

ATTACHMENT C

Applicant's Correspondence to BZA dated August 18, 2021

August 18, 2021

VIA E-MAIL

Board of Zoning Appeals
City of Pasadena
175 N. Garfield Avenue
Pasadena, CA 91101

E-Mail: tvarsh@cityofpasadena.net

Re: **Appeal of Zoning Administrator's Determination re: 1450 N. Fair Oaks Avenue (Item 3A)**

Dear Honorable Board Members:

Our firm represents Sadvipra, LLC, the owner of 1450 N. Fair Oaks Avenue (the "Property"), which is the subject of the Zoning Administrator's determination that the Property's legal nonconforming rights have terminated by discontinuance under the Pasadena Municipal Code Section 17.71.060.B.1. Pursuant to our appeal, we believe the City improperly issued the determination, failed to apply the relevant law, and hastily took action based on political desires, not sound planning and legal principles. Accordingly, we respectfully request the Board of Zoning Appeals reject the Staff's recommendation and confirm that the Owner's legal nonconforming rights remain intact.

Background

Since 2018, Sadvipra, LLC ("Owner") has owned the abovementioned Property in the City of Pasadena. During this time, the Owner has leased the Property to Golden Cross Health Care ("Golden Cross"), which has consistently operated a high-quality, 96-bed convalescent facility without incident until the COVID-19 pandemic. (Exhibit A – Property photos). On June 16, 2021, without any prior notice, the City issued a one-page Zoning Administrator Determination letter ("ZA Determination") stripping the Owner of its long-held legal nonconforming property rights. In the letter, the City alleges that due to a temporary suspension of Golden Cross' operator's license by the California Department of Public Health

(“CDPH”) on June 10, 2020, and subsequent relocation of the facility’s residents, the Property has “lost its nonconforming status through disuse.” To justify this bare conclusion, the City cites Pasadena Zoning Code (“Zoning Code”) Section 17.71.060.B.1: “Without any further action by the City, a nonconforming use shall lose its nonconforming status and shall not be reestablished if the nonconforming use is discontinued for any reason for a continuous period of at least 12 months.”

After the CDPH issued its Temporary Suspension Order (“TSO”) related to a COVID-19 outbreak on June 10, 2020—which pertained to the operator, Golden Cross, not the Owner or the Property itself—the Owner continued to work with CDPH to resolve the issues raised in the TSO. Not only did the Owner attempt to address the alleged public health concerns, but also undertook an exhaustive process to install a new operator for the facility. Unfortunately, and inexplicably, CDPH rejected the Owner’s Plans of Correction and proposed offers (including several reputable facility operators), and protracted the administrative proceeding well beyond the standard compliance time frame. (Exhibit B – Plan of Correction, September 13, 2020). As a result, the Owner has been unable to secure a new operator.

Despite the Owner’s ongoing efforts, and merely days after the purported 12 month period of discontinuance had ended, the City issued the ZA Determination. The Owner timely filed the instant appeal, yet did not receive proper written notice of the scheduled Board of Zoning Appeals (“BZA”) hearing (an informal email from the Zoning Administrator without any hearing details is insufficient). Nevertheless, based on the governing California case law and other provisions of the Zoning Code related to nonconforming uses, the ZA Determination is flawed, inaccurate, and unnecessarily punitive.

Analysis

1. ZA Determination does not comply with the legal standard for abandonment of nonconforming rights, as delineated by California courts

The California Supreme Court has established a clearly defined test to determine whether a property owner has discontinued its nonconforming property rights. In short, the Court has equated discontinuance of a nonconforming use with voluntary abandonment. (See, *Hill v. City of Manhattan Beach* (1971) 6 Cal.3d 279, 286; See also, *Hansen Brothers Enterprises, Inc. v. Board of Supervisors* (“*Hansen*”) (1996) 12 Cal.4th 533, 569.) In *Hansen*, the Court explained the test as follows: “[A]bandonment of a nonconforming use ordinarily depends on a concurrence of two factors: (1) an intention to abandon; and (2) an overt act, or failure to act, which carries the implication the owner does not claim or retain any interest in the right to the

nonconforming use.” *Hansen* at 569. Importantly, the Court also declared that “cessation of use alone does not constitute abandonment.” *Id.*

As to the first factor—intent—the City has offered no evidence to show the Owner intended to abandon the use. Instead, it has relied solely on the fact that CDPH issued the Temporary Suspension Order as the basis for discontinuance. Objectively, the TSO does not, and cannot, constitute voluntary abandonment; the Owner did not initiate or pursue this action. To the contrary, the Owner has continuously made efforts to resolve the issues raised in the TSO and restore the facility’s license. (See, Exhibit B). Its intent has always been to maintain the current use, and the short-term cessation of the use is not determinative here.

