Loan Agreement provided:

> "The parties to this Agreement acknowledge and agree that the provisions of this Agreement are for the sole benefit of Agency and Borrower, and not for the benefit, directly or indirectly, of any other person or entity, except as other wise expressly provided herein."

The above provisions plainly indicate that while any change in the use of the property requires prior written Agency approval no consent by any other person or entity is called for. In addition, the provisions of the Agreement are expressly stated to be for the "sole benefit" of Agency and Borrower with no mention of any benefit for Borrower's successors, assigns and any other third parties.

Consistent with the above sections of the Loan Agreement, provisions the Agreement Affecting Real Property (AARP) provided that exclusive Agency approval alone was required for any change in use of the property and that no third party approval was contemplated. Specifically, Section 1.c. of the AARP provided:

> "Owner, its successors and assigns, shall protect, maintain and preserve the Improvements on the Property and obtain approval in writing from Agency prior to any material alteration or modification of such Improvements, such approval not to be unreasonably withheld or delayed."

In addition, Section 2 of the AARP stated:

> "All conditions, covenants and restrictions contained in this Agreement shall be covenants running with the land, and shall, in any event, and without regard to technical classification or designation, legal or otherwise, be, to the fullest extent permitted by law and equity, binding for the benefit and in favor of, and enforceable by Agency, its successors and assigns, and the City of San Diego (the "City") and its successors and assigns, against Owner, its successors and assigns, to or of the Property or any portion thereof or any interest therein, and any party in possession or occupancy of said Property or portion thereof. Agency and the City shall be deemed the beneficiaries of the covenants, conditions and restrictions of this Agreement both for and in their own rights and for the purposes of protecting the interests of the community. The covenants, conditions, and restrictions shall run in favor of the Agency and the City , without regard to whether the Agency or City has been, remains, or is an owner of any land or interest therein in the Property or the Project area. Except as provided I the preceding sentence, the covenants, conditions and restrictions contained in this Agreement shall not benefit nor be enforceable by any owner of any other real property within or outside the Project area or any person or entity having any interest in any such other real property"(Emphasis added).

Section 2 consistent with the Loan Agreement clearly indicates the covenants and restrictions in the AARP are intended to benefit the Agency and the City and to burden the owner of the property or portion of the property to which the covenants and restrictions apply. Also agreed by the parties is that the covenants and restrictions shall not benefit or be enforceable by the owner of any other property inside or outside the Redevelopment Project area. This is shown by the phrase "other property" referring to property other than that which may be owned by the Agency or City.

Read together the above the above provisions of the Loan Agreement and AARP clearly indicate the Agency did not intend the enforcement of the use restrictions to extend to subsequent successors or purchasers of the Developer or other such third party entities like the El Cortez HOA. Therefore, the consent of the El Cortez HOA or any other property owner on Lot 1 is not required by the Agency in order to permit the development of Lot 2. B.C.E. Development v. Smith, 215 Cal. App. 3d 1142 (1989).

II

Covenants, Conditions & Restrictions

As mentioned above, declarations of covenants, conditions and restrictions (CC&Rs) establishing a common plan for ownership in a subdivision have been held to create land use restrictions enforceable by subsequent purchasers of property affected by the CC&Rs and by third parties such as Homeowners Associations given enforcement powers under their terms.

Citizens for Covenant Compliance v. Anderson, 12 Cal. 4th 345 (1995).

In the present case, in September, 2004 the CC&Rs El Cortez Owners Association were recorded after which the apartment units were sold as condominiums. In Section 5 of the CC&Rs provided that "Each Owner's use of the Association Property shall be subject to:..g. The development of Parcel Two as described in this Declaration." That Description is set forth in Section 17 of the CC&Rs, which provides:

> "Development of Parcel 2: The Parcel Two Developer may ultimately develop Parcel Two with condominiums, apartments, or another use. The development of Parcel Two may temporarily or permanently interfere with and (or) alter the use of areas within Parcel Two (including, without limitation, the swimming pool), the parking garage and other portions of the Association Property. The Board shall be entitled to enter into such cost sharing agreement or similar type of agreement for shared use of any amenity serving the Project and Parcel Two. The development of Parcel Two may negatively impact and obstruct existing views from Units within the Project."

From the above it is plainly demonstrated that the CC&Rs put El Cortez condominium purchasers on Lot 1 on notice of the potential future development on Lot 2. We don't know if the CC&Rs were referenced in any deed or other documents received by condo purchasers at time of sale. However, recent case law states that if the recordation of the CC&RS occurred before execution of a contract for sale subsequent purchasers are deemed to have constructive notice of their terms including any land use restrictions. Citizens for Covenant Compliance v. Anderson, 12 Cal. 4th 345 (1995).

In Citizens for Covenant Compliance v. Anderson, supra, the California Supreme Court held that if a declaration establishing a common plan for ownership of property in subdivision and containing restrictions upon use of property as part of common plan is recorded before execution of a contract of sale, describes the property it is to govern and states that it is to bind all purchasers and their successors, subsequent purchasers have constructive notice of the recorded declaration and are deemed to intend and agree to be bound by, and accept benefits of the common plan. Thus, restrictions are not unenforceable merely because they are not additionally cited in deed or other documents at the time of sale.

Applying Citizens for Covenant Compliance to the El Cortez situation shows the condo owners by purchasing their units after the recording of the CC&Rs are deemed to have agreed to with its provisions regarding the future development of Lot 2. Thus, it appears that under the Loan Agreement and AARP the El Cortez HOA and any El Cortez condo owner have no legal right to require their consent be obtain prior to Agency approval of development on Lot 2. Further, it appears from the CC&Rs that they deemed to have agreed to the potential development of Lot 2 at the time they purchased their unit on Lot 1.

CONCLUSION

Please let me know if you need any additional information regarding this matter.

MICHAEL J. AGUIRRE, City Attorney

By
Bruce E. Bartram
Deputy City Attorney

BEB: mm
ML-2006-16