SAN FRANCISCO
PLANNING DEPARTMENT

Memo to the Planning Commission

HEARING DATE: JULY 21, 2011

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Date: July 13, 2011
Re: **PLANNING COMMISSION RESPONSE TO CIVIL GRAND JURY REPORT ON PARKMERCED DEVELOPMENT**
Recommendation: **Approve Draft Response Letter**

BACKGROUND

The San Francisco Civil Grand Jury issued a report on May 17, 2011 regarding the Parkmerced project entitled "The Parkmerced Vision: Government By Developer," containing a number of findings and recommendations. The Planning Department and Planning Commission were recipients of this report and are required to respond within 60 days to each finding and recommendation. In coordination with the Office of Workforce and Economic Development and the City Attorney's office, staff has drafted a response letter for the Commission's review.

A response to a Grand Jury Report must meet certain content and formatting requirements as established by California Penal Code Section 933.05. This Code Section reads as follows:

(a) For purposes of subdivision (b) of Section 933, as to each grand jury finding, the responding person or entity shall indicate one of the following:

(1) The respondent agrees with the finding.

(2) The respondent disagrees wholly or partially with the finding, in which case the response shall specify the portion of the finding that is disputed and shall include an explanation of the reasons therefore.

(b) For purposes of subdivision (b) of Section 933, as to each grand jury recommendation, the responding person or entity shall report one of the following actions:

(1) The recommendation has been implemented, with a summary regarding the implemented action.

(2) The recommendation has not yet been implemented, but will be implemented in the future, with a timeframe for implementation.

(3) The recommendation requires further analysis, with an explanation and the scope and parameters of an analysis or study, and a timeframe for the matter to be prepared for discussion by the officer or head of the agency or department being investigated or reviewed, including the governing body of the public agency when applicable. This timeframe shall not exceed six months from the date of publication of the grand jury report.

(4) The recommendation will not be implemented because it is not warranted or is not reasonable, with an explanation therefor.

(c) However, if a finding or recommendation of the grand jury addresses budgetary or personnel matters of a county agency or department headed by an elected officer, both the agency or department head and the board of supervisors shall respond if requested by the grand jury, but the response of the board of supervisors shall address only those budgetary or personnel matters over which it has some

decision-making authority. The response of the elected agency or department head shall address all aspects of the findings or recommendations affecting his or her agency or department.

(d) A grand jury may request a subject person or entity to come before the grand jury for the purpose of reading and discussing the findings of the grand jury report that relates to that person or entity in order to verify the accuracy of the findings prior to their release.

(e) During an investigation, the grand jury shall meet with the subject of that investigation regarding the investigation, unless the court, either on its own determination or upon request of the foreperson of the grand jury, determines that such a meeting would be detrimental.

(f) A grand jury shall provide to the affected agency a copy of the portion of the grand jury report relating to that person or entity two working days prior to its public release and after the approval of the presiding judge. No officer, agency, department, or governing body of a public agency shall disclose any contents of the report prior to the public release of the final report.

While the Commission is not able to meet the required 60-day deadline, notification has been sent to the Grand Jury that the Commission is considering approval of a response at its hearing on July 21 and that a response will be forthcoming immediately following the Commission's approval of a response.

REQUIRED COMMISSION ACTION

Approval a response letter to the Grand Jury on behalf of the Planning Commission.

RECOMMENDATION:	**Approve Draft Response Letter to Grand Jury**

Attachments:
Parkmerced Grand Jury Report, May 2011
Draft Response Letter to Grand Jury

DRAFT RESPONSE TO THE CIVIL GRAND JURY REPORT ON PARKMERCED

Honorable Katherine Feinstein
Presiding Judge
Civil Grand Jury
400 McAllister Street, Dept. 205
San Francisco, CA 94102

Re: Response to Grand Jury Report Regarding Parkmerced Development Project

July 21, 2011

Honorable Judge Feinstein,

The San Francisco Planning Commission was in receipt of the Civil Grand Jury's report in May entitled "The Parkmerced Vision: Government-by-Developer." The Planning Commission has reviewed the report and prepared this response to the report's findings and recommendations as required. The Planning Commission respectfully requests that the Grand Jury accept this letter, approved by the Commission at its regular public hearing on July 21, 2011, on behalf of the Planning Commission and Planning Department.

In reviewing the Grand Jury Report, the Planning Commission respectfully notes that the Grand Jury's criticism of the Parkmerced project focuses solely on the substance of the approved Development Agreement and not with the actions, deliberations or procedures of the Planning Department or Planning Commission in review and approval of the Parkmerced project, and that these bodies acted properly, according to relevant law, and with full public involvement – including a large number of public hearings before the Planning Commission.

