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Honorable Katherine Feinstein
Presiding Judge of the Superior Court
Civil Grand Jury
400 McAllister Street, Room 408
San Francisco, CA 94102

Re: Response to Grand Jury Report Regarding Parkmerced Development Project

July 21, 2011

Honorable Judge Feinstein,

On behalf of the Planning Department, I present our department's response to the 2010-2011 San Francisco Civil Grand Jury report to the public entitled, "The Parkmerced Vision: Government-By-Developer." Our response to each finding and recommendation, as requested by the Foreperson of the Civil Grand Jury in a letter dated May 12, 2011, is attached to this letter.

Sincerely,

John Rahaim
Planning Director

Attachments: Responses to Findings and Recommendations

cc: Linda A. Clardy, Foreperson, 2010-2011 San Francisco Civil Grand Jury
San Francisco Board of Supervisors
San Francisco Planning Commission
Mayor Ed Lee
Jennifer Matz, Director, Office of Economic and Workforce Development

CITY OF SAN FRANCISCO
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."

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