On the second factor—an overt act—the City likewise fails to demonstrate how the Owner took affirmative steps to abandon the Property’s use. As explained in more detail below, the Owner actually expended money and resources on the Property to allow for its continued use—staff were employed on-site and the building and landscaping were maintained in operable condition. In fact, CDPH took initial steps to maintain the use by installing a “temporary manager” for the facility. (See, City Staff Report, Attachment B). Furthermore, the Owner’s ongoing discussions and negotiations with CDPH during the 12 month period at issue are evidence of its intent to continue the existing use.

Clearly, the City has not, and cannot, satisfy either requirement to demonstrate the Owner actually abandoned the nonconforming use. For this reason alone, the BZA should reject the Staff’s recommendation and overturn the Zoning Administrator’s determination.

2. The City has not offered the required evidence to support loss of nonconforming property rights under the Zoning Code

Even if the City could prove the Property met the legal standard for abandonment of a nonconforming use, which it cannot, it still has not complied with the necessary findings as dictated in the Zoning Code. Section 17.71.060.B.3 provides essential guidance about what the City needs to show to make a determination of discontinuance:

“The determination of discontinuance (aka abandonment) shall be supported by evidence, satisfactory to the Zoning Administrator (e.g., the actual removal of equipment, furniture, machinery, structures or other components of the nonconforming use and not replaced, the turning off of the previously connected utilities, or where there are no business receipts/records or any necessary licenses available to provide evidence that the use is in continual operation).” (emphasis added).

Not surprisingly, this evidentiary requirement is wholly consistent with the *Hansen* court's abandonment test. All of the examples cited in Section 17.71.060.B.3 indicate affirmative acts taken by the property owner to abandon the existing use. Here, however, no such voluntary acts were taken by the Owner. In fact, the Property has remained exactly as it was when the TSO was issued—utilities have been in continuous operation, the landscaping and building have been regularly maintained (including system repairs), and the facility is currently prepared to accept new residents. (See, Exhibit C – Building Repairs Report; Exhibit A – Property photos).

Further, even with the TSO in place, the operator continued operations to comply with reporting requirements, such as audit reports and other state-mandated requests. Other agencies, such as the federal Centers for Medicare & Medicaid Services, allowed the continuation of the Medicare provider agreement for the operator until November 27, 2020. (See Exhibit D - CMS Termination Notice). This allowed the operator to receive Medicare payments after the TSO was issued (on June 10, 2020), and therefore the facility's Medical Services – Extended Care land use was in still in effect as of November 2020. Thus, the Property's use ceased at the earliest at this point, and therefore does not meet the Zoning Code's requirement for disuse during a continuous period of at least 12 months.

In sum, there is no evidence of voluntary abandonment. Even while the operator's license is temporarily suspended, the Property's underlying use remains in continual operation under the applicable law.

3. As a matter of equity and fairness, the City should allow the continuance of the Property's legal nonconforming rights

Because the suspension of the facility operator's license was both involuntary and temporary, the City should recognize these unusual circumstances do not justify terminating the Owner's legal nonconforming rights. To reiterate, the Owner did not initiate or execute the suspension, which related only to the operations and not the Property itself, and it had little control over the timeline to resolve the TSO. To be sure, CDPH dictated the process. Based on the City's logic, CDPH's efforts to protract an enforcement matter (e.g., TSO) could essentially "run out the clock" on the underlying non-conforming property rights. This is not only inherently unfair (and inequitable to property owners), but also allows another government agency to usurp the City's local land use authority. As a matter of policy, the City should not penalize property owners—by terminating nonconforming property rights—who are subject to enforcement actions beyond their control. Also, the City has offered no explanation for why it has purposefully singled out this Property for loss of its legal nonconforming rights. The gravity of this matter, potential irreparable harm to the Owner, and general inequity dictate that the ZA Determination was unreasonable and should be rejected.

4. The Property's land use is not dictated by the CDPH License

The City contends that the Property is nonconforming because it is considered "Medical Services – Extended Care (land use)", which is not currently permitted in the FGSP-RM-16 zoning district. Under Section 17.80.020, the Zoning Code defines this land use as, "An establishment providing care on a 24-hour basis for persons requiring medical attention, but excluding facilities providing surgical and emergency medical services." Notably, the definition makes no mention of, or requirement for, a permit or license. It follows, then, that suspension of a license (associated with an operator) has no bearing on the property's use; and it certainly does not contribute to a discontinuance or abandonment of the use.