As background to this response, the Planning Commission held a public hearing on the Park Merced project, including the development agreement and amendments to the Planning Code, Zoning Map and General Plan on February 10, 2011 after several lively public hearings. The Planning Commission voted 4 – 3 to recommend that the San Francisco Board of Supervisors approve the Development Agreement, as well as the Planning Code, Zoning Map and General Plan amendments. The Planning Commissioners voting against this recommendation expressed concerns about tenant disruption, long-term protection of tenants in the new residential units, and demolition of housing, among other issues. The Commission's decision to recommend approval reflects the determination by a majority of the Commissioners that the proposed project adequately addressed these issues. The detailed findings about the issues raised by the Civil Grand Jury are attached to this memorandum.

Attached to this letter is an item-by-item response to the specific findings and recommendations of the Grand Jury Report.

Thank you.

Sincerely,

Linda Avery
Planning Commission Secretary

Attachments: Responses to Findings and Recommendations

CITY OF SAN FRANCISCO
PLANNING COMMISSION AND PLANNING DEPARTMENT
RESPONSES TO FINDINGS AND RECOMMENDATIONS

FINDINGS

1. By not explaining how it will override/resolve potentially conflicting provisions of state law, the Development Agreement (DA) does not protect tenants against rent increases as it claims.

   We disagree with Finding #1. The DA does not purport to override state law. Sections 4.1, 4.2 and 4.3 of the DA thoroughly explain how new rent control protections and protections against pass-throughs will be enforced consistent with state law (specifically, Chapter 4.3 of the California Government Code, commonly referred to as "Costa Hawkins") for any new Replacement Unit provided to any Relocating Tenant on the Project Site. Section 12.8 of the DA also contains provisions that require financial obligations of the developer (called "Rent Control Liquidation Amount" to be paid to the City to further protect tenants by providing rental subsidies in the unlikely event that the rent control provisions are found to be unenforceable. (This amount is currently estimated to be approximately $160 Million). We respectfully request that the Civil Grand Jury review the language in the DA.

2. Having no penalties or disincentives for the owner/developer in the Development Agreement should it choose to abandon the project before completion encourages short-term investment speculation over long-term collaborative development with the City, and adds risk to the program.

   We disagree with Finding #2. There are many "penalties" and "disincentives" contained in the DA in the event that a future owner/developer does not fulfill their obligations to the City. For example, the City may suspend issuance of building permits, file liens, declare owners in default and eventually terminate all development rights, and request specific performance. In addition, the DA provides the City with the remedy of "specific performance," meaning that it can compel the project sponsor to complete any unfinished construction.

   Second, the development phasing requirements set forth in Section 3.4 of the DA discourage "short-term investment speculation" and reduce "risk to the program" by ensuring that public benefits are provided at every stage of development commensurate with the rate of private development. Specifically, public benefits must be provided in proportion and proximity to new development, based on public policy priorities negotiated with City agencies. Exhibit F, the DA Phasing Plan, establishes specific numeric thresholds based on (1) net new residential units added and (2) net increases in afternoon vehicle trips that trigger enforceable requirements to deliver

specific community benefits and mitigation projects. This means that a future owner/developer cannot benefit from the private development rights afforded by the DA without also providing a proportionate amount of public benefits. The City is not required to issue further approvals under the DA if these public benefits are not provided. Accordingly, there is no basis for suggesting that the DA creates any incentive for "speculative" activity.

Furthermore, the DA minimizes risk to the public by not committing any public funds, tax resources or net land dedications to the Project. Simply stated, no public funds are invested in the Project at any time during its 30-year build-out. Accordingly, the financial risk of any failure to complete the Project is borne entirely by the private owner/developer and their investors, not the City and County of San Francisco. Reports prepared by consultants for the City estimate the net value of public benefits required by the DA —in excess of current Municipal Code requirements—at approximately $500M..

3. The owner/developer fails to address the social and financial impact to the Parkmerced citizen/tenants, local businesses and citizen users of the 19th Avenue traffic corridor if it elects to abandon re-development of Parkmerced and sell the property to another owner.

   We disagree with Finding #3. The requirements of the DA (including the requirements to construct all of the public benefits of the Project) are not affected by the sale of the property or what owner/developer owns the Parkmerced. This is because the obligations "run with the land" and therefore apply to the Parkmerced property and any development thereon regardless of who or what entity owns the property. If the current owner (or any future owner) did not proceed with development and instead sold all or a portion of the existing 152-acre property to another owner, all of the benefits and burdens of the DA (including all physical improvements, on-going services and mitigation requirements provided for the benefit of citizen/tenants, local businesses and citizen users of the 19th Avenue traffic corridor) would run with the land pursuant to the express statutory language of California Government Code Section 65868 and Sections 11 and 13.2 of the DA. The DA's substantial public benefits and mitigation requirements would apply to any future owner of any portion of the Parkmerced property, including any owner obtaining the property due to foreclosure by a lender to the current owner.

4. The Development Agreement presumes demolition is necessary, and presents no alternative, or combination of alternatives, that might satisfy the programmatic goals of redevelopment without the demolition of 1,583 occupied units.

