

Date: Jan. 24, 2012

Item No. 11 & 12

File No. 11066

SUNSHINE ORDINANCE TASK FORCE

AGENDA PACKET CONTENTS LIST*

- | | |
|-------------------------------------|---------------------------------|
| <input checked="" type="checkbox"/> | Anonymous v DCA Sullivan |
| <input type="checkbox"/> | _____ |
| <input type="checkbox"/> | _____ |
| <input type="checkbox"/> | _____ |
| <input type="checkbox"/> | _____ |
| <input type="checkbox"/> | _____ |
| <input type="checkbox"/> | _____ |
| <input type="checkbox"/> | _____ |
| <input type="checkbox"/> | _____ |
| <input type="checkbox"/> | _____ |
| <input type="checkbox"/> | _____ |

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.



DENNIS J. HERRERA
City Attorney

JERRY THREET
Deputy City Attorney

DIRECT DIAL: (415) 554-3914
E-MAIL: jerry.threet@sfgov.org

MEMORANDUM

October 19, 2011:

ANONYMOUS VS. DEPUTY CITY ATTORNEY CHARLES SULLIVAN (11066)

COMPLAINT

THE COMPLAINANT ALLEGES THE FOLLOWING:

Complainant "Anonymous" alleges that Deputy City Attorney Charles Sullivan violated sections 67.7 (a), (b),(d); 67.7-1(a); 67.8; 67.15 (a)-(b); and 67.21(i) of the Ordinance by acting as legal counsel for Land Use Committee of the Board of Supervisors for the purpose of denying access to the public, during the May 24, 2011 meeting of the Committee.

COMPLAINANT FILES COMPLAINT:

On September 7, 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 67.7-1 deals with the notice to be provided by City agencies to residents regarding any activity that may affect their property or the neighborhood.
- Administrative Code Section 67.8 deals with agenda requirements for closed sessions.
- 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) deals with the duties of the City Attorney with regard to public meetings and public information.

APPLICABLE CASE LAW:

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

**Memorandum
Privileged & Confidential**

DATE: October 19, 2011
PAGE: 2
RE: Anonymous v. DCA Sullivan (11066)

ISSUES TO BE DETERMINED

Uncontested/Contested Facts: Anonymous offers few factual allegations to support their complaint. The following factual recital is primarily comes from my review of the tape of the May 24, 2011 Land Use Committee meeting of the Board of Supervisors.

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 was considered. These included the meeting of May 24, 2011, at which the DA was amended and then referred to the full Board of Superiors without recommendation.

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 these 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.

**Memorandum
Privileged & Confidential**

DATE: October 19, 2011
PAGE: 3
RE: Anonymous v. DCA Sullivan (11066)

Anonymous alleges that, during DCA Sullivan's comments, he "admits to working on the 14 pages of revisions [to the DA] the night before the meeting. As a result, he is aware that only a few people have read the revisions. He violated the rights of the people by not allowing them to access public information and the opportunity to provide meaningful public comment."

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. This has been disputed by some members of the public, who said no copies of the amendments were available to them, only summaries of those amendments.

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, 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."

The City Attorney's Office offered the following factual allegations in response to this complaint:

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

**Memorandum
Privileged & Confidential**

DATE: October 19, 2011
PAGE: 4
RE: Anonymous v. DCA Sullivan (11066)

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, 67.7-1, 67.8, 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 Committee by the Deputy City Attorney?
- Did it consist of advising the Committee as to the legal effect of amendments to the DA?
- Or was it for the purpose of advising the Committee 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?

**Memorandum
Privileged & Confidential**

DATE: October 19, 2011
PAGE: 5
RE: Anonymous v. DCA Sullivan (11066)

- In what way does the complainant allege that DCA Sullivan violated section 67.7-1 of the Ordinance, governing the notice to be provided by City agencies to residents regarding legislative activity that may affect their property or the neighborhood?
- In what way does the complainant allege that DCA Sullivan violated section 67.7-8 of the Ordinance, governing agenda requirements for closed sessions?
- In what way does the complainant allege that DCA Sullivan violated section 67.15 (a)-(b) 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, 67.7-1, 67.8, 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?
- Did the proposed amendments to the DA trigger additional notice requirements under section 67.7-1 of the Ordinance beyond those already provided for consideration of the DA?
- Under section 67.15, was there a "substantial change" to 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 City Departments 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

**Memorandum
Privileged & Confidential**

DATE: October 19, 2011
PAGE: 6
RE: Anonymous v. DCA Sullivan (11066)

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.

Notice re Affect On Neighborhood

It is unclear how Anonymous alleges Section 67.7-1 was violated. It also is unclear what Anonymous alleges was the action of the DCA that violated that section of the Ordinance. I have no information as to what public notices were provided pursuant to this section, if any.

