SAN FRANCISCO
PLANNING DEPARTMENT

Memo to the Planning Commission

HEARING DATE: FEBRUARY 10, 2011

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Date:	February 10, 2011
Case No.:	**2008.0021EPMTZW**
Project Address:	**Parkmerced Mixed-Use Development Program**
Project Sponsor:	Seth Mallen, Parkmerced Investors, LLC 3711 19th Avenue San Francisco, California 94132 (415) 584-4561
Staff Contact:	Elizabeth Watty – (415) 558-6620 Elizabeth.Watty@sfgov.org

Dear Honorable Commissioners:

Attached in this packet is an updated MMRP document for the Commission's review and approval; the precise changes to this documents are outlined below. This packet also includes an estimated budget for City staff time and materials spent on the Parkmerced project and a letter from the Project Sponsor's Attorney regarding the Costa-Hawkins Rental Housing Act. Updated CEQA findings will be provided separately at the hearing from the City Attorney's office.

Updated MMRP

- Add into schedule column for M-TR-2C the triggers for implementing transportation mitigation measures that were for M-TR-2B;
- Change cross references from M-TR-2B to M-TR-2C.
- Added SFMTA as the monitoring and reporting responsibility for M-TR-22C.
- Added Project Sponsor coordination with Daly City in the responsibility for implementation column, and reporting results to SFMTA and ERO in the monitoring and reporting responsibility column for M-TR-36D.

Extra copies of this packet have been made for members of the public to view at this hearing. Copies are also available at the Planning Department Reception, 1650 Mission Street, Suite #400; electronic copies on the Planning Department's website at www.Parkmerced.sfplanning.org.

ECONOMIC AND WORKFORCE DEVELOPMENT
JENNIFER MATZ, DIRECTOR

CITY AND COUNTY OF SAN FRANCISCO
EDWIN M. LEE, MAYOR

February 10, 2011

The estimated budget for City staff time and materials spent on the preparation and review of documents and plans for the Parkmerced project is as follows. This budget is based on actual accruals of time and materials as well as reasonable estimates for City departments. Actual invoices will be submitted to the Developer as costs are incurred.

Office of Economic and Workforce Development	$120,000
Planning Department	$60,000
San Francisco Municipal Transportation Agency	$75,000
San Francisco County Transportation Authority	$10,000
Department of Public Works	$10,000
Public Utilities Commission	$35,000
Department of the Environment	$4,000
City Attorney	$180,000

Total Budget: $494,000

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February 10, 2011

HAND DELIVERY

John Rahaim
Director of Planning
San Francisco Planning Department
1650 Mission Street, Suite 400
San Francisco, CA 94102

City Attorney Dennis J. Herrera
City Attorney's Office
1 Dr. Carlton B. Goodlett Place
City Hall, Rm. 234
San Francisco, CA 94102

Re: Enforceability of Rent Control Protections for Parkmerced Residents under the Proposed Development Agreement

Dear Mr. Rahaim and Mr. Herrera:

This firm represents Parkmerced Investors, LLC, sponsors of the proposed Parkmerced Project, which would replan and redesign the Parkmerced neighborhood over a period of 20 to 30 years. At your request, to assist you with your independent legal analysis, this letter responds to concerns expressed by some existing tenants of Parkmerced and tenant attorneys that the Project's proposal to replace the existing 1,538 rent-controlled dwelling units at Parkmerced with new rent-controlled units (the "Replacement Units") is illegal pursuant to the Costa-Hawkins Rental Housing Act ("Costa-Hawkins"), Calif. Civ. Code §§ 1954.52-1954.535.

Contrary to these assertions, our analysis of the provisions of Costa-Hawkins and applicable case law indicates that the Project's proposed construction of new rent-controlled units is legally defensible on several different grounds discussed below. California courts have generally interpreted Costa-Hawkins as prohibiting the adoption of new rent control restrictions applicable to housing constructed after 1995. *Francisco Residential Rent Stabilization Board*, 106 Cal.App. 4th 488, 489 (2003), *Apartment Assoc. of Los Angeles County, Inc. v. City of Los Angeles*, 136 Cal.App.4th 119 (2006); *Costa-Hawkinsion*