   We disagree in part with Finding #4. The question of whether demolition is "necessary" is not the appropriate subject of the DA, but instead is a policy decision made by the Planning Commission and the San Francisco Board of Supervisors in deliberating whether to approve the project. While it's true that the DA "presents no alternative or combination of alternatives that might satisfy the programmatic goals

of redevelopment without demolition of [the] 1,583 occupied units," there is no legal requirement or reason for the DA to include such alternatives. The DA is merely the contractual mechanism between the City and the property owner to memorialize the terms of the approved project. Perhaps the Grand Jury intended to direct this finding toward the Environmental Impact Report ("EIR") for the Project which was certified by the Planning Commission (and upheld on appeal by the Board of Supervisors) prior to approval of the project and the DA. The California Environmental Quality Act (CEQA) requires the City to study a "range of alternatives" to a proposed project prior to its approval that may satisfy the programmatic goals of the proposed project but result in less environmental impacts. The San Francisco Planning Department prepared an exhaustive CEQA analysis in the EIR, including an Alternatives Analysis that analyzed several alternatives that featured less demolition than in the approved project, including "No Project," "Retention of the Historic District Central Core," and "Partial Historic District" Alternatives. "p These and other alternatives were determined to be infeasible and undesirable for a variety of policy reasons.

5. The DA's claim that it provides rent control protection on newly constructed units under the City's rent stabilization ordinance is uncertain. It may not be enforceable.

   We disagree in part with Finding #5. This is a legal question, and the City Attorney has given extensive testimony on the enforceability of the rent control provisions, advising the Board of Supervisors of all of the arguments and reasons why the DA's extensive rent-control protection provisions should be enforceable. The City Attorney also exhaustively detailed the contractual measures and remedies that were included in the DA to bolster its enforceability, and to provide tenant protections even in the unlikely event that rent control provisions were deemed unenforceable by a future court decision.

   We note that the one express recommendation of the Grand Jury was for the City to adopt a specific law of general applicability to impose rent control on replacement units that are built on the same property within 5 years. However, this specific law already existed as part of the San Francisco Rent Ordinance at the time of issuance of the Grand Jury report.

RECOMMENDATION

The Civil Grand Jury recommended that the City and County of San Francisco:

1. Remove Section 2.2.2(h) of the Development Agreement; and

   This recommendation will not be implemented because it is not reasonable. Deletion of this Section would not be consistent with the basic purpose of the Development Agreement, which is to create certainty of development rights in exchange for certainty of delivery of specific public benefits. Deleting this section would introduce an unreasonable degree of uncertainty by granting the City the unilateral right to

impose new rules on the Parkmerced Project during the 30-year DA term that could potentially restrict residential rents for new market rate units. This recommendation undermines the primary public policy and business reason that cities and developers negotiate and enter into development agreements, which is to exchange the financial benefits of regulatory certainty and vested development rights for public benefits above and beyond what can be achieved through existing city regulations and state law nexus requirements. A developer cannot be expected to invest the significant private capital needed to build all of the public improvements contemplated in a neighborhood the size and scope of Parkmerced Project if they cannot in turn rely on the basic rules established during the DA negotiation and the expectation of receiving reasonable, market-based revenues from the proposed non-rent-controlled (i.e., market-rate) units. Finally, Section 2.2.2(h) equally protects the City's right to apply the existing Inclusionary Affordable Housing Ordinance and provisions of the San Francisco Rent Stabilization Ordinance incorporated by the DA on the Project Site 30 years into the future. Accordingly, deletion of this provision would also permit a future Board ordinance or voter ballot measure to reduce or eliminate these important tenant affordability protections.

2. Enact legislation prior to signing the Development Agreement that adequately assures the statutory rights of existing tenants to remain at Parkmerced and enjoy undisturbed continued tenancy. The Grand Jury report specifically cites Los Angeles Municipal Code section 151.28 as a model.

   This recommendation was implemented by the City several years ago. The City Attorney has confirmed that exactly such legislation was enacted by the San Francisco Board of Supervisors and has been part of the existing San Francisco Rent Ordinance for several years prior to the Grand Jury making this recommendation. Specifically, California Government Code section 7060.2(d) provides an exception to Costa Hawkins, as recognized in Apartment Association of Los Angeles County, Inc. v. City of Los Angeles, *173 Cal.App.4th 13 (2nd Dist. 2009), to allow public entities to impose rent control on newly constructed units by ordinance or regulation when an existing rent controlled unit is demolished and a new unit is constructed on the same property within 5 years. San Francisco has adopted such an ordinance, as set forth in San Francisco Rent Ordinance, Administrative Code section 37.9A(b) (similar to the L.A. ordinance cited by the Grand Jury). Furthermore, section 4.1.2 of the DA expressly incorporates this provision of state law and the San Francisco Rent Ordinance, and clearly states that it is the intent of all parties to the agreement to rely on this exception, and reiterates that the City and Developer would not be willing to permit demolition of the Existing Units if they could not impose the Rent Ordinance on the Replacement Units and satisfy the needs of existing and future tenants.*

Accordingly, we concur with the Grand Jury that "with such an ordinance, tenants and citizens of SF can be reasonably assured that the City and County of San Francisco is making its best efforts to ensure rights are being upheld regardless of development arrangements in the future."

