

REUBEN, JUNIUS & ROSE, LLP

March 3, 2016

Delivered Via E-Mail

Scott Sanchez
Zoning Administrator
San Francisco Planning Department
1650 Mission Street, Suite 400
San Francisco, CA 94103

RA# 2015-013954 ZAD

**Re: Request for Written Determination – Withdrawal
333 12th Street
Dwelling Unit Usable Open Space
Our File No.: 6954.10**

Dear Mr. Sanchez:

Panoramic Interests hereby withdraws its Request for Written Determination dated October 13, 2015 in connection with the project located at 333 12th Street.

Thank you.

Very truly yours,

REUBEN, JUNIUS & ROSE, LLP



Daniel A. Frattin

cc: Corey Teague
Rich Sucre
Patrick Kennedy
Zac Shore
Mark Macy

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REUBEN, JUNIUS & ROSE, LLP

October 13, 2015

Via Hand Delivery

Mr. Scott Sanchez, Zoning Administrator
San Francisco Planning Department
1650 Mission Street, 4th Floor
San Francisco, CA 94103

R # 2015-013954 ZAD
CK # 25642 \$ 645 -
J. BANALES (SE)

Re: 333 12th Street (3521/022)
Request for Written Determination
Subject: Dwelling Unit Usable Open Space
Our File No.: 6954.10

Dear Mr. Sanchez:

We are working with Panoramic Interests on its proposed residential project (the "Project") at 333 12th Street (the "Property"). The Property is located in the Western SoMa Community Plan Area, the WMUG Zoning District (Western SoMa Mixed Use General), and the Western SoMa Special Use District ("SUD").

In a Preliminary Project Assessment letter dated August 28, 2015 ("the PPA"), the Planning Department indicated that the Project must provide at least 80 square feet of open space per dwelling unit, including dwelling units that measure less than 350 square feet plus a bathroom ("Small Units"). This guidance is based on a provision of the SUD, which states:

Publicly Accessible Open Space. Dwelling units within Eastern Neighborhoods Mixed Use Districts shall provide 80 square feet per unit of useable open space regardless of whether the open space is privately or publicly accessible.

(Planning Code Section 823(c)(2)(A); the "SUD Rule".)

We respectfully assert that Small Units are not required to provide a minimum of 80 square feet of open space per unit because:

- Planning Code Section 135(d)(2) ("Small Unit Rule") specifically provides that Small Units need only provide one-third the amount usable open space otherwise required for a dwelling unit.

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- The SUD Rule disallows a credit for publicly accessible space that otherwise applies in the Eastern Neighborhoods Mixed Use Districts; it does not repeal or eliminate the Open Space Reduction for private open space in Section 135.
- The guidance provided by the Planning Department conflicts with the express policy of the Western SoMa Plan to require Small Units to “meet minimum private opens [sic] space requirements of 36 square feet per unit.” (Western SoMa Community Plan, Policy 3.3.1 at p. 14.)

Pursuant to Planning Code Section 307(a), we respectfully request a written determination that Small Units at the Property are subject to a reduced open space requirement under the Small Unit Rule. A check for the determination fee of \$645.00 is enclosed.

I. LEGAL ANALYSIS

As stated, the Property is located in the WMUG Zoning District, which is an Eastern Neighborhoods Mixed Use District (Plan. Code §§ 201, 802.4), and in the West SoMa SUD. With respect to usable open space for dwelling units, Planning Code Section 823(c)(2) provides as follows:

Dwelling units within Eastern Neighborhood Mixed Use Districts shall provide 80 square feet per unit of useable open space regardless of whether the open space is privately or publicly accessible.

Planning Code Section 135(d)(2) provides as follows:

For group housing structures, SRO units, and dwelling units that measure less than 350 square feet plus a bathroom, the minimum amount of usable open space provided for use by each bedroom or SRO unit shall be one-third the amount required for a dwelling unit as specified in Paragraphs (d)(1) above and (d)(4) and (d)(5) [Eastern Neighborhoods Mixed Use Districts], below.

