Date: Jan. 24, 2012

Item No. 13 & 14
File No. 11080

SUNSHINE ORDINANCE TASK FORCE

AGENDA PACKET CONTENTS LIST*

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Completed by: Chris Rustom **Date:** Jan. 20, 2012

***This list reflects the explanatory documents provided**

~ Late Agenda Items (documents received too late for distribution to the Task Force Members)

** The document this form replaces exceeds 25 pages and will therefore not be copied for the packet. The original document is in the file kept by the Administrator, and may be viewed in its entirety by the Task Force, or any member of the public upon request at City Hall, Room 244.

CITY AND COUNTY OF SAN FRANCISCO

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MEMORANDUM

November 18, 2011:

ANONYMOUS VS. DEPUTY CITY ATTORNEY CHARLES SULLIVAN (11080)

COMPLAINT

THE COMPLAINANT ALLEGES THE FOLLOWING:

Complainant "Anonymous" alleges that Deputy City Attorney Charles Sullivan violated sections 67.7 (a), (b), (d); 67.15 (a)-(c); and 67.21(i) and (j) in connection with May 24, 2011 meetings of the Board of Supervisors' Land Use Committee.

COMPLAINANT FILES COMPLAINT:

On October 6, 2011, Anonymous filed a complaint with the Task Force.

JURISDICTION

The CAO is a charter department under the Ordinance. The Task Force therefore generally has jurisdiction to hear a complaint of a violation of the Ordinance against the CAO.

APPLICABLE STATUTORY SECTION(S):

- Administrative Code Section 67.7 governs descriptions of agenda items for a public meeting.
- Administrative Code Section 67.9 deals with when documents to be considered by members of a policy body must be made available to the public for inspection.
- Administrative Code Section 67.15 (a)-(b) deal with requirements for public comment on items on an agenda.
- Administrative Code Section 67.21(i) & (j) deal with the duties of the City Attorney in advising and defending City officials with regard to public meetings and public information.

APPLICABLE CASE LAW:

Please refer to cases cited in the analysis set out below.

ISSUES TO BE DETERMINED

Uncontested/Contested Facts: Anonymous offers no factual allegations or documentation to support their complaint. On November 17, 201,1 the Task Force administrator followed up by email to Anonymous with the following statement: "Can you provide

documentation to support your claims because the Deputy City Attorney has to write an instructional memo for each complaint for the Task Force and minus your documentation that memo may not be a factual representation of facts." Anonymous responded with the following statement: "The meeting I am pertaining to is for the BOS meeting on May 24, 2011." It is not clear whether this statement was meant to refer to the Land Use Committee meeting that day, the full BOS meeting that day, or both.

The following factual recital is derived primarily from my review of the video recordings of the May 24, 2011 Land Use Committee and full board meetings of the Board of Supervisors, as well as the agenda packets.

During its consideration of approval of an ordinance ratifying the Development Agreement ("DA") between the City and the Park Merced project developers, the Board of Supervisors ("BOS") held a series of meetings at which that Ordinance and the underlying DA were considered. These included the meeting of May 24, 2011, at which the DA was amended by the Land Use Committee and then referred to the full Board of Superiors without recommendation for its consideration later that same afternoon. They also included the full board meeting later that day, when the ordinance approving the amended DA was finally passed.

Land Use Committee Meeting

The May 24, 2011 Land Use Committee agenda included the following description of item 2, the Ordinance approving the DA:

> **110300**
>
> **[Development Agreement - Parkmerced]**
>
> **Sponsor: Elsbernd**
>
> Ordinance approving a Development Agreement between the City and County of San Francisco and Parkmerced Investors, LLC, for certain real property located in the Lake Merced District of San Francisco, commonly referred to as Parkmerced, generally bounded by Vidal Drive, Font Boulevard, Pinto Avenue and Serrano Drive to the north, 19th Avenue and Junipero Serra Boulevard to the east, Brotherhood Way to the south, and Lake Merced Boulevard to the west; making findings under the California Environmental Quality Act, findings of conformity with the City's General Plan and with the eight priority policies of Planning Code Section 101.1(b); and waiving certain provisions of Administrative Code Chapter 56.

In addition, the front page of the agenda contained the following language: "*Note: Each item on the [. . .] agenda may include the following documents: 1) Legislation 2) Budget and Legislative Analyst report 3) Department [ ] cover letter and/or report 4) Public correspondence. These items will be available for review at City Hall, Room 244, Reception Desk.*"

The Chair of the Land Use Committee began consideration of the DA during the May 24, 2011 meeting by allowing BOS President Chiu to introduce a series of amendments to the DA for consideration by the Committee. Supervisor Chiu first summarized those amendments, then

turned to City staff, including Mr. Yarne and DCA Charles Sullivan, to further describe the substance and effects of this proposed amendments to the DA. The participants described the amendments as intended to provide additional protections for tenants beyond those already provided by the DA. The Committee then took extensive public comment on the agenda item, including the proposed amendments.

President Chiu indicated during his remarks that copies of the proposed amendments had been made available to members of the public through his office and through the office of the Clerk of the Board of Supervisors.[1]

Following public comment, committee members adopted the proposed amendments without objection. Supervisor Weiner then moved to forward the Ordinance approving the amended DA to the full board that afternoon for its consideration, as a committee report, without recommendation from the committee. At that point, Supervisor Mar, the chair of the committee, stated that, due to the legal complexity of the proposed amendments, he favored continuing the item to give both supervisors and the public time to further digest the amendments before the amended DA was voted on by the committee. Based in part of this rationale, Supervisor Mar voted against the motion to refer the matter to the full board. Nevertheless, the motion to report the matter out to the full board passed, with Supervisors Weiner and Cohen voting in favor.

Prior to calling the question on the motion to refer to the full board, Supervisor Mar asked DCA Adams whether a continuance was legally required before taking a vote. Supervisor Mar asked if the amendments adopted by the Committee were "substantial" or could the Committee move forward that day and vote to refer the amended DA without continuing the item. DCA Adams replied that the "amendments made to the DA are within the scope of the notice of the meeting, [so the committee] can move forward without additional public comment."

Full Board of Supervisors Meeting

The May 24, 2011 full Board of Supervisors agenda included the following description of item 25, the Ordinance approving the DA:

> **110300**
>
> **[Development Agreement - Parkmerced]**
>
> **Sponsor: Elsbernd**
>
> Ordinance approving a Development Agreement between the City and County of San Francisco and Parkmerced Investors, LLC, for certain real property located in the Lake Merced District of San Francisco, commonly referred to as Parkmerced, generally bounded by Vidal Drive, Font Boulevard, Pinto Avenue and Serrano Drive to the north, 19th Avenue and Junipero Serra Boulevard to the east, Brotherhood Way to the south, and

[1] Supervisor Chiu's claim was disputed by members of the public during a previous hearing on another Sunshine Complaint by "Pastor Gavin." Anonymous has presented no factual allegations or evidence disputing Supervisor Chiu's contentions in support of this complaint, however.