THE PARKMERCED VISION:

GOVERNMENT-BY-DEVELOPER

CIVIL GRAND JURY
CITY AND COUNTY OF SAN FRANCISCO
2010-2011

THE CIVIL GRAND JURY

The Civil Grand Jury is a government oversight panel of volunteers who serve for one year. It makes findings and recommendations resulting from its investigations.

Reports of the Civil Grand Jury do not identify individuals by name.
Disclosure of Information about individuals interviewed by the jury is prohibited.
California Penal Code, section 929

STATE LAW REQUIREMENT
California Penal Code, section 933.05

Each published report includes a list of those public entities that are required to respond to the Presiding Judge of the Superior Court within 60 to 90 days as specified. A copy must be sent to the Board of Supervisors. All responses are made available to the public.

For each finding the response must:

1) agree with the finding, or
2) disagree with it, wholly or partially, and explain why.

As to each recommendation the responding party must report that:

1) the recommendation has been implemented, with a summary explanation; or
2) the recommendation has not been implemented but will be within a set timeframe as provided: or
3) the recommendation requires further analysis. The officer or agency head must define what additional study is needed. The Grand Jury expects a progress report within six months; or
4) the recommendation will not be implemented because it is not warranted or reasonable, with an explanation.

THE PARKMERCED VISION:
GOVERNMENT-BY-DEVELOPER

SUMMARY

Parkmerced is a privately-owned residential community located in southwest San Francisco at 3711 19th Avenue. Because it is the City's single largest rental complex, housing more than 9,000 tenants, the treatment of those tenants affects all renters throughout the city, as well as residential owners and business people who live and work here. Because Parkmerced is an integral part of the city, any abrogation of tenant rights would set a destructive precedent for the future of tenants throughout the city.

On February 10, 2011, the re-development of Parkmerced was sanctioned by the City's Planning Commission. Commissioners voted 4-3 to support a Development Agreement drafted by the Office of Economic and Workforce Development and the Planning Department for the City and County of San Francisco and the owner/developer of Parkmerced. The Agreement calls for the demolition of 1,583 rental units [1] currently covered under San Francisco's Residential Rent Stabilization and Arbitration Ordinance [2] (hereby known as the "rent stabilization ordinance") and relocation of the tenants to newly constructed replacement units.

While the Development Agreement makes extraordinary efforts to assure that Parkmerced's relocated tenants will have the same rent-control protections they currently have, the new units may not be protected by the rent stabilization ordinance, but only by the contractual agreement of the owner/developer.

Pivotal to the Development Agreement is a provision calling for the present or future owner/developer of Parkmerced to apply the City's rent stabilization ordinance to the newly built replacement units and forego its statutory rights to raise rental rates to market levels (Costa-Hawkins) or evict tenants (Ellis). In exchange, the City and County of San Francisco will rezone the property as a Special Use District to provide for increased density, relaxed height and bulk restrictions, elimination of discretionary reviews, and other incentives to make the project financially viable for the developer.

The Costa-Hawkins Act was passed by the California Legislature in part so no municipality could interfere (through strict ordinance) with an owner's right to raise rental rates to market level once a unit has been vacated. [3] The Ellis Act permits property owners to evict tenants if the property owner's intent is to 'go out of the rental business.'[4] The Development Agreement

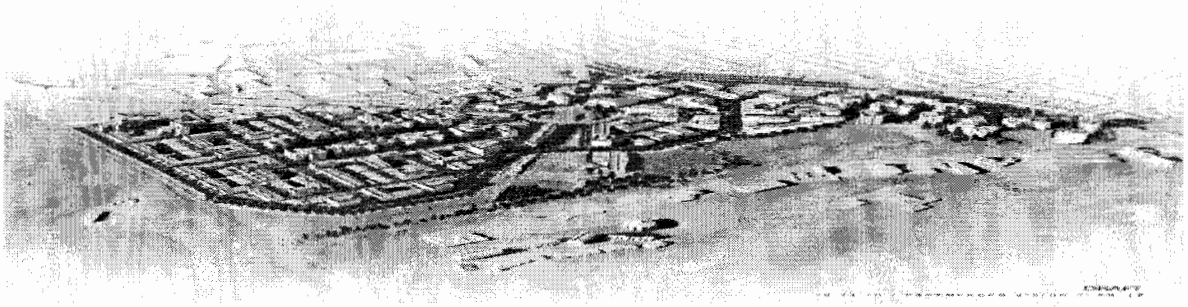
however, specifically requires the owner/developer to waive both of these statutory rights as a means to protect renters.