The City claims that the use has been discontinued because the "Medical Services – Extended Care (land use)" definition includes a requirement that the use provide residents with "regular medical attention". This argument is misplaced. The salient fact here is that the Owner could not provide such services because of the involuntarily issued TSO. As a practical matter, when licenses are suspended and/or revoked, the standard remedy accepted by CDPH is simply to install a new operator. Again, abandonment of a nonconforming use requires both an intent to abandon and a voluntary, overt act—neither of those facts are present here. Accordingly, the City's abandonment argument is without merit.

Conclusion

Based on the applicable law and City's own Zoning Code, the facts alleged in the ZA Determination do not support abandonment of the Property's legal nonconforming use. Mere non-use of a property over a period of time (e.g., such as that due to the TSO), without other acts by the property owner indicating an intention to abandon the property, does not amount to an abandonment. Here, the Owner has not made any efforts to permanently relinquish the nonconforming use, and City has not provided any evidence that it has. On the contrary, the Owner has demonstrated it made every effort to continue the skilled nursing use of the Property, the same use the Property has maintained for the past 30 years. As a matter of fairness and equity, the City should confirm that the Owner retains its nonconforming rights.

We appreciate your consideration, and urge you to reject the Staff's recommendation and overturn the ZA Determination.

Board of Zoning Appeals
August 18, 2021
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ERVIN COHEN & JESSUP^{LLP}

Sincerely,

A handwritten signature in black ink, reading "Jeffrey T. Harlan". The signature is written in a cursive style with a large initial "J" and a distinct "T".

Jeffrey T. Harlan

Exhibits A-D

jth:JTH

EXHIBIT A - PROPERTY PHOTOS











**EXHIBIT B - PLAN OF CORRECTION,
9.13.20**

DEPARTMENT OF HEALTH AND HUMAN SERVICES
CENTERS FOR MEDICARE & MEDICAID SERVICES

PRINTED: 09/04/2020
FORM APPROVED
OMB NO. 0938-0391

STATEMENT OF DEFICIENCIES AND PLAN OF CORRECTION		(X1) PROVIDER/SUPPLIER/CLIA IDENTIFICATION NUMBER: 555096	(X2) MULTIPLE CONSTRUCTION A. BUILDING _____ B. WING _____		(X3) DATE SURVEY COMPLETED C 05/26/2020
NAME OF PROVIDER OR SUPPLIER GOLDEN CROSS HEALTH CARE			STREET ADDRESS, CITY, STATE, ZIP CODE 1450 N. FAIR OAKS AVENUE PASADENA, CA 91103		
(X4) ID PREFIX TAG	SUMMARY STATEMENT OF DEFICIENCIES (EACH DEFICIENCY MUST BE PRECEDED BY FULL REGULATORY OR LSC IDENTIFYING INFORMATION)	ID PREFIX TAG	PROVIDER'S PLAN OF CORRECTION (EACH CORRECTIVE ACTION SHOULD BE CROSS-REFERENCED TO THE APPROPRIATE DEFICIENCY)	(X5) COMPLETION DATE	
F 000	INITIAL COMMENTS The following reflects the findings of the California Department of Public Health during the investigation of one complaint during an abbreviated standard survey. Complaint number: CA00696167 Representing the Department: Health Facilities Evaluator Nurse 37897 The inspection was limited to the specific complaint investigated and does not represent the findings of a full inspection of the facility. One deficiency was written for complaint number CA00696167.	F 000	THIS PLAN OF CORRECTION CONSTITUTES MY WRITTEN CREDIBLE ALLEGATION OF COMPLIANCE FOR DEFICIENCIES NOTED. THE FACILITY WILL BE IN SUBSTANTIAL COMPLIANCE ON 9/15/20."		
F 580 SS=D	Notify of Changes (Injury/Delirium/Room, etc.) CFR(s): 483.10(g)(14)(i)-(iv)(15) §483.10(g)(14) Notification of Changes. (i) A facility must immediately inform the resident; consult with the resident's physician; and notify, consistent with his or her authority, the resident representative(s) when there is- (A) An accident involving the resident which results in injury and has the potential for requiring physician intervention; (B) A significant change in the resident's physical, mental, or psychosocial status (that is, a deterioration in health, mental, or psychosocial status in either life-threatening conditions or clinical complications); (C) A need to alter treatment significantly (that is, a need to discontinue an existing form of treatment due to adverse consequences, or to commence a new form of treatment); or (D) A decision to transfer or discharge the	F 580	Immediate actions taken for the resident found to have been affected include: Based on review of Medical record there was a change of condition for the Resident 1 on April 29, 2020. Resident 1 had low oxygen saturation and was lethargic. Oxygen was administered at 5 LPM and oxygen saturation improved. Responsible party was informed as well as the attending physician. Attending physician ordered lab works for CMP, CBC, and UA on April 29, 2020. Due to change of condition on May 7, 2020 Resident 1 was transferred to the Acute Hospital per order of the attending physician. RN Supervisor left a message to the responsible party about the transfer.	09/15/20	