Lake Merced Boulevard to the west; making findings under the California Environmental Quality Act, findings of conformity with the City's General Plan and with the eight priority policies of Planning Code Section 101.1(b); and waiving certain provisions of Administrative Code Chapter 56.

In addition, page 3 of the agenda contained the following language: "*Agenda Item Information: Each item on the Consent or Regular agenda may include the following documents: 1) Legislation 2) Budget and Legislative Analyst report 3) Department or Agency cover letter and/or report 4) Public correspondence. These items will be available for review at 1 Dr. Carlton B. Goodlett Place, City Hall, Room 244, Reception Desk on the Friday preceding a regularly scheduled Board meeting.*"

The full Board of Supervisors took up this agenda item at the beginning of its meeting later that afternoon. Board President Chiu recognized Supervisor Elsbernd to introduce the item, who gave a brief argument for why it was a beneficial project for the City. He then turned to his argument why the project was in the best interests of the residents of Park Merced, and gave the strongest possible protections to tenants, while also arguing that a failure to approve the project presented major risks that tenants would face significant rent increases for capital improvement "pass-throughs."

President Chiu then surrendered the chair to Supervisor Mirikarimi and was recognized to speak on the agenda item.[2] Supervisor Chiu then spoke to his focus on tenant protections as a part of this project and described and summarized the amendments that he introduced and were adopted by the Land Use Committee earlier that day. The chair then clarified that all supervisors had copies of the amendments that had been adopted in the committee meeting.

Supervisor Campos then spoke to his efforts to find a compromise between the developers and tenant representatives concerning possible additional tenant protections that might allow the project to be supported by these tenants. Supervisor Campos acknowledged that many of the ideas raised in those discussions were included in Supervisor Chiu's amendments adopted that day, but noted that they still did not satisfy the tenant advocates who were concerned with the uncertain state of the law. Supervisor Campos said he did not support the item because the tenant representatives were not satisfied and there remained legal uncertainty as to whether the tenant protections would survive a court challenge.

Supervisor Avalos then also opposed the ordinance for similar reasons enunciated by Supervisor Campos, as well as additional reasons related to the agreement itself. Supervisor Avalos then said he would be moving to amend the DA to add other tenant protections.

The chair then asked the DCA whether it was possible for the BOS to amend the DA in this manner. DCA Adams responded that a DA was a contract between two parties, the City and

[2] Before he could do so, a member of the public attempted to present public comment, was ruled out of order by the chair, and was threatened with removal from the chambers by the Deputy Sheriffs if she refused to stop her testimony. Later in Supervisor Chiu's comments, the same member of the public again began shouting and was removed from the board chambers.

the developer, and it was not possible for the BOS to unilaterally amend the DA without the consent of the developer. DCA Adams further opined that the ordinance approving the DA could be amended by the BOS, but not in such a way that it would impose binding terms on the parties without their consent. The chair then recognized other speakers while Supervisor Avalos considered this advice.

Supervisor Mar spoke about the Land Use Committee hearing that morning, stating that while the proposed project was otherwise admirable, he believed it would destroy the existing character of the neighborhood and end a way of life for an entire community. He further said he would like a continuance to allow participants to more carefully consider the 14 pages of amendments offered at the Land Use Committee meeting that morning.

The chair then asked the DCA what would be the effect of a continuance at that point in the procedural process of project approval. DCA Adams responded that the Planning Commission had approved a General Plan Amendment as part of its earlier review of the project, and that the BOS had 90 days to approve or reject the Commission's action. She further stated that the May 24, 2011 meeting was the last one at which the BOS could reject the GA amendment and its failure to act would result in automatic approval of the Commission's action.

Supervisor Avalos then moved he still wanted to move his proposed amendment to the DA, and asked the DCA why his amendment was legally different from those adopted that morning by the Land Use Committee. DCA Sullivan responded that the 14 pages of amendments adopted that morning had already been agreed to by the developer prior to their introduction.

Supervisor Campos then stated that there were 14 pages of "very extensive and substantive amendments" that had been adopted that morning, and asked the DCA how the adoption of such amendments could be legal under the Brown Act when the agenda description did not mention anything about such amendments. DCA Adams responded that the agenda notice for that item was so broad that it covered both the tenant protections that were already in the DA and the amendments that had been adopted, and while the BOS could continue the item and allow additional public comment, it was not required to do so. Supervisor Campos then asked whether the DCA could cite case law to support that opinion and whether the City Attorney's Office believed that the 14 pages of amendments were "substantive changes or non-substantive changes." DCA Adams responded that the term "substantive" as used in the governing Brown Act and Sunshine Ordinance provisions was a "term of art" and the amendments were not substantive "for that purpose." She then also stated that the amendments did contain changes that were otherwise substantial.

Supervisor Campos then asked what was the level of "substantive" or "substantial" that was needed to trigger a requirement that the matter be renoticed and heard again. DCA Sullivan responded that the ordinance itself, which was the agenda item in front of the BOS, was not being amended. He reviewed the wording of the ordinance, which generally described the DA, including certain specific tenant protections, and stated that ordinance approved a DA "substantially in the form that was in the BOS file for the agenda item. He further stated that, if the amendments had changed any of those aspects specifically described by the wording of the

ordinance, or if the amendments were such that they DA was no longer "substantially in the form" as that which was in the BOS file prior to the amendments, then it might require renoticing. Since it did not, no renoticing was required, he opined.

Supervisor Campos responded that the DCA's explanation confused him more than it clarified the matter, and that he believed taking action on the matter without a continuance and renoticing would be a violation of the Sunshine Ordinance and the Brown Act.

Supervisor Weiner then stated that he would be supporting the EIR and project that day. He then stated that he believed the project offered much stronger tenant projections than were included in the Trinity project previously passed by a former BOS. He then stated that he did not believe the amendments adopted that day by the Land Use Committee legally required any continuance of the legislation, as those amendments simply strengthened tenant protections that were already present in the DA, and thus did not substantially change the nature of the agenda item under consideration.