Based on California case law, certain owner rights are arguably inviolable. At least one appellate court has ruled that owners' rights cannot be given away, even voluntarily. [5] This would appear to make the terms of the Agreement unenforceable and could invalidate the Development Agreement. Should the present or future owner/developer of Parkmerced challenge the provisions of the Development Agreement, there would be no ironclad assurance Parkmerced tenants would have the legal protections they formerly enjoyed.

At the heart of the Development Agreement for the City is the potential to realize enormous tax revenues in the future from re-development of Parkmerced. However, this windfall, no matter how promising, should not come at the expense of citizens' legal rights.

The Development Agreement does take steps to assure continuity of protection for tenants in rent-controlled units, but it is aspirational and inconclusive; only a future court can provide the definitive conclusion.

Meanwhile tenants will live under a cloud of uncertainty, possibly for years.



Parkmerced Vision Plan
San Francisco Planning Department Website

PURPOSE

The purpose of this report is to recommend that the City and County of San Francisco take action to protect the rights and interests of tenants affected by the Project, and more generally citizen/taxpayers, prior to entering any Development Agreement for the property.

At hand is whether the proposed Development Agreement between the City and Parkmerced's developer/owners can keep rent-controlled units intact as promised in view of the Costa-Hawkins and Ellis Acts.

The Office of Economic and Workforce Development and the Planning Department, lead architects of the Agreement for the City, reported at a Planning Commission hearing that they believe the Agreement contains enough incentives and other concessions to meet the exemption clause in Costa-Hawkins and overcome the burden of proof required for invocation.

But any legal action by the owner of Parkmerced (present or future), or a court decision that views the incentives or concessions as not meeting the exemption, could render the Agreement useless for protecting rent-controlled units. And, the incentives and concessions themselves are not a certainty because they may 'run with the land' (are subject of the property itself, not its current owners) and could be challenged at any time as 'hostile and inimical' by an owner who claimed its rights were being forced away by the Agreement.

Any of these scenarios would ultimately cause tenants to lose their claim to rent control.

The Development Agreement, a work-in-progress at the time of this report, claims to make exceptional efforts to assure tenants in rent-controlled units have continuity of protection under San Francisco's rent stabilization ordinance. However, the Agreement is fundamentally unable to deliver such assurances because of overarching State laws that are changeable and subject to court interpretation.

~~Through its call for demolition of existing units, the Agreement eliminates existing statutory~~ rights of tenants, replaces them with a contractual Agreement from the owner/developer, and bypasses due process in the face of eviction.

Wikipedia Photo

HISTORY

Parkmerced, with its 3,221 units [6] is San Francisco's largest single apartment complex. It is a privately owned neighborhood of apartment towers and garden apartments sited in the city's southwest corner. Parkmerced was built by Metropolitan Life Insurance Company between 1941 and 1951 to satisfy affordable housing demands. One of four privately owned large scale garden apartment complexes in the country, Parkmerced is noted for its generous open spaces and modern landscaping.

In the early 1970s Parkmerced was sold to the Helmsley Group of New York, who held the property until 1999. Since then, the property has had several owners and commercial acreage has been sold off. Today, only 116 of the original 192 acres are owned by the current owner, Parkmerced Investors LLC. [7]

Now a half century old, Parkmerced shows expected wear. Nonetheless, it has been a treasured home for many. And though the plan by noted landscape architect Thomas Church is considered outdated by some, others note its historic use of space, light and air. [8]

In 2008 Parkmerced Investors hired Skidmore Owings and Merrill to transform the property. The result was a design that sets out a 30 year vision for Parkmerced including density increases, light rail, sustainable land use, and an innovative watershed habitat. In a city looking for affordable housing, the Parkmerced vision promises 8,900 units. [9]

Never before has a re-development project of this size and length been undertaken in San Francisco in an existing community where more than 9,000 people live.

THE DEVELOPMENT AGREEMENT

The Development Agreement between the City and Parkmerced Investors LLC is a comprehensive contract that frames approximately what will happen in the Parkmerced Mixed Use Development Program. It defines the obligations, concessions, incentives and performance thresholds that legally bind the City and the owner/developer for the 30-year duration of the project.

DEMOLITION OF RENT-CONTROLLED UNITS

As it pertains to demolition and replacement of rent-controlled units, and relocation of tenants, the Development Agreement requires the developer to maintain 3,221 rent-controlled units at all times (1683 existing and 1583 replacement units) throughout the life of the project.

> "Of the existing 3,221 residential units on the Site, approximately 1,683 units located within the existing 11 towers would remain and approximately 1,583 existing apartments would be demolished and replaced in phases over the approximately 20 to 30 year development period. As provided in the proposed Development Agreement, all 1,538 new replacement units would be subject to the Rent Stabilization Ordinance and existing tenants in the to-be-replaced existing apartment units would have rights to relocate into new replacement units of equivalent size with the same number of bedrooms and bathrooms at their existing rents."[10]

As it is stated, the Agreement claims it can cause newly constructed units to be protected under the same rent stabilization ordinance previously applied to the demolished dwellings. In reality, current laws appear to contravene this claim.