LABORATORY DIRECTOR'S OR PROVIDER/SUPPLIER REPRESENTATIVE'S SIGNATURE

TITLE
Administrator

(X6) DATE
09/13/20

Any deficiency statement ending with an asterisk (*) denotes a deficiency which the institution may be excused from correcting providing it is determined that other safeguards provide sufficient protection to the patients. (See instructions.) Except for nursing homes, the findings stated above are disclosable 90 days following the date of survey whether or not a plan of correction is provided. For nursing homes, the above findings and plans of correction are disclosable 14 days following the date these documents are made available to the facility. If deficiencies are cited, an approved plan of correction is requisite to continued program participation.

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CENTERS FOR MEDICARE & MEDICAID SERVICES

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F 580	<p>Continued From page 1</p> <p>resident from the facility as specified in §483.15(c)(1)(ii).</p> <p>(ii) When making notification under paragraph (g) (14)(i) of this section, the facility must ensure that all pertinent information specified in §483.15(c)(2) is available and provided upon request to the physician.</p> <p>(iii) The facility must also promptly notify the resident and the resident representative, if any, when there is-</p> <p>(A) A change in room or roommate assignment as specified in §483.10(e)(6); or</p> <p>(B) A change in resident rights under Federal or State law or regulations as specified in paragraph (e)(10) of this section.</p> <p>(iv) The facility must record and periodically update the address (mailing and email) and phone number of the resident representative(s).</p> <p>§483.10(g)(15)</p> <p>Admission to a composite distinct part. A facility that is a composite distinct part (as defined in §483.5) must disclose in its admission agreement its physical configuration, including the various locations that comprise the composite distinct part, and must specify the policies that apply to room changes between its different locations under §483.15(c)(9).</p> <p>This REQUIREMENT is not met as evidenced by:</p> <p>Based on interview and record review, the facility failed to notify the resident's responsible party (RP) of a change of condition for one of three sampled residents (Resident 1).</p> <p>This deficient practice resulted in Resident 1's RP not informed of the resident's poor appetite and only tolerating clear liquids prior to the resident's</p>	F 580	<p>Identification of other residents having potential to be affected was accomplished by:</p> <p>The facility determined that all residents have a potential to be affected. Currently the facility has no residents since all residents were transferred on June 11, 2020 per order of CDPH.</p> <p>Actions taken/systems put into place to reduce the risk of future occurrence include:</p> <p>In case the facility will be allowed to admit residents. An Inservice program will be conducted by the Director of Nursing Services with all licensed staff addressing circumstances that require notification of the resident's physician, legal representative or family member. Medical records will check on a daily basis to check if there are any resident change of condition and that the attending physician, legal representative or family member were informed.</p> <p>How the corrective action will be monitored to ensure the practice will not recur:</p> <p>The Director of Nursing Services, or designee, will conduct a random audit of five (5) residents weekly for four consecutive weeks.</p>		

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F 580	<p>Continued From page 2</p> <p>transfer to a General Acute Care Hospital (GACH).</p> <p>Findings:</p> <p>On 5/26/20, an onsite visit was conducted at the facility to investigate a complaint.</p> <p>During an interview with the Director of Nursing (DON) on 5/26/20 at 5:10 p.m., the DON said she had been absent from the facility and it was her first day back to work. A request for Resident 1's clinical record was made and the DON said Resident 1's clinical records were not available for review at this time.</p> <p>On 5/27/20 and 5/28/20, multiple requests were made to the facility to obtain Resident 1's complete clinical record but the facility failed to provide.</p> <p>A review of Resident 1's Admission Records indicated the resident was admitted to the facility on 5/24/14 with diagnoses that included anemia (decrease in the total amount of red blood cells in the blood) and dementia (long term and often gradual decrease in the ability to think and remember severe enough to affect a person's daily functioning).</p> <p>A review of the Resident 1's Minimum Data Set (MDS- a standardized screening and assessment tool) dated 5/6/20 indicated the resident's cognition (process of acquiring knowledge and understanding) was moderately impaired. Resident 1 required supervision with bed mobility, transfer and eating.</p> <p>A review of Resident 1's Nurse Progress Notes</p>	F 580	<p>These residents will be newly assessed to ensure any declines in condition have been identified, properly evaluated and communicated to the appropriate people.</p> <p>This plan of corrections will be monitored at the Monthly Quality Assurance Performance Improvement meeting until such time consistent substantial compliance has been met.</p> <p>Director of Nursing will monitor for compliance.</p>		