Supervisor Chiu then asked DCA Sullivan to review the tenant protections that were in the DA prior to his amendments, the tenant protections added by his amendments, and to offer an opinion on whether specific tenant protections would be enforceable. DCA Sullivan reviewed the legal context created by the state Costa Hawkins Act, which generally prohibits application of rent control to newly constructed apartment units, with some exceptions. DCA Sullivan explained why the City Attorney's Office believed that the specific tenant protections included in the DA were within the exceptions allowed by Costa Hawkins and would give the City a strong position in defending the application of rent control to replacement units in the Park Merced project, should they be attacked in court. He also discussed additional tenant protections in the DA that would provide for substantial liquidated damages should the rent control provisions of the DA be struck down by the courts, in order to provide the City with the "benefit of its bargain" in agreeing to the DA.

Supervisor Chu then expressed her view that the City had done everything possible to provide tenant protections and that the Chiu amendments only made these protections stronger.

The BOS then voted on the agenda item, which passed by a vote of 6-5.

The City Attorney's Office offered the following factual allegations in response to this complaint (10/18/11 email from Jack Song):

> The proposed ordinance at issue was for the approval of a development agreement "substantially in the form" on file with the Clerk of the Board (Ordinance 89-11, page 5, line 8), and included a delegation of authority to the Planning Director to make additional changes to the development agreement that the Planning Director determines, after consultation with the City Attorney, are in the "best interests of the City and that do not materially increase the obligations or liabilities of the City or decrease the benefits to the City" (Ordinance 89-11, page 6, lines 22 through 25). Other than a general project description, the only terms of the development agreement summarized in the body of the proposed

ordinance were certain tenant protection provisions (Ordinance 89-11, Section 4.A), which remained unchanged in the final ordinance that the Board approved. The proposed ordinance further included an express acknowledgement that the Board would not be willing to approve the development agreement without these critical tenant protections.

The development agreement in the Board file was approximately 200 pages including exhibits (excluding all of the plan documents that were incorporated by reference). The City held over 250 public meetings on the proposed project, including City board and commission hearings. City staff and officials held further meetings with tenants and interested parties throughout the negotiations, including meetings at the project site. The City Planning Department also posted multiple drafts of the development agreement on its website.

One of the main issues discussed throughout the public review process was the protections for existing tenants under the development agreement. At many of the public hearings, project opponents complained about the strength and enforceability of the tenant protections under state law. City staff and this office gave extensive testimony and advice on this issue at many public hearings, including as early as the public hearing at the Planning Commission on February 10, 2011 and then again at the Board hearings on May 24, 2011.

At the Board's Land Use Committee hearing on May 24, 2011, President Chiu described seven specific amendments to the development agreement, all of which were for the further benefit of the tenants and were a result of the extensive public comment to date. None of the changes contradicted or revised the specific tenant protections described in the ordinance . They added tenant protections and benefits, including provisions to allow tenants to stay together, potential rent reductions, additional moving benefits, and additional remedies if the developer reaches the agreement. President Chiu summarized these changes at the Land Use Committee hearing and at the full Board hearing. A written summary of the changes, as well as detailed text for changed language of the development agreement itself - marked to show the changes - was distributed to all Board members and to members of the public before the start of public comment. While the total number of pages showing the textual changes to the development agreement was 14, those pages included existing text from the development agreement for context and location, as well as the language of existing text from the development agreement that was deleted and replaced.

QUESTIONS THAT MIGHT ASSIST IN DETERMINING FACTS:

- Is compliance with any of the provisions of sections 67.7 or 67.15 that Anonymous alleges were violated, the responsibility of the DCA? Or are they responsibilities carried out by members of the legislative body advised by the DCA?

- What was the nature of the legal advice provided to the Supervisors by the Deputy City Attorney?
- Did it consist of advising the Supervisors as to the legal effect of amendments to the DA?
- Or was it for the purpose of advising the Supervisors how to evade or avoid the requirements of public meetings laws, in violation of section 67.21(i) of the Ordinance?
- In what way does the complainant allege that DCA Sullivan violated section 67.7 of the Ordinance, governing the adequacy of agenda descriptions?
- In what way does the complainant allege that DCA Sullivan violated section 67.15 (a)-(c) of the Ordinance, governing requirements for public comment on items on an agenda?
- In what way does the complainant allege that DCA Sullivan violated section 67.21(i) of the Ordinance, governing advising a City official for the purpose of denying access to the public?

LEGAL ISSUES/LEGAL DETERMINATIONS:

- Are any of the provisions of sections 67.7 or 67.15 that Anonymous alleges were violated, the responsibility of the DCA? Or are they responsibilities carried out by members of the legislative body advised by the DCA?
- Was the description of the agenda item for approval of the DA sufficient to put a member of the public on notice that they may wish to make additional inquiry about the matter?
- Were supporting documents available for public review as required by section 67.7?
- If made available to the public, were such documents available for review within the time periods required by section 67.9?
- Under section 67.15, was there a "substantial change" to the Ordinance approving the DA during the committee meeting that required additional public comment, beyond that which had been taken during the meeting?
- Does section 67.21(i) of the Ordinance purport to prohibit the City Attorney from advising Supervisors on the legal effect of amendments to a proposed ordinance such as the one approving the DA?
- If so, is this prohibition preempted by requirements under state law and the municipal Charter requiring that the City Attorney provide legal advice to City and County departments and requiring that departments be able to seek that advice from their counsel when needed?

SUGGESTED ANALYSIS

Agenda Description

It is unclear what Anonymous alleges was the deficiency in the agenda description of the Ordinance approving the DA. It also is unclear what Anonymous alleges was the action of the DCA that violated Section 67.7 of the Ordinance.

The California Attorney General has concluded that, under Government Code § 54954.2, the agenda must include a sufficient description "to inform interested members of the public about the subject matter under consideration so that they can determine whether to monitor or

participate in the meeting of the body." See *The Brown Act: Open meetings for Local Legislative Bodies.* The courts have held that, under the Brown Act, "where the subject matter to be considered is sufficiently defined to apprise the public of the matter to be considered and notice has been given in the manner required by law, the governing body is not required to give further special notice." *Phillips v. Seely* (1974) 43 Cal.App.3d 104, 120.

While section 67.7 of the Ordinance provides more specific guidance as to what is required for an agenda description to be "meaningful," those requirements are similar to those enumerated in the *Phillips* case, above. Section 67.7(b) provides that the description should be "sufficiently clear and specific to alert a person of average intelligence and education whose interests are affected by the item that he or she may have reason to attend the meeting or seek more information on the item." On the other hand, that same provision goes on to add that "[t]he description should be brief, concise and written in plain, easily understood English." Thus, there remains the tension between the requirements that a description be brief and plain, and that it also convey sufficient information to alert the reader that the committee may act on a matter about which the reader may have an interest and may wish to find out additional information. The Task Force therefore must decide whether the agenda description quoted above was legally sufficient under the requirements of the Brown Act and the Ordinance.

