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August 5, 2011

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

Re: Response to Civil Grand Jury Report Regarding Parkmerced Development Project

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 provides 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 August 4, 2011, on behalf of the Planning Commission.

In reviewing the Grand Jury Report, the Planning Commission respectfully notes that the Grand Jury's criticism of the Parkmerced project focuses on the substance of the approved Development Agreement and not with the procedures of the Planning Department or Planning Commission in review and approval of the Parkmerced project.

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. All Planning Commissioners were very concerned about tenant disruption, long-term protections for tenants in the new residential units, and demolition of housing. The Planning Commissioners voting against the recommendation expressed concerns that the development agreement did not provide adequate provision for, or protection on, these issues, among other concerns. The Planning Commission's decision to recommend approval reflects the determination by a majority of the Commissioners that the proposed development agreement 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 Civil Grand Jury Report.

Sincerely,

Linda D. Avery,
Planning Commission Secretary

C: San Francisco Planning Commission
John S. Rahaim, Director of Planning, San Francisco Planning Department

Attachments:

CITY and COUNTY OF SAN FRANCISCO
PLANNING COMMISSION AND PLANNING DEPARTMENT

RESPONSES TO CIVIL GRAND JURY REPORT 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 in part with Finding #1. The DA cannot override state law. Whether the DA conflicts with state law is a matter that will be resolved, if necessary, by a court if the protections are ever challenged. The majority of the commission concluded that the tenant protections were adequate and consistent with state law, while three commissioners questioned whether there was sufficient certainty on the tenant protections. Sections 4.1, 4.2 and 4.3 of the DA purport to explain how new rent control protections and protections against rent pass-throughs will be enforced consistent with state law (the "Costa Hawkins" Act) 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 a "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). Commissioners Olague, Moore and Sugaya question whether these penalties provisions would be enforceable if the underlying tenant guarantees were held by a court to be unenforceable. Fundamentally, the Commissioners all agree that the DA purports to provide tenant protections, but there are differing views as to whether these protections will withstand a legal challenge should the developer bring one.*

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 future owners do 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. Under the DA, the City may also request that the owners specifically perform all of their obligations under the DA, including compelling the owners to complete any unfinished construction.*

Second, the development phasing requirements of Section 3.4 of the DA discourage "short-term investment speculation" and reduce "risk to the program" by ensuring that necessary public services are provided at every stage of development, commensurate with the rate of development. Specifically, public services must be provided in proportion and proximity to new development, based on priorities established by 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 services tied to the level of development underway. The City is not required to issue further approvals under the DA if these public benefits are not provided, thus reducing any incentive for "speculative" activity that could occur without meeting the responsibilities to provide necessary public services.

Furthermore, the DA seeks to minimize 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. Thus the financial risk of any failure to complete the Project is borne by the private owner/developer and their investors, not the City. Reports prepared by consultants for the City estimate the net value of public services and amenities required by the DA —in excess of current Municipal Code requirements—at approximately $500 Million.

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 in part with Finding #3. The requirements of the DA (including the requirements to construct and provide all of the public services of the Project) are not changed or reduced in any way by the sale of the property or what owner/developer owns the Parkmerced. As part of the DA, the obligations "run with the land" and therefore apply to the Parkmerced property and any development regardless of who 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 as provided by the express requirements 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.

Nonetheless, Commissioners are aware of concerns raised by the public of the impact that foreclosure, bankruptcy, natural disaster, or other unforeseen circumstances could have on the ability of the developer, or a successor, to perform on the obligations of the DA.

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 agree in part with Finding #4. It is 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." However, there is no requirement 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. The question of whether demolition is "necessary" is a policy decision made by the Planning Commission and the San Francisco Board of Supervisors in deliberating whether to approve the project and the DA.

Under the California Environmental Quality Act (CEQA), the Environmental Impact Report ("EIR") for the Project examined alternatives to the proposed project, but the Planning Commission did not approve any of those alternatives for inclusion in the DA. The EIR was certified by the Planning Commission (and upheld on appeal by the Board of Supervisors) prior to approval of the project and the DA. 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 would reduce some or all of the identified significant environmental impacts. The San Francisco Planning Department prepared the EIR, including an Alternatives Analysis that referenced 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. These and other alternatives were determined by the Planning Department to be infeasible and undesirable and so were not included in the DA.

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 agree in part with Finding #5. The City Attorney has made clear that there is no guarantee that the subject promises will be deemed enforceable by a court, but that the city has strong arguments to support enforceability in the event of a challenge. The provisions of the DA seek to provide as much protection as possible under current law. This is a legal question, and the City Attorney has given advice on the enforceability of the rent control provisions, advising the Planning Commission and the Board of Supervisors 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 event that rent control provisions were deemed unenforceable by a future court decision.

We note that the one explicit recommendation of the Grand Jury was for the City to adopt a law to impose rent control on replacement units that are built on the same property within 5 years. However, this specific law already exists as part of the San Francisco Rent Ordinance. This provision only applies in the five year period following an Ellis Act eviction at the property and thus would not be triggered unless the Ellis Act was invoked.

RECOMMENDATIONS

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 deletion of this Section would not be consistent with the basic purpose of a development agreement, which is to create certainty of development rights in exchange for certainty of delivery of specific public benefits and services. Deleting this section would undermine the purpose of a development agreement 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 enter into development agreements, which is to exchange the financial benefits of regulatory certainty and vested development rights for public services and benefits above and beyond what can be achieved through existing city regulations and state law requirements. Developers could be unwilling 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, including the market-based revenues from the proposed market-rate dwelling 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. Deletion of this provision would also permit a future ordinance 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's Rent Ordinance contains a virtually identical provision, which has been part of the existing San Francisco Rent Ordinance for several years, set forth in San Francisco Rent Ordinance, Administrative Code section 37.9A(b). As background for this provision, the Ellis Act, California Government Code section 7060.2(d), provides an exception to Costa Hawkins, 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. Section 37.9A (b) of San Francisco's Rent Ordinance implements this provision. Section 4.1.2 of the DA expressly incorporates this provision of state law and the San Francisco Rent Ordinance, and explicitly states that all parties intend to rely on this exception, and reiterates that the City would not be willing to permit demolition of the Existing Units if the City could not impose the Rent Ordinance on the Replacement Units and satisfy the needs of existing and future tenants.

We therefore agree 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."