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F 580	<p>Continued From page 3</p> <p>dated 5/2/20 at 9:15 p.m. indicated the resident had poor appetite and only tolerating clear liquid diet. There was no documented evidence that the family/RP was notified of Resident 1's poor appetite.</p> <p>A review of Resident 1's Nurse Progress Notes did not indicate the resident's poor appetite was monitored on 5/3/20, 5/4/20, 5/5/20 and 5/6/20.</p> <p>A review of a Physician's Order dated 5/7/20 at 12:42 p.m. indicated to transfer Resident 1 to GACH for further evaluation due to failure to thrive (state of sleepiness or deep unresponsiveness), weakness and lethargy (lack of energy) .</p> <p>A review of Resident 1's Nurse Progress Notes, dated 5/7/20 at 12:42 p.m. indicated Registered Nurse 1 (RN1) called and left a voice message to Resident 1's RP that the resident was being transferred to GACH for further evaluation.</p> <p>A follow up onsite visit to the facility was conducted on 6/29/2020.</p> <p>During an interview with the Director of Nurses (DON) on 6/29/20 at 11:08 a.m., she stated she was out sick during the time Resident 1 had a change of condition. The DON stated the facility is now closed and there were no residents residing at the facility. The DON stated there were no nursing staff working at the facility at this time and no staff can be interviewed. During this visit, the DON was not able to provide additional clinical records requested for Resident 1.</p>	F 580			

EXHIBIT C - BUILDING REPAIRS REPORT, 9.25.20



**OFFICE OF STATEWIDE HEALTHPLANNING AND DEVELOPMENT
FACILITIES DEVELOPMENT DIVISION**

355 South Grand Avenue, Suite 1900, Los Angeles, CA 90071
2020 West El Camino Avenue, Suite 800, Sacramento, CA 95833

Phone (213) 897-0166 Fax (213) 217-8511
Phone (916) 440-8300 Fax (916) 324-9188

FV

CONSTRUCTION ADVISORY REPORT - Field Visit

Facility Name and Address Golden Cross Health Care 1450 N Fair Oaks Ave Pasadena, CA 91103		Facility No. 21676	Project No. S181448-19-00
		Date 9/25/2020	Parent Project No. N/A
Contractor G N A - BROOK FIRE PROTECTION INC			
Inspector of Record Dwight A Clements	Telephone No. (323) 757-1799	Approved Plans 10/16/2018	Project % Complete 86
Title or Scope of Project Fire Sprinklers Head Replacment & UL Testing (Golden Cross)			

FIELD VISIT - The above named facility/project was visited this date September 25, 2020 and the following was noted.

Comments or Additional Conditions
--

Received project update from IOR Dwight Clements.

IOR reported that additional work was recently completed.
FLSO reported to be contacted for final report.

EXHIBIT D - CMS TERMINATION NOTICE

DEPARTMENT OF HEALTH & HUMAN SERVICES
Centers for Medicare & Medicaid Services
San Francisco Survey and Enforcement Division
Survey Operations Group
90 7th Street, Suite 5-300 (5W)
San Francisco, CA 94103-6707



Center for Clinical Standards and Quality/Quality, Safety & Oversight Group

Termination Notice

Notice is hereby given that the agreement between the Secretary of Health and Human Services and Golden Cross Health Care, 1450 N. Fair Oaks Avenue, Pasadena, CA 91103, as a provider of skilled nursing services in the Health Insurance for the Aged and Disabled Program (Medicare) is to be terminated at the close of November 26, 2020.

The Centers for Medicare & Medicaid Services has determined that Golden Cross Health Care is not in substantial compliance with Medicare regulations.

The Medicare Program will not make payment for Skilled Nursing Facility services furnished to residents who were admitted on or after August 27, 2020. For residents admitted prior to August 27, 2020 payment may continue for up to 30 days after November 26, 2020.

Paula Perse
Long Term Care Branch Manager
Survey & Operations Group
CMS San Francisco