In addition, Section 67.7 also requires that the agenda "shall refer to any explanatory documents that have been provided to the policy body in connection with an agenda item [ ] and such documents shall be posted adjacent to the agenda or, if such documents are of more than one page in length, made available for public inspection and copying at a location indicated on the agenda during normal office hours." Page 1 of the agenda provides notice that such explanatory documents "will be available for review at City Hall, Room 244, Reception Desk." Therefore, the Task Force must decide whether the documents in question were next to the agenda at the time of the meeting, or otherwise available for review, as the agenda states.

In connection with this inquiry, the Task Force may wish to consider Section 67.9 of the Ordinance, which was not cited by Anonymous, but governs the time that such explanatory documents must be available for review by the public. Under those provisions, the explanatory documents must be available for review at approximately the same time they are made available to committee members, with some additional flexibility if they are made available to committee members only during consideration of the item. In the latter case, they should be made available immediately, or as soon thereafter as is practicable.

Finally, the Task Force may wish to consider whether, even if there was a violation of this provision, the DCA was the City official legally responsible for such a violation.

Public Comment

It is unclear how Anonymous alleges Section 67.15 was violated. It also is unclear what Anonymous alleges was the action of DCA Sullivan that violated that section of the Ordinance.

It appears from a review of the meeting video that public comment was allowed on the amendments to the DA during the May 24, 2011 committee meeting when they were introduced,

and that public comment was vigorous. Some members of the public requested that the item be continued so as to give them additional time to review the amendments before the offered public comment. Some members of the public stated that they had not yet seen a copy of the proposed amendments to the DA. DCA Sullivan offered no legal advice on this issue, although DCA Adams did.

Section 67.15(a) of the Ordinance is virtually identical to section 54954.3(a) of the Brown Act. Each provide that a legislative body need not take additional public comment on an item for which the public already has had an opportunity to address the body on the item, "unless the item has been ***substantially changed*** since the committee heard the item, ***as determined by the legislative body***." There appears to be no state case law that directly addresses what is meant by the term "substantially changed" as used in these two statutory provisions.[3] Nevertheless, several conclusions can be drawn.

First, it is important to note the rules governing statutory construction. To determine intent, one first turns to the words of the statute, itself. When the language of the statute is clear, one need go no further. However, when a provision is susceptible to more than one interpretation, one may look to the legislative history, the objects to be achieve, and the statutory scheme, in general. *Chafee v. San Francisco Public Library Commission* (*Chafee II*) (2005) 134 Cal.App.4th 109, 114. One must avoid an interpretation that renders a part of the statute "surplusage." *Chafee II, id.*

According to the language of the statutory provisions, the relevant inquiry is whether Ordinance approving the DA, which was the agenda item in question, was ***substantially changed*** by the amendments to the DA adopted by the Land Use Committee at the May 24, 2011 meeting, "***as determined by the legislative body***." In order to make that determination, there are two levels of analysis. First, the Task Force should consider the original ordinance approving the DA, at the time the meeting was held, and compare its provisions with the ordinance after the DA was amended by the Committee. There appears to be general agreement among Committee members and members of the public, during the May 24, 2011 hearing, that the DA already contained provisions intended to protect tenants, and that the amendments purported to offer additional tenant protections. The Task Force will need to decide whether, taken in their entirety, the amended DA created a *substantial change* in the ordinance approving the DA as it existed prior to the amendments adopted by the Committee.[4]

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[3] The Northern District U. S. Court did hold, however, that there was no "substantial change" justifying additional public comment where an agenda item was changed by deleting a phrase from a resolution calling for impeachment of President George Bush and Vice-President Cheney, after the resolution was considered by committee but prior to being voted on by the full Board of Supervisors. See *Jenkel v. CCSF* (2006) 2006 U.S. Dist. LEXIS 49923 at pp. 15-17.

[4] The City Attorney's Office argues in its response that there was no "substantial change" for two reasons. First, there already were significant tenant protections in the DA and therefore amendments offering additional tenant protections did not materially alter the agenda item under consideration. Second, the Ordinance adopting the DA already included a provision allowing the Planning Director to amend it in ways that were "in the best interests of the City and that [did] not materially increase the obligations or liabilities of the City or decrease the benefits to the

Second, state and local statutory provisions appear to lodge discretion with the legislative body in making the determination of whether amendments make a substantial change mandating a continuance and additional public comment. The interplay between obedience to a public duty (such as required public comment) and the exercise of discretion by a public official (such as making a determination whether an amendment triggers additional public comment) is most often analyzed in the context of a petition for a writ of mandate. Such a petition seeks to have a court force a public official to comply with an asserted public duty. In that context, courts have held that mandate "lies only when the petitioner shows the respondent failed to act upon a clear, ministerial duty to do so[.]" *International Federation of Professional & Technical Engineers, AFL-CIO v. City and County of San Francisco* (1999) 76 Cal.App.4th 213, 224. "[T]he writ of mandate is not a writ of right to be freely issued whenever a court disagrees with the policy of the administrative action." *Barnes v. Wong* (1995) 33 Cal.App.4th 390, 396. Accordingly, "mandamus will not lie to control the discretion of a public official or agency; that is, to force the exercise of discretion in a particular manner." *Gordon v. Horsley* (2001) 86 Cal.App.4th 336, 350-51; *Unnamed Physician v. Bd. Of Trustees of St. Agnes Medical Center* (2001) 93 Cal.App.4th 607, 618.; *see also, Hiatt v. Berkeley* (1982) 130 Cal.App.3d 298, 323.

While the Task Force is not a court considering a petition for a writ of mandate, the principles involved in analyzing this issue are similar and may provide guidance to the Task Force in considering the Land Use Committee's exercise of its delegated discretion in deciding whether amendments to the DA required additional public comment. Under such principles, the Task Force would need to find not merely that it disagrees with the decision of the Committee, but to find further that the Land Use Committee abused its discretion in determining that there was no "substantial change" in the ordinance approving the DA that would require a continuance. With regard to the actions of DCA Sullivan, both state law and the charter lodge substantial discretion with the City Attorney to provide its best advice to its clients (see further discussion below).

Finally, the Task Force may wish to consider whether, even if there was a violation of this provision, the DCA was the City official legally responsible for such a violation.

Legal Advice by City Attorney

In *Roberts v. City of Palmdale* (1993) 5 Cal.4th 363, the California Supreme Court was faced with an apparent conflict between principles of open government and secrecy when it looked at whether attorney-client privileged documents must be disclosed under the Public Records Act. In analyzing the issue, the court stated:

> A city [department] needs freedom to confer with its lawyers confidentially in order to obtain adequate advice, just as does a private citizen who seeks legal counsel [ ]. The public interest is served by the privilege because it permits local government agencies to seek advice that

City." Thus, argues the CAO, the Ordinance already would have allowed the Planning Director to make the changes the Committee added in the amendments through legislative action, and therefore the amendments did not substantially change the substance of the agenda item.