Counsel for the owner/developer submitted a letter to the City Attorney and the San Francisco Planning Director dated February 10, 2011, discussing some of the legal issues created by the proposed demolition and expansion of portions of Parkmerced.[11] The letter asserts that the developer's proposed program is "legally defensible"[12] and cites numerous cases which appear to be off-point. The developer apparently takes the view that otherwise applicable rental unit development limitations would be inapplicable because the developer, acting for the City, would provide benefits to Parkmerced as a sort of surrogate for the City.

None of the cases cited by the owner/developer involve this 'developer-acting-as-government' concept, and the Civil Grand Jury has not found any in its own review.

Moreover, the owner/developer fails to discuss the potentially painful consequences to the Parkmerced tenants, local businesses and users of the 19th Avenue traffic corridor if the owner/developer, for whatever reason, simply elects to abandon re-development of Parkmerced and sell the property to another party. The Development Agreement and other documents contain no hint of any penalty to the developer if this should occur, and the Civil Grand Jury is unable to discern any concrete disincentives to the developer to refrain from doing so. Without such penalties or disincentives, the property could potentially be sold many times and have several owner/developers throughout the 30-year project. Each new owner/developer would have the opportunity to challenge the Agreement.

Finally, the Development Agreement presumes demolition is necessary, and presents no alternative, or combination of alternatives, that might satisfy the programmatic goals of re-development without the demolition of 1,583 occupied units.

The Civil Grand Jury believes the City should address these critical issues before any binding commitment to the owner/developer is made.

TRANSFER OF PROPERTY OWNERSHIP

Under "Transfer or Assignment; Release; Rights of Mortgagees; Constructive Note" there is a list of requirements demanded by the Developer:

> "At any time, Developer shall have the right to transfer the entirety of its right, title, and interest in and to the Project Site together with all rights and obligations of this Agreement without the City's consent. Developer shall also have the right, at any time, without the City's consent, to sell developable lots or parcels within the Project Site for vertical development ... "[13]

> "The Parties acknowledge that the Project involves the demolition of dwelling units but that the Project replaces all demolished dwelling units with the Replacement Units and increases the City's overall supply of housing, including the supply of BMR [Below Market Rate] Units. By adopting this Agreement, the City acknowledges that it has thoroughly considered the Project's effects on housing supply and therefore, during the Term of this Agreement, shall not

require Developer to obtain conditional use authorization for the demolition of any dwelling units on the Project Site that may be required by Planning Code section 317 or subsequent amendment of the Planning Code, Administrative Code or any other City code or regulation." [14]

Numerous cases in California and elsewhere recognize that development obligations and restrictions may "run with the land" and may not be waived by contract or by land transfer. See *Monterey/Santa Cruz County Building and Construction Trades Council v. Cypress Marina Heights LP*, 11 C.D.O.S. 1147 (January 24, 2011). [15]

The application of this established principle should be reviewed by City, and publicly addressed by the owner/developer before any binding commitment to the Development Agreement is made.

COSTA-HAWKINS ACT

The Development Agreement also addresses the Costa-Hawkins Act. (Civil Code § 1954.50 et seq.) Passed in 1995, the Costa-Hawkins Act "prohibit(s) 'strict' municipal rent control ordinances which do not allow landlords to raise rents to market level when tenants vacate a unit." [16]

The law applies to units built after February 1, 1995, as long as the developer did not receive any financial or other form of assistance under the Density Bonus provision. It also establishes "vacancy decontrol," permitting a landlord to reset rent levels when a tenant has voluntarily vacated, abandoned or been legally evicted. [17]

In the Parkmerced Development Agreement the developer clearly waives rights:

> "These public benefits to be provided by Developer at its cost include, without limitation:
>
> [A.2 The non-applicability of certain provisions of the Costa-Hawkins Rental Housing Act (California Civil Code sections 1954.50 *et seq.*; the "Costa-Hawkins Act"), and Developer's waiver of any and all rights under the Costa-Hawkins Act and the Ellis Act (California Gov't Code Section 7060 et seq.; the "Ellis Act") and any other laws or regulations so that (i) each Replacement Unit will be subject to rent control and other

provisions and provisions protecting tenants under the San Francisco Rent Ordinance and (ii) each Inclusionary Unit will be subject to the City's Inclusionary Unit requirements as set forth in Planning Code section 415;]" [18]

The Civil Grand Jury believes this waiver may be insufficient to protect the rights of Parkmerced residents.