Apartment Assn., Inc. v. City of Santa Monica, 41 Cal. 4th 1232, 1237-1238 (2007). The operative language of Costa-Hawkins prohibiting new rent control restrictions is that "[n]otwithstanding any other provision of law, an owner of residential real property may establish the initial and all subsequent rental rates for a dwelling or a unit." Civ. Code §§ 1954.52-1954.535. The courts have interpreted this language to mean that rent control restrictions, defined as ordinances or regulations that restrict the property owner's ability to charge the prevailing market rate rents for a residential unit, are illegal because they restrict the owner's right to establish the "initial and subsequent rates" for their dwelling units. *Francisco Residential Rent Stabilization Board*, 106 Cal.App. 4th 488, 489 (2003), *Apartment Assoc. of Los Angeles County, Inc. v. City of Los Angeles*, 136 Cal.App.4th 119 (2006); *Costa-Hawkinsion Apartment Assn., Inc. v. City of Santa Monica*, 41 Cal. 4th 1232, 1237-1238 (2007). Our analysis indicates that Costa-Hawkins' prohibition of rent control restrictions should not apply to the Replacement Units and BMR Units for two significant reasons detailed below.

The Restriction on the Parkmerced Project Falls Within an Explicit Exception to Costa-Hawkins

First, Costa-Hawkins contains an explicit exception to its prohibition of rent control restrictions. This exception is applicable to the Replacement Units and any on- or off-site BMR units provided under Section 415 of the Planning Code in the Parkmerced Project. Specifically, Costa-Hawkins provides that cities and counties may apply rent control restrictions to residences constructed after 1995 when:

> [t]he owner has otherwise agreed by contract with a public entity in consideration for a direct financial contribution or any other forms of assistance specified in Chapter 4.3 (commencing with Section 65919) of . . . the Government Code.

Although the City is not providing any direct financial contribution to the Parkmerced Project, the City proposes to contract with the project sponsor (via the Parkmerced Project Development Agreement) to provide the "forms of assistance" specified in Chapter 4.3 of the Government Code. The types of assistance set forth in Chapter 4.3 of the Government Code include an increase in the permitted residential density (a "density bonus"), and relaxation "of a site or construction condition, including, but not limited to, a height limitation, a setback requirement, . . . [or] a floor area ratio . . . ." Government Code Section 65919. The Development Agreement explicitly confers these types of assistance, including but not limited to: (i) eliminating maximum residential density controls, such that density is limited only by other Planning Code limitations, such as height, bulk, setbacks, open space, exposure, and unit mix, (ii) increasing the permitted height and bulk envelope for new buildings in at least 50% of the existing Project Site, and (iii) eliminating conditional use requirements for any new building exceeding 40 feet in height and for residential

demolitions. Moreover, additional types of assistance are specifically listed in Section 4.1 of the Development Agreement.

The forms of assistance provided by the City are also sufficient in amount to meet the requirements of Chapter 4.3 of the Government Code. Specifically, that chapter states that "it is the intent of the Legislature that the density bonus or other incentives offered by the city, county, or city and county pursuant to this chapter shall contribute significantly to the economic feasibility of [the Project]." Gov't Code Section 65917. Further, Chapter 4.3 states that concessions or incentives provided by the public agency must result in "identifiable, financially sufficient and actual cost reductions." Gov't Code Section 65915(k). Our client has confirmed that the increases in permitted density and building heights, and the other forms of assistance provided by the City under the Development Agreement significantly increase the financial feasibility of the Parkmerced Project. Our client has informed us that these forms of assistance provide a significant economic benefit to the Parkmerced Project and that the project would not be financially feasible without such assistance. Therefore, based on such information, we believe that such benefits would constitute forms of assistance for purposes of Chapter 4.3 of the Government Code. Indeed, in light of the significant cost of the public benefits provided by the Parkmerced Project and required by the development agreement, including the construction of new transit stations, intersection improvements, new parks and open space, and the realignment of the MUNI "M" Oceanview line, the Parkmerced Project would not be financially feasible without the forms of assistance granted by the City in the Development Agreement.