> may prevent the agency from becoming embroiled in litigation, and it may permit the agency to avoid unnecessary conflict with various members of the public.

City of Palmdale, supra, 5 Cal.4th at 380-381.

While the complaint before the Task Force in this instance does not directly involve the attorney-client privilege, it implicates the very principles that underlie that privilege: the need for City departments to obtain adequate advice from their legal counsel, the City Attorney. As *City of Palmdale* makes clear, City departmental clients should have the freedom to seek their counsel's best advice on how to craft proposed legislation to achieve their legislative goals, without the worry that such advice will be second-guessed by others who may seek to punish the attorneys who provided their best advice under the circumstances.

The San Francisco Charter vests in the City Attorney the sole authority and the duty to act as the City's independent legal advisor. *Charter Section 6.102.* By making the City Attorney the sole legal representative of City departments, officials, and employees, the Charter generally vests in that independently elected officer the full rights and obligations inherent in an attorney-client relationship under state law. In addition, subsection 4 of this charter section specifically includes among the obligations that the City Attorney owes to client departments the duty to provide legal advice. Moreover, as an independently elected official who acts as the legal representative of all City departments, officials, and employees, the CAO has full discretion in determining how to advise and represent his or her clients.

As a charter provision, this section would override the Sunshine Ordinance to the extent the two are in conflict. *City and County of San Francisco v. Patterson* (1988) 202 Cal.App.3d 95, 102-103. Where the Sunshine Ordinance seeks to impose requirements on City departments that are separate and distinct from those of the Brown Act, those distinct local requirements must give way to charter provisions with which they conflict. The Sunshine Ordinance is not cloaked in the supremacy of state law over local law simply because it addresses the same subject matter as the Brown Act. While provisions of state law may supersede charter requirements in certain circumstances, there is no provision in the Brown Act that prevents a City Attorney from advising her client as to the legal requirements imposed by that statute or similar, local statute, such as the Sunshine Ordinance.

In contrast, several requirements of state law ***do*** apply to the attorney client relationship created by Charter Section 6.102. For example, city and county lawyers are generally subject to the same ethical requirements as those in private practice when representing their clients. (See, e.g., *People ex rel. Younger v. Superior Court* (1979) 86 Cal.App.3d 180, 192; *Ward v. Superior Court* (1977) 70 Cal.App.3d 23, 30.) An attorney is required to apply the diligence, learning, and skill reasonably necessary to perform the legal services requested by the client. (Cal. Rules Prof. Conduct, Rule 3-110.) An attorney may breach the standard of care owed to the client if she fails to inform the client fully about its rights and the alternatives available to the client under the circumstances and the likelihood of their success. See *Considine Co. v. Shadle, Hunt & Hagar* (1986) 187 Cal.App.3d 760, 765. An attorney may not advise a client to violate the law, unless

the attorney believes in good faith that the law is invalid. (Cal. Rules Prof. Conduct, Rule 3-210; *Wolfrich Corp. v. United Services Automobile Assn.* (1983) 149 Cal.App.3d 1206, 1211.)

The Task Force is thus faced with the task of interpreting the requirements of Section 67.21(i), in light of these principles of state law that apply to the City Attorney's representation of its clients through Charter Section 6.102. Section 67.21(i) provides that the City Attorney's Office "**shall not act as legal counsel for any city employee or any person having custody of any public record *for purposes of denying access to the public.***" In providing adequate legal advice to City departments in crafting legislation, the City Attorney must at times analyze issues and craft legislative proposals under tight and demanding timelines. A Supervisor therefore may request assistance from the City Attorney's Office in understanding the best way to achieve their legislative goals and to draft legislative language to enact those goals, in time for a scheduled meeting of the legislative body. The City Attorney is obliged under the charter and under state law to provide such advice.

If Section 67.21(i) is interpreted to mean that the City Attorney is prohibited from advising client departments in the manner required by the charter and state law, then it must give way to those superior requirements of law. If, instead, Section 67.21(i) is interpreted as prohibiting the City Attorney from advising a client department to act in a manner the City Attorney believes would violate the valid provisions of the Sunshine Ordinance and the Brown Act, it is consistent with the charter and state law. Where there is a possible conflict between a statutory enactment and a superior law, "the enactment may be validated if its terms are reasonably susceptible to an interpretation consistent with the [superior law]. [ ] [T]he court should construe the enactment so as to limit its effect and operation to matters that may be [permissibly] [ ] prohibited." *Welton v. City of Los Angeles* (1976) 18 Cal.3d 497, 505. Therefore, where a statutory provision is susceptible to two interpretations, one of which would render it invalid and one of which would render it valid, it should be interpreted in the manner that renders it valid. Section 67.21(i) therefore should be interpreted to allow the City Attorney to provide its best advice in situations such as drafting and explaining the legal effect of an amendment to a development agreement before a legislative body for approval. It is difficult to see how the City Attorney offering such advice could be interpreted as being ***"for purposes of denying access to the public."*** Section 67.21(i) therefore would appear to have no bearing on the rendering of such advice.

Remedies

It is unclear from the complaint what remedies Anonymous is seeking should the Task Force conclude that the Ordinance was violated. It also appears that no remedy is available that would affect the validity of the legislative action of the Board of Supervisors should the Task Force find a violation on this complaint.

Prior to amendments to the Brown Act in 1986, the validity of an action taken in violation thereof was not affected by that violation. *Centinela Hospital Association v. Didi Hirsch Psychiatric Service* (1990) 225 Cal.App.3d 1586, 1598; *Stribling v. Mailliart* (1970) 6 Cal.App.3d 470, 474; *Adler v. City Council of Culver City* (1960) 184 Cal. App. 2d 763, 774.

The rationale of these holdings was that, in the absence of specific statutory remedies invalidating official action of a public body, the law was directory rather than mandatory. See *Stribling,* 6 Cal.App.3d at 474; *Adler,* 184 Cal. App. 2d at 774. In addition, in *Stribling*, the Court further held that then San Francisco Charter Section 19(f), which required that meetings of commission be open to the public, also was directory and not mandatory The Court therefore found that an alleged violation of this local charter provision would not invalidate action taken by a commission. *Stribling,* 6 Cal.App.3d at 475. The Sunshine Ordinance also does not include remedies allowing invalidation of a legislative act taken in violation of its provisions.