THE ELLIS ACT

Passed in 1985, The Ellis Act (California Government Code section 7060 et seq.) is a statute that permits property owners to evict tenants if the property owner's intent is to 'go out of the rental business.' Landlords must evict all tenants in a given building or parcel of land. [19]

The Act also contains provisions to prevent 'false' evictions. If, for example, a landlord begins renting a previously rent-controlled property again after evicting its tenants, local rent control measures would still apply to the unit. In addition, local governments under certain conditions may impose rent control on replacement units under the Ellis Act. [20]

WAIVER OF RIGHTS

Can an owner/developer waive its rights? The answer is uncertain. The City's ability to prevent an owner/developer from invoking Costa-Hawkins or the Ellis Act at Parkmerced could be hampered by a 2009 court ruling, where the developer agreed to waive its rights under the Ellis Act. In *Embassy v. City of Santa Monica*, the Court held that a landlord's written waiver of the right to invoke the Ellis Act was invalid. [21, 22]

If the Development Agreement were ever to be challenged in court, the voluntary waiver could become invalid. That would have a profound effect on San Francisco. Tenants' rights would immediately be questionable.

CONCLUSION

The Parkmerced Mixed Use Program Development Agreement, for all its complexity, fails to mitigate the most significant risk it creates: the direct loss of statutory rights by Parkmerced citizen tenants.

As it is written, the proposed Development Agreement does not give adequate rent control protection to the residents of the Parkmerced property. The owner/developer, present or future, has the opportunity to challenge the Agreement. By doing so, it will deflect a portion of its investment risk (rent control) onto tenants through no choice of their own.

So long as the opportunity exists for tenants to involuntarily bear the burden of lost rent control, the City must provide legal protection.

FINDINGS

1. By not explaining how it will override/resolve potentially conflicting provisions of state law, the Development Agreement does not protect tenants against rent increases as it claims.

2. Having no penalties or disincentives for the owner/developer in the Development Agreement should it choose to abandon the project before completion, encourages short term investment speculation over long term collaborative development with the City, and adds risk to the program.

3. The owner/developer fails to address the social and financial impact to the Parkmerced citizen/tenants, local businesses and citizen users of the 19th Avenue traffic corridor if it elects to abandon re-development of Parkmerced and sell the property to another party.

4. The Development Agreement presumes demolition is necessary, and presents no alternative, or combination of alternatives, that might satisfy the programmatic goals of re-development without the demolition of 1,583 occupied units.

5. The Development Agreement's claim that it provides rent control protection on newly constructed units under the City's rent stabilization ordinance is uncertain. It may not be enforceable.

RECOMMENDATION

In addition to addressing the findings of this report, the Civil Grand Jury recommends the City and County of San Francisco remove Section 2.2.2 (h) of the Development Agreement [23] and enact legislation prior to signing the Development Agreement that adequately assures the statutory rights of existing tenants to remain at Parkmerced and enjoy undisturbed continued tenancy.

A possible provision would include:

> "If a landlord demolishes residential property currently protected under the City's Rent Stabilization and Arbitration Ordinance, and builds new residential rental units on the same property within five (5) years, the newly constructed units are subject to the San Francisco Rent Stabilization Ordinance. (See Los Angeles City Ordinance No. 178848, codified as Los Angeles Municipal Code section 151.28) [24]

The new legislation should be applicable to all development, including Special Use Districts.

With such an ordinance, tenants and citizens of San Francisco can be reasonably assured that the City and County of San Francisco is making its best efforts to ensure rights are being upheld regardless of development arrangements in the future.

METHOD OF INVESTIGATION

Investigating the validity of the Development Agreement, the Civil Grand Jury:

- reviewed in detail four versions of the Development Agreement Draft between the City and Developer/Owner
- conducted ten face-to-face interviews for eighteen hours with officials in the following agencies:
  - Members of the San Francisco Board of Supervisors
  - Office of Economic and Workforce Development
  - San Francisco Planning Commission
  - San Francisco Planning Department
- conducted several face-to-face interviews with Parkmerced tenants
- attended several public meetings and hearings
- exchanged correspondence with City staff
- conducted background research in case law, documents, and videos found in libraries and on the internet

ENDNOTES

1. "Development Agreement By and Between the City and County of San Francisco And Parkmerced Investors LLC Relative To The Development Known As The Parkmerced Development Project" (The Development Agreement) PUBLIC DRAFT 4; January 20, 2011; p. 1

2. CITY AND COUNTY OF SAN FRANCISCO MUNICIPAL CODE; ADMINISTRATIVE CODE, File No. 101445, (CHAP 37 et seq.) http://search.municode.com/html/14131/level1 /CH37RERESTAROR.html

3. Costa-Hawkins Rental Housing Act (Civ. Code, § 1954.50 et seq.)

4. Ellis Act; (California Government Code 7060 et seq.)

5. *Embassy LLC v. City of Santa Monica*, 185 Cal. App. 4th 771, 777 (2010).