Costa-Hawkins Does Not Prohibit Parkmerced From Voluntarily Agreeing to Rent Control

Second, while no additional basis is needed to enforce the rental restrictions under our reasoning above, our analysis indicates that the language of Costa-Hawkins does not prohibit the project sponsor from entering a contractual agreement with the City to establish rent control restrictions applicable to the Replacement Units in the Parkmerced Project, and waiving its rights (as provided in the Development Agreement), so long as that the project sponsor enters into that contractual agreement without coercion from the City. The legal threshold for finding that a party has entered into a contract out of coercion is highly difficult to establish, and would arguably be impossible to establish with regard to the Development Agreement, which was initially proposed by the project sponsor (rather than the City) and provides a commensurate set of benefits and burdens for both the City and the project sponsor.

As discussed above, the language of Costa-Hawkins confers a statutory right on owners of residential real property to impose whatever rent they choose at the commencement of a tenancy. *Costa-Hawkinsion Apartment Assn., Inc. v. City of Santa Monica*, 41 Cal. 4th 1232,

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1237-1238 (2007). Costa-Hawkins confers this statutory right "notwithstanding any other provision of law." This phrase indicates that the right conferred may not be impaired by operation of law, but does not preclude a property owner from agreeing to impose certain rental rates or terms as part of a contract. Indeed, Costa-Hawkins does not speak to what rental rates a property owner can or should establish—to do so would be inimical to Costa-Hawkins's purpose in freeing property owners from regulation of the rents they charge for occupation of their property.

Instead, the statute's use of the term "may establish" indicates that the property owner retains the ability to choose the initial and subsequent rental rates for a dwelling or unit, but the statute does not bar the residential property owner from establishing whatever rates it chooses (including rent control rates). Ev. Code § 11 (use of word "'may' is permissive"); *Cobb v. San Francisco Residential Rent Stabilization and Arbitration Board*, 98 Cal.App.4th 345, 351 (2002) ("Civil Code section 1954.53, subdivision (a) permits landlords to impose whatever rent they choose at the commencement of a tenancy."); *see also Bisno v. Douglas Emmett Realty Fund 1988*, 174 Cal. App. 4th 1534, 1553 (2009) ("at heart Costa-Hawkins allows landlords to avoid local rent control ordinances and impose whatever rent they think the market will bear either at the start of a new tenancy or when an existing tenant sublets his unit.

Thus, although the plain language of Costa-Hawkins prohibits a governmental entity from limiting the exercise of the property owner's right by passing laws requiring the property owner to charge certain rental rates, but does not preclude the property owner from voluntarily entering into a contract regarding those rates. The property owner's decision to contractually agree to certain rates should be deemed to be an exercise of its statutory rights under Costa-Hawkins, rather than a waiver of its rights under that law.

General Waiver

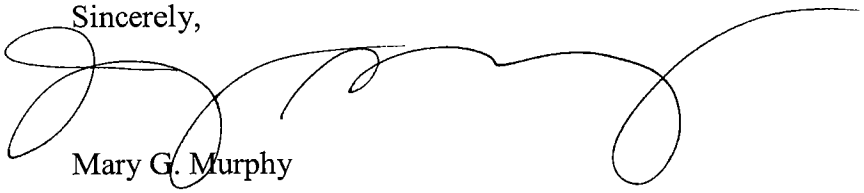
The Development Agreement also contains a general waiver by the Developer of rights under Costa Hawkins. At the public hearings about the Parkmerced Project, certain housing attorneys have also argued that the case *Embassy LLC v. City of Santa Monica ("Embassy Suites")* may operate to render the rent control provisions of the Parkmerced Project Development Agreement unenforceable or that the *Embassy* case renders the general waiver in the Development Agreement unenforceable. 185 Cal.App.4th 771, 777 (2010). We disagree with this conclusion.

Embassy Suites is a recent case from the Second Appellate District that considered whether a property owner could waive the protections afforded under an entirely different statute (the Ellis Act), and concluded that such rights were not contractually waivable. The Court reached this conclusion, however, because (among other reasons), the Ellis Act, unlike

Costa-Hawkins, explicitly prohibits the Developer and City from contractually restricting the property to rental use, unless, in exchange for such restrictions, the City provides some form of financial assistance to the property owner. *Id.* Thus, the *Embassy Suites* facts are distinguishable from the Parkmerced circumstances.

Thank you for your consideration of this matter.

Sincerely,



Mary G. Murphy

MGM/mgm