The Brown Act was amended in 1986 to provide for proceedings in state court to invalidate legislative actions taken in violation of certain of some of its provisions. See *Gov't Code Section 54960.1*. Such an action may be brought for a violation of requirements governing agenda descriptions (§ 54954.2), closed sessions (§ 54954.5), meetings concerning adoption of new taxes (§ 54954.6), special meetings (§ 54956), or emergency meetings (§ 54956.5). Absent these specific provisions of the Brown Act, the law remains the same for violations of public meeting provisions – a violation does not invalidate an act taken by the legislative body. In addition, the Brown Act specifies that these remedies are available through an action in state court for mandamus. For these reasons, the Task Force has no power to invalidate any action taken in violation of the Ordinance or the Brown Act.

CONCLUSION

THE TASK FORCE FINDS THE FOLLOWING FACTS TO BE TRUE:

THE TASK FORCE FINDS THE ALLEGED VIOLATIONS TO BE **TRUE OR NOT TRUE.**

Memorandum
Privileged & Confidential

DATE: November 18, 2011
PAGE: 15
RE: Anonymous v. DCA Sullivan (11080)

ATTACHED STATUTORY SECTION FROM CHAPTER 67 OF THE SAN FRANCISCO ADMINISTRATIVE CODE UNLESS OTHERWISE SPECIFIED

SECTION 67.7 - AGENDA REQUIREMENTS; REGULAR MEETINGS
(a) At least 72 hours before a regular meeting, a policy body shall post an agenda containing a ***meaningful description of each item of business*** to be transacted or discussed at the meeting. Agendas shall specify for each item of business the proposed action or a statement the item is for discussion only. In addition, a policy body shall post a current agenda on its Internet site at least 72 hours before a regular meeting.
(b) A description is meaningful if it is ***sufficiently clear and specific to alert a person of average intelligence and education whose interests are affected by the item that he or she may have reason to attend the meeting or seek more information on the item.*** The description should be ***brief, concise and written in plain, easily understood English***. It shall refer to any **explanatory documents** that have been provided to the policy body in connection with an agenda item, such as correspondence or reports, and ***such documents shall be posted adjacent to the agenda or, if such documents are of more than one page in length, made available for public inspection and copying at a location indicated on the agenda during normal office hours***."
(d) No action or discussion shall be undertaken on ***any item not appearing*** on the posted agenda, except that members of a policy body may respond to statements made or questions posed by persons exercising their public testimony rights, to the extent of asking a question for clarification, providing a reference to staff or other resources for factual information, or requesting staff to report back to the body at a subsequent meeting concerning the matter raised by such testimony.

SEC. 67.9. AGENDAS AND RELATED MATERIALS: PUBLIC RECORDS.
(a) Agendas of meetings ***and any other documents on file with the clerk*** of the policy body, when intended for distribution to all, or a majority of all, of the members of a policy body in connection with a matter anticipated for discussion or consideration at a public meeting ***shall be made available to the public.*** To the extent possible, such documents shall also be made available through the policy body's Internet site. However, this disclosure need not include any material exempt from public disclosure under this ordinance.
(b) Records which are subject to disclosure under subdivision (a) and which are intended for distribution to a policy body prior to commencement of a public meeting shall be made available for public inspection and copying upon request prior to commencement of such meeting, whether or not actually distributed to or received by the body at the time of the request.
(c) Records which are subject to disclosure under subdivision (a) and ***which are distributed during a public meeting but prior to commencement of their discussion shall be made available for public inspection prior to commencement of, and during, their discussion.***
(d) Records which are subject to disclosure under subdivision (a) and which are distributed during their discussion at a public meeting ***shall be made available for public inspection immediately or as soon thereafter as is practicable.***

Memorandum
Privileged & Confidential

DATE: November 18, 2011
PAGE: 16
RE: Anonymous v. DCA Sullivan (11080)

SEC. 67.15. PUBLIC TESTIMONY.
(a) Every agenda for regular meetings shall provide an opportunity for members of the public to directly address a policy body on items of interest to the public that are within policy body's subject matter jurisdiction, provided that no action shall be taken on any item not appearing on the agenda unless the action is otherwise authorized by Section 67.7(e) of this article. However, in the case of a meeting of the Board of Supervisors, **the agenda need not provide an opportunity for members of the public to address the Board on any item that has already been considered by a committee, composed exclusively of members of the Board, at a public meeting wherein all interested members of the public were afforded the opportunity to address the committee on the item, before or during the committee's consideration of the item, unless the item has been *substantially changed* since the committee heard the item, *as determined by the Board.***
(b) **Every agenda** for special meetings at which action is proposed to be taken on an item **shall provide an opportunity for each member of the public to directly address the body concerning that item prior to action thereupon.**
(c) A policy body may adopt reasonable regulations to ensure that the intent of subdivisions (a) and (b) are carried out, including, but not limited to, regulations limiting the total amount of time allocated for public testimony on particular issues and for each individual speaker. Each policy body shall adopt a rule providing that each person wishing to speak on an item before the body at a regular or special meeting shall be permitted to be heard once ***for up to*** three minutes. Time limits shall be ***applied uniformly*** to members of the public wishing to testify.

SEC. 67.21. - PROCESS FOR GAINING ACCESS TO PUBLIC RECORDS; ADMINISTRATIVE APPEALS.
(i) The San Francisco City Attorney's office shall act to protect and secure the rights of the people of San Francisco to access public information and public meetings and **shall not act as legal counsel for any city employee or any person having custody of any public record *for purposes of denying access to the public.***
(j) Notwithstanding the provisions of this section, the City Attorney may defend the City or a City Employee in litigation under this ordinance that is actually filed in court to any extent required by the City Charter or California Law.

SAN FRANCISCO MUNICIPAL CHARTER

SEC. 6.102. - CITY ATTORNEY.
The City Attorney shall:
1. Represent the City and County in legal proceedings with respect to which it has an interest;
[ ]
2. Represent an officer or official of the City and County when directed to do so by the Board of Supervisors, unless the cause of action exists in favor of the City and County against such officer or official;

3. Whenever a cause of action exists in favor of the City and County, commence legal proceedings when such action is within the knowledge of the City Attorney or when directed to do so by the Board of Supervisors, except for the collection of taxes and delinquent revenues, which shall be performed by the attorney for the Tax Collector;
4. Upon request, provide advice or written opinion to any officer, department head or board, commission or other unit of government of the City and County;
[ ]

SECTIONS 54950.ET SEQ. OF THE CAL. GOVERNMENT CODE (BROWN ACT)

SECTION 54954.2 - AGENDA; POSTING; ACTION ON OTHER MATTERS
(a) At least 72 hours before a regular meeting, the legislative body of the local agency, or its designee, shall post an agenda containing a ***brief general description of each item of business*** to be transacted or discussed at the meeting, including items to be discussed in closed session. A brief general description of an item generally need not exceed 20 words.