6. "Parkmerced"; http://en.wikipedia.org/wiki/Parkmerced,_San_Francisco

7. Ibid

8. "Garden and Landscape Guide"; Biography of Thomas Church (1902 – 1978); *"American landscape architect and garden designer, author and pioneer of the 'California Style', using asymmetrical plans, raised planting beds, sitting walls and timber decks."*; http://www.gardenvisit.com/biography/thomas_church

9. SF Planning Department Memo "Parkmerced Mixed-Use Development Program Development Agreement" to SF Planning Commission; Executive Summary; January 27, 2011, p. 2; "February 10, 2011: Planning Commission Packet" (http://www.sf-planning.org/ftp/files/publications_reports/parkmerced/PC_Packet_012711.pdf)

10. Ibid

11. Gibson-Dunn Letter to SF City Attorney and SF Planning Director; SF Planning Department Memo "Memo To The Planning Commission" to SF Planning Commission, February 10, 2011, pp. 3-8; "February 10, 2011: Addendum To Planning Commission Packet" (http://www.sf-planning.org/ftp/files/publications_reports/parkmerced/PC_Packet_021010.pdf)

12. Gibson-Dunn Letter to SF City Attorney and SF Planning Director; SF Planning Department Memo "Memo To The Planning Commission" to SF Planning Commission, February 10, 2011, p.3; "February 10, 2011: Addendum To Planning Commission Packet" (http://www.sf-planning.org/ftp/files/publications_reports/parkmerced/PC_Packet_021010.pdf)

13. "Development Agreement By and Between the City and County of San Francisco And Parkmerced Investors LLC Relative To The Development Known As The Parkmerced Development Project" (The Development Agreement) PUBLIC DRAFT 4; January 20, 2011; p.73

14. "Development Agreement By and Between the City and County of San Francisco And Parkmerced Investors LLC Relative To The Development Known As The Parkmerced Development Project" (The Development Agreement) PUBLIC DRAFT 4; January 20, 2011; p.74

15. *Monterey/Santa Cruz County Building and Construction Trades Council v. Cypress Marina Heights LP*, 11 C.D.O.S. 1147 (January 24, 2011)

16. Costa-Hawkins Rental Housing Act (Civ. Code, § 1954.50 et seq.)

17. Ibid

18. "Development Agreement By and Between the City and County of San Francisco And Parkmerced Investors LLC Relative To The Development Known As The Parkmerced Development Project" (The Development Agreement) PUBLIC DRAFT 4; January 20, 2011; p. 1

19. Ellis Act; (California Government Code 7060 et seq.)

20. Ibid

21. San Francisco Real Estate Brain; "Ellis Act".
http://www.sanfranciscorealestatebrain.com/EllisAct

22. *Embassy LLC v. City of Santa Monica*, 185 Cal. App. 4th 771, 777 (2010).

23. "Development Agreement By and Between the City and County of San Francisco And Parkmerced Investors LLC Relative To The Development Known As The Parkmerced Development Project" (The Development Agreement) PUBLIC DRAFT 4; January 20, 2011; p.18

24. Los Angeles City Ordinance No. 178848 (Los Angeles Municipal Code SEC. 151 et seq.)

FINDINGS	RECOMMENDATIONS	RESPONSES REQUIRED
1. By not explaining how it will override/resolve potentially conflicting provisions of state law, the Development Agreement does not protect tenants against rent increases as it claims. 2. Having no penalties or disincentives for the owner/developer in the Development Agreement should it choose to abandon the project before completion, encourages short term investment speculation over long term collaborative development with the City, and adds risk to the program. 3. The owner/developer fails to address the social and financial impact to the Parkmerced citizen/tenants, local businesses and citizen users of the 19th Avenue traffic corridor if it elects to abandon re-development of Parkmerced and sell the property to another party. 4. The Development Agreement presumes demolition is necessary, and presents no alternative, or combination of alternatives, that might satisfy the programmatic goals of re-development without the demolition of 1,583 occupied units. 5. The Development Agreement's claim that it provides rent control protection on newly constructed units under the City's rent stabilization ordinance is uncertain. It may not be enforceable.	In addition to addressing the findings of this report, the Civil Grand Jury recommends the City and County of San Francisco remove Section 2.2.2 (h) of the Development Agreement and enact legislation prior to signing the Development Agreement that adequately assures the statutory rights of existing tenants to remain at Parkmerced and enjoy undisturbed continued tenancy. A possible provision would include: "If a landlord demolishes residential property currently protected under the City's Rent Stabilization and Arbitration Ordinance, and builds new residential rental units on the same property within five (5) years, the newly constructed units are subject to the San Francisco Rent Stabilization Ordinance." (See Los Angeles City Ordinance No. 178848, codified as Los Angeles Municipal Code section 151.28) The new legislation should be applicable to all development, including Special Use Districts. With such an ordinance, tenants and citizens of San Francisco can be reasonably assured that the City and County of San Francisco is making its best efforts to ensure rights are being upheld regardless of development arrangements in the future.	▪ Board of Supervisors ▪ Office of Economic and Workforce Development ▪ SF Planning Commission ▪ SF Planning Department