In the PPA, Planning Department Staff concludes that SUD, and not the Small Unit Rule, controls the amount of usable open space that must be provided for Small Units at the Property. We disagree with this conclusion, however, because it violates controlling state law concerning statutory construction, as well as the policies of the Western SoMa Community Plan.

The SUD Rule and Small Unit Rule are similar ordinances in that they address the same subject matter, usable open space for dwelling units. However, the Small Unit Rule is the more specific provision, because it addresses usable open space for a specific type of dwelling unit. Under California law, where two ordinances address the same subject matter and one is more specific than the other, the more specific ordinance controls. (Cal. Code of Civ. Proc. § 1858; *see also Pettus v. Cole* (1996) 49 Cal.App.4th 402 [Specific statutory provision relating to particular subject will govern that subject as against general provision, although the latter, standing alone, would be broad enough to include subject to which more particular provision relates.].) California Civil Code Section 3534 similarly provides, “Particular expressions qualify those that are general.”

In addition, California law mandates that an existing provision (here, the reduced open space requirement in the Small Unit Rule) can be modified or repealed by a later law (here, the SUD) only if the later law specifically provides that it modifies or repeals the existing law. (Cal. Code of Civ. Proc. § 1858; *see also Barratt American Inc. v. City of San Diego* (2004) 117 Cal.App.4th 809 [All presumptions are against a repeal of a statute by implication; absent express declaration of legislative intent, courts will find implied repeal only where there is no rational basis for harmonizing the two potentially conflicting statutes, and the statutes are irreconcilable, clearly repugnant, and so inconsistent that the two cannot have concurrent operation.].)

Here, the SUD cannot be read to have repealed the Small Unit Rule because no express intent to do so exists, nor is there any justification for an implied repeal. The two statutes can be harmonized and read to co-exist by recognizing that the reduced usable open space requirement in the Small Unit Rule only applies in the West SoMa SUD to dwelling units that measure less than 350 square feet plus a bathroom.

Notably, the West SoMa SUD did in fact amend Section 135(d) in that it eliminated the distinction in the amount of open space required depending on whether the space was privately or publicly accessible. For the SUD to amend one provision of the open space requirement and not another is further evidence that the reduced open space requirement was not amended or repealed.

Moreover, we again reference Code of Civil Procedure Section 1858, which provides as follows:

In the construction of a statute or instrument, the office of the Judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted, or to omit what has been inserted; and where there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all.

Under Section 1858, the reduced usable open space requirement for Eastern Neighborhoods Mixed Use Districts must be read to apply to the West SoMa SUD, which is an Eastern Neighborhoods Mixed Use District; for to not do so would be to “omit was has been inserted” and to not give effect to all provisions of the Small Unit Rule.

Finally, the policies of the Western SoMa Community Plan indicate that the Small Unit Rule applies in the SUD. Policy 3.3.1 of the Community Plan provides as follows:

Allow single-resident occupancy uses (SROs) with no less than 300 square feet of livable area and “efficiency” units to continue in limited locations to be an affordable type of dwelling option, and recognize their role as an appropriate source of housing for small households. In addition SRO projects should be required (with no permitted variances) to:

- exceed existing City inclusionary requirements for below market rate units, and
- meet minimum rear yard requirements, and
- meet the dwelling unit exposure requirements, and
- meet minimum private opens [sic] space requirements of 36 square feet per unit, and
- have no required parking minimum, and
- discourage new ground floor residential units facing neighborhood or regional serving streets, and
- comply with required active non-residential ground floor uses on neighborhood or regional serving street facades.

(Western SoMa Community Plan, p. 3:8 [emphasis added].) This Policy is in furtherance of Objective 3.3 of the Plan, which states: “Ensure that a significant percentage of the new housing created is affordable to people with a wide range of incomes.”

II. REQUESTED DETERMINATION

For all of the foregoing reasons, we respectfully request a written determination that in the West SoMa SUD, Planning Code Section 135(d)(2) controls the amount of usable open space required to be provided per dwelling unit where that dwelling unit measures less than 350 square feet plus a bathroom.

Mr. Scott Sanchez, Zoning Administrator
San Francisco Planning Department
October 13, 2015
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Please contact me should you have any questions.

Very truly yours,

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