54954.3. OPPORTUNITY FOR PUBLIC TO ADDRESS LEGISLATIVE BODY; ADOPTION OF REGULATIONS; PUBLIC CRITICISM OF POLICIES
(a) Every agenda for regular meetings shall provide an opportunity for members of the public to directly address the legislative body on any item of interest to the public, before or during the legislative body's consideration of the item, that is within the subject matter jurisdiction of the legislative body, provided that no action shall be taken on any item not appearing on the agenda unless the action is otherwise authorized by subdivision (b) of Section 54954.2. However, the agenda need not provide an opportunity for members of the public to address the legislative body on any item that has already been considered by a committee, composed exclusively of members of the legislative body, at a public meeting wherein all interested members of the public were afforded the opportunity to address the committee on the item, before or during the committee's consideration of the item, **unless the item has been *substantially changed* since the committee heard the item, *as determined by the legislative body***. Every notice for a special meeting shall provide an opportunity for members of the public to directly address the legislative body concerning any item that has been described in the notice for the meeting before or during consideration of that item.
(b) The legislative body of a local agency may adopt reasonable regulations to ensure that the intent of subdivision (a) is carried out, including, but not limited to, regulations limiting the total amount of time allocated for public testimony on particular issues and for each individual speaker.
(c) The legislative body of a local agency shall not prohibit public criticism of the policies, procedures, programs, or services of the agency, or of the acts or omissions of the legislative body. Nothing in this subdivision shall confer any privilege or protection for expression beyond that otherwise provided by law.

SUNSHINE ORDINANCE TASK FORCE
1 Dr. Carlton B. Goodlett Place, Room 244, San Francisco CA 94102
Tel. (415) 554-7724; Fax (415) 554-7854
http://www.sfgov.org/sunshine

SUNSHINE ORDINANCE COMPLAINT

Complaint against which Department or Commission City Attorney's Office

Name of individual contacted at Department or Commission Charles Sullivan

☐ Alleged violation public records access
☑ Alleged violation of public meeting. Date of meeting May 24, 2011 BOS

Sunshine Ordinance Section 67.7 (a,b,d) 67.15 a-c, 67.21 i and j
(If known, please cite specific provision(s) being violated)

Please describe alleged violation. Use additional paper if needed. Please attach any relevant documentation supporting your complaint.

Board of Supervisors Meeting
67.7 (a-b, d) Agenda Requirements; Regular Meetings
67.15 (a-c) Public Testimony
67.21 (i and j) Process for Gaining Access to Public Records

Do you want a public hearing before the Sunshine Ordinance Task Force? ☑ yes ☐ no
Do you also want a pre-hearing conference before the Complaint Committee? ☐ yes ☑ no

(Optional)[1]
Name _____ Address _____

Telephone No. _____ E-Mail Address [redacted]@hotmail.com

Date _____ Signature _____

I request confidentiality of my personal information. ☑ yes ☐ no

[1] NOTICE: PERSONAL INFORMATION THAT YOU PROVIDE MAY BE SUBJECT TO DISCLOSURE UNDER THE CALIFORNIA PUBLIC RECORDS ACT AND THE SUNSHINE ORDINANCE, EXCEPT WHEN CONFIDENTIALITY IS SPECIFICALLY REQUESTED. YOU MAY LIST YOUR BUSINESS/OFFICE ADDRESS, TELEPHONE NUMBER AND E-MAIL ADDRESS IN LIEU OF YOUR HOME ADDRESS OR OTHER PERSONAL CONTACT INFORMATION. Complainants can be anonymous as long as the complainant provides a reliable means of contact with the SOTF (Phone number, fax number, or e-mail address).

07/31/08

Evidence
[redacted]
to:
sotf
10/25/2011 05:21 PM
Hide Details
From: [redacted] <[redacted]@hotmail.com>

To: <sotf@sfgov.org>

Hello Mr. Rustom:

The meeting I am pertaining to is for the BOS meeting on May 24, 2011.

> Subject: Re: Evidence
> To: [redacted]@hotmail.com
> From: sotf@sfgov.org
> Date: Tue, 25 Oct 2011 11:53:00 -0700
>
> There were several meetings that day. Which meeting video is your testimony
> dependent on?
>
> Chris Rustom
> Sunshine Ordinance Task Force
> City Hall, Rm. 244, San Francisco, CA 94102
> sotf@sfgov.org, (415) 554-7724, fax: (415) 554-7854
>
>
>
>
> From: [redacted] <[redacted]@hotmail.com>
> To: <sotf@sfgov.org>
> Date: 10/17/2011 06:22 PM
> Subject: Evidence
>

>
>
> Hello SOTF:
>
> The evidence that I am using is the video of the meeting on May 24, 2011.
>
> > Subject: Re:
> > To: [redacted]@hotmail.com
> > From: sotf@sfgov.org
> > Date: Thu, 13 Oct 2011 11:30:27 -0700
> >
> > Can you provide documentation to support your claims because the Deputy
> > City Attorney has to write an instructional memo for each complaint for
> the
> > Task Force and minus your documentation that memo may not be a factual
> > representation of facts. Also, please be aware that there are about 15
> > items that need to be heard ahead of you and, based on the number of
> > complaints, yours and many others stand a very low chance of being heard
> > this month.
> >
> >
> >
> >
> >
> > [redacted]
> > <[redacted]@hotma
> > il.com> To
> > <sotf@sfgov.org>
> > 10/11/2011 07:07 cc
> > PM
> > Subject
> >
> >
> >
> >
> >
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> >
> >
> >
> >
> >
> > Thank you for scheduling the complaints regarding the Board of
> Supervisors
> > meeting held on May 24, 2011 for October 25, 2011.
> >
>

re: Complaint Numbers 11067 and 11079 (against Cheryl Adams, Deputy City Attorney) and Complaint Numbers 11066 and 11080 (against Charles Sullivan, Deputy City Attorney)

Jack Song to: SOTF, Chris Rustom 10/18/2011 01:41 PM

October 18th, 2011
Chris Rustom
Sunshine Ordinance Task Force
1 Dr. Carlton B. Goodlett Place
City Hall, Room 244
San Francisco, CA 94102-4689

Re: Complaint Numbers 11067 and 11079 (against Cheryl Adams, Deputy City Attorney) and Complaint Numbers 11066 and 11080 (against Charles Sullivan, Deputy City Attorney)

Dear Mr. Rustom and Members of the Sunshine Ordinance Task Force:

We write this letter in response to the above complaints, all of which relate to the legal advice Deputy City Attorneys Cheryl Adams and Charles Sullivan gave to the Board of Supervisors (the "Board") at its Land Use Committee meeting on May 24, 2011 and then reiterated at the meeting of the full Board later that day. Cheryl Adams and Charles Sullivan advised that the Brown Act and the Sunshine Ordinance allowed the Board to consider and approve changes to the proposed Parkmerced development agreement at the Board's May 24, 2011 meeting without re-noticing the matter or conducting an additional public hearing. We explain that legal advice again here.

