Org: GAO Clerk
COB. 2pages

ECONOMIC AND WORKFORCE DEVELOPMENT
JENNIFER MATZ, DIRECTOR

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

July 13, 2011

Presiding Judge of the Superior Court
The Honorable Katherine Feinstein
400 McAllister St., Room 008
San Francisco, Ca 94102

Dear Judge Feinstein:

On behalf of the Office of Economic & Workforce Development (OEWD), I present our department's response to the 2010-2011 San Francisco Civil Grand July 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,

Jennifer Matz

cc: Linda A. Clardy, Foreperson, 2010-2011 San Francisco County Civil Grand Jury
Honorable Members of the San Francisco Board of Supervisors
Mayor Ed Lee
Planning Director John Rahaim

FINDINGS & RESPONSES:

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. The Grand Jury does not specify what "potentially conflicting provisions of state law" that the DA must "override," we assume that the Grand Jury is referring to Chapter 4.3 of the California Government Code, popularly known as the Costa Hawkins Act. Contrary to the statements contained in Finding #1, Sections 4.1, 4.2 and 4.3 of the DA thoroughly explain how new rent control protections will be enforced consistent with state law and the Costa Hawkins Act for any new Replacement Unit provided to any Relocating Tenant on the Project Site. Rather than restating those sections in their entirety here, 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 DA 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. First, the DA provides many "penalties" and "disincentives" in the event that a future owner/developer does not fulfill any of 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 to the Project. 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 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. The provisions of the DA mandating that the rate of growth be proportionate to the construction of public benefits are innovative in that they exceed what is required even by the City's Better Neighborhoods Plans (which permit new housing development regardless of the City's implementation and construction of public benefits. 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. In other words, 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. Finally, the approximately $500M in public benefits in excess of existing Municipal Code requirements required by the DA were negotiated by the Office of Economic and Workforce Development (OEWD) in partnership with all affected City agencies, as part of a long-term, collaborative process.

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 Parkmerced 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.

To repeat: 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 DA 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 DA does not "presume demolition is necessary." It simply proposes a scope of development on the Project Site that allows the incremental one-for-one replacement and demolition of up to 1,583 rent-controlled garden apartments. The question of whether demolition is "necessary" is not the appropriate subject of the DA, but instead is a policy decision made by the San Francisco Board of Supervisors. 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 practical reason for the DA to include such hypothetical alternatives.

Perhaps the Grand Jury intended to direct this finding toward the certified EIR for the Project. 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 that included a large number of alternatives to the project, including an early version that studied the possibility of a "no-demolition" version that was determined to be infeasible and undesirable for a variety of policy reasons. One such reason is that any such "no-demolition" alternative would in fact require demolition of buildings located directly adjacent to existing residences (such as the car port and laundry buildings located at the center of each garden block) and the construction of new residential buildings literally in the backyards of the existing apartments was seen as infeasible. A copy of the EIR and the alternatives studied and rejected is posted on the Planning Department's website and was available for the Grand Jury to review as part of its investigative process.

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 gave 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. These protections were further bolstered in the DA at the request of President Chiu.

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 and applies to the Parkmerced Project.

RECOMMENDATIONS & RESPONSES:

1. Remove Section 2.2.2(h) of the DA.

   This recommendation will not be implemented because it is unreasonable and conflicts with the fundamental purpose of the DA. 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 the public improvements 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 DA 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 Grand Jury's legislative request is confusing, because nearly identical legislation was enacted by the San Francisco Board of Supervisors over 10 years ago and already applies to the Parkmerced Project. 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. The City Attorney confirmed that San Francisco has adopted such as ordinance, as set forth in San Francisco Administrative Code section 37.9A(b). Furthermore, section 4.1.2 of the DA expressly incorporates both California Government Code section 7060.2(d) and San Francisco Administrative Code section 37.9A(b), and clearly states that it is the intent of all parties to rely on this exception, and reiterates that the City and Developer would not be willing to permit demolition of any of the existing rent-controlled units on the Project Site if they could not impose the Rent Ordinance on the Replacement Units and satisfy the needs of existing and future tenants. Presumably without knowledge of Administrative Code section 37.9A(b) or section 4.1.2 of the DA, the Grand Jury concluded 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."*