Summary of Advice

Neither the Brown Act nor the Sunshine Ordinance required re-noticing or an additional hearing on the proposed amendments summarized by President Chiu on May 24, 2011 for two reasons. First, the amendments were consistent with the title of the proposed ordinance and the critical terms of the development agreement as described in the ordinance. The Board made no changes to the ordinance itself, and the changes to the underlying development agreement were within the scope of reasonably foreseeable changes that could be made based upon the publicly noticed agenda description. Second, the amendments to the underlying proposed agreement were all within the parameters of the authority that the ordinance itself delegated to the Planning Director. The proposed ordinance approved a development agreement "substantially in the form" found in the Board's file, and authorized the Planning Director to make changes that are in the City's best interests and do not materially increase the City's obligations or liabilities or decrease the City's benefits. Because the Planning Director had the authority to make the proposed changes even after the Board's approval action, the Board had the authority to accept these changes during the Board approval process. In sum, the Board could have decided, as a policy matter, to re-notice the ordinance and hold another hearing. But the Board was not required to do so, and the Board acted lawfully in approving the ordinance.

Background

The proposed ordinance at issue was for the approval of a development agreement " *substantially in the form* " on file with the Clerk of the Board (Ordinance 89-11, page 5, line 8), and included a delegation of authority to the Planning Director to make additional changes to the development agreement that the Planning Director determines, after consultation with the City Attorney, are in the "*best interests of the City and that do not materially increase the obligations or liabilities of the City or decrease the benefits to the City* " (Ordinance 89-11, page 6, lines 22 through 25). Other than a general project description, the only terms of the development agreement summarized in the body of the proposed ordinance were certain tenant protection provisions (Ordinance 89-11, Section 4.A), which remained unchanged in the final ordinance that the Board approved. The proposed ordinance further included an express acknowledgement that the Board would not be willing to approve the development agreement without these critical tenant protections.

The development agreement in the Board file was approximately 200 pages including exhibits (excluding all of the plan documents that were incorporated by reference). The City held over 250 public meetings on the proposed project, including City board and commission hearings. City staff and officials held further meetings with tenants and interested parties throughout the negotiations, including meetings at the project site. The City Planning Department also posted multiple drafts of the development agreement on its website.

One of the main issues discussed throughout the public review process was the protections for existing tenants under the development agreement. At many of the public hearings, project opponents complained about the strength and enforceability of the tenant protections under state law. City staff and this office gave extensive testimony and advice on this issue at many public hearings, including as early as the public hearing at the Planning Commission on February 10, 2011 and then again at the Board hearings on May 24, 2011.

At the Board's Land Use Committee hearing on May 24, 2011, President Chiu described seven specific amendments to the development agreement, all of which were for the further benefit of the tenants and were a result of the extensive public comment to date. None of the changes contradicted or revised the specific tenant protections described in the ordinance. They added tenant protections and benefits, including provisions to allow tenants to stay together, potential rent reductions, additional moving benefits, and additional remedies if the developer breaches the agreement. President Chiu summarized these changes at the Land Use Committee hearing and at the full Board hearing. A written summary of the changes, as well as detailed text for changed language of the development agreement itself - marked to show the changes - was distributed to all Board members and to members of the public before the start of public comment. While the total number of pages showing the textual changes to the development agreement was 14, those pages included existing text from the development agreement for context and location, as well as the language of existing text from the development agreement that was deleted and replaced.

Analysis

The title of the proposed ordinance was: "Ordinance approving a Development Agreement between the City and County of San Francisco and Parkmerced Investors LLC, for certain real property located in the Lake Merced District of San Francisco, commonly referred to as Parkmerced, generally bounded by Vidal Drive, Font Boulevard, Pinto Avenue and Serrano Drive to the north, 19th Avenue and Junipero Serra Boulevard to the east, Brotherhood Way to the south, and Lake Merced Boulevard to the west; making findings under the California

Environmental Quality Act, findings of conformity with the City's General Plan and with the eight priority policies of Planning Code Section 101.1(b); and waiving certain provisions of Administrative Code Chapter 56."

The Brown Act requires a "brief general description" of the items of business to be transacted or discussed at a public meeting. Cal. Gov't Code § 54954.2. The Sunshine Ordinance requires a "meaningful description" of items to be discussed. S.F. Administrative Code § 67.7(a). To be meaningful, the item must be "sufficiently clear and specific to alert a person of average intelligence and education whose interests are affected by the item that he or she may have reason to attend the meeting or seek more information on the item." S.F. Administrative Code § 67.7(b).

The amendments to the Parkmerced development agreement introduced on May 24, 2011 did not require re-noticing or an additional hearing for two reasons.

First, the proposed changes to the underlying agreement in the Board file were consistent with, and did not require a single change to, the agenda item or the ordinance before the Board of Supervisors. Neither the Brown Act nor the Sunshine Ordinance require a new public notice or additional pubic hearing for changes to a proposed ordinance or an underlying agreement so long as the changes are within the scope of reasonably foreseeable changes that the Board may make to the item based on the agenda that was put forth to the public on that item. The changes to the underlying agreement were within the scope of reasonably foreseeable changes that debate could produce based upon the existing public agenda for this item. As noted above, there had been extensive debate, advice and public comment on the tenant protections throughout the public review process. It was reasonably foreseeable that the Board could require additional tenant protections as a condition to its approval of this development agreement. Accordingly, the addition of tenant protections on May 24, 2011 was within the public notice requirements of the item that was on the agenda for May 24, 2011.

Second, the proposed ordinance expressly delegated authority to the Planning Director to agree, on behalf of the City, to the very the changes that the Board accepted at the hearing (i.e., changes that are "in the best interests of the City and that do not materially increase the obligations or liabilities of the City or decrease the benefits to the City"). Because the ordinance without any changes would have empowered the Planning Director to agree to these changes after the Board approval action, and because the publicly noticed agenda item included this authority, the Brown Act and Sunshine Ordinance allowed the Board itself to accept these changes before or during its final hearing on the ordinance.

As our office advised the Board on May 24, 2011, the Board could decide as a policy matter to re-notice and hold an additional public hearing on the proposed ordinance after the introduction of President Chiu's changes to the development agreement, but it was not legally required to do so.

Best regards,

JACK SONG
Public Information Officer

OFFICE OF CITY ATTORNEY DENNIS HERRERA
San Francisco City Hall, Room 234

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