**Memorandum
Privileged & Confidential**

DATE: October 19, 2011
PAGE: 7
RE: Anonymous v. DCA Sullivan (11066)

The requirements of Section 67.7-1 as to public notices is similar to that of the Brown Act and Section 67.7 with regard to agenda items, with some differences. For example, any such notice must include "the effect of the proposal or activity." Therefore, with regard to the sufficiency of any notice under this section, the Task Force must decide whether it was brief concise and written in plain, easy to understand English. It also must decide whether any such notice met the additional requirements of 67.7-1(b), such as informing residents of the "effect of the proposal or activity." Finally, the Task Force may wish to consider whether the amendments adopted by the Land Use Committee on May 24, 2011 would have changed the "proposal" to such a degree as to require a new notice under this section.

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 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.¹ 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 achieved, and the statutory scheme, in general. *Chafee v. San Francisco Public Library Commission (Chafee II)* (2005) 134

¹ 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.

**Memorandum
Privileged & Confidential**

DATE: October 19, 2011
PAGE: 8
RE: Anonymous v. DCA Sullivan (11066)

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 the DA, which was the agenda item in question, was *substantially changed* by the amendments 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 DA, at the time the meeting was held, and compare its provisions with the DA after it 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 constituted a *substantial change* from the DA as it existed prior to the amendments adopted by the Committee.²

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

² 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 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.

**Memorandum
Privileged & Confidential**

DATE: October 19, 2011
PAGE: 9
RE: Anonymous v. DCA Sullivan (11066)

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 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 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

**Memorandum
Privileged & Confidential**

DATE: October 19, 2011
PAGE: 10
RE: Anonymous v. DCA Sullivan (11066)

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

**Memorandum
Privileged & Confidential**

DATE: October 19, 2011
PAGE: 11
RE: Anonymous v. DCA Sullivan (11066)

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 Land Use Committee 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: October 19, 2011
PAGE: 12
RE: Anonymous v. DCA Sullivan (11066)

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.

SECTION 67.7 -1 – PUBLIC NOTICE REQUIREMENTS

(a) Any public notice that is mailed, posted or published by a City department, board, agency or commission to residents residing within a specific area to inform those residents of a matter that may impact their property or that neighborhood area, shall be *brief, concise and written in plain, easily understood English*.

(b) The notice should *inform the residents of the proposal* or planned activity, the length of time planned for the activity, the *effect of the proposal or activity*, and a telephone contact for residents who have questions.

(c) If the notice informs the public of a public meeting or hearing, then the notice shall state that persons who are unable to attend the public meeting or hearing may submit to the City, by the time the proceeding begins, written comments regarding the subject of the meeting or hearing, that these comments will be made a part of the official public record, and that the comments will be brought to the attention of the person or persons conducting the public meeting or hearing. The notice should also state the name and address of the person or persons to whom those written comments should be submitted.

**Memorandum
Privileged & Confidential**

DATE: October 19, 2011
PAGE: 13
RE: Anonymous v. DCA Sullivan (11066)

SEC. 67.8. AGENDA DISCLOSURES: CLOSED SESSIONS.

(a) In addition to the brief general description of items to be discussed or acted upon in open and public session, the agenda posted pursuant to Government Code Section 54954.2, any mailed notice given pursuant to Government Code Section 54954.1, and any call and notice delivered to the local media and posted pursuant to Government Code Section 54956 shall specify and disclose the nature of any closed sessions by providing all of the following information:

(1) With respect to a closed session held pursuant to Government Code Section 54956.7:

LICENSE/PERMIT DETERMINATION:

_____ applicant(s)

The space shall be used to specify the number of persons whose applications are to be reviewed.

(2) With respect to every item of business to be discussed in closed session pursuant to government Code Section 54956.8:

CONFERENCE WITH REAL PROPERTY NEGOTIATOR

Property:

Person(s) negotiating:

Under negotiation:

Price: Terms of payment: Both: _____

The space under "Property" shall be used to list an address, including cross streets where applicable, or other description or name which permits a reasonably ready identification of each parcel or structure subject to negotiation. The space under "Person(s) negotiating" shall be used to identify the person or persons with whom negotiations concerning that property are in progress. The spaces under "Under negotiation" shall be checked off as applicable to indicate which issues are to be discussed.

(3) With respect to every item of business to be discussed in closed session pursuant to Government Code Section 54956.9, either:

CONFERENCE WITH LEGAL COUNSEL

Existing litigation:

_____ Unspecified to protect service of process

_____ Unspecified to protect settlement posture

or:

CONFERENCE WITH LEGAL COUNSEL

Anticipated litigation:

_____ As defendant _____ As plaintiff

The space under "Existing litigation" shall be used to specifically identify a case under discussion pursuant to subdivision (a) of Government Code Section 54956.9, including the case name, court, and case number, unless the identification would jeopardize the City's ability to effectuate service of process upon one or more unserved parties, in which instance the space in the next succeeding line shall be checked, or unless the identification would jeopardize the City's ability to conclude existing settlement negotiations to its advantage, in which instance the space

**Memorandum
Privileged & Confidential**

DATE: October 19, 2011
PAGE: 14
RE: Anonymous v. DCA Sullivan (11066)

in the next succeeding line shall be checked. If the closed session is called pursuant to Subdivision (b) or (c) of Section 54956.9, the appropriate space shall be checked under "Anticipated litigation" to indicate the City's anticipated position as defendant or plaintiff respectively. If more than one instance of anticipated litigation is to be reviewed, space may be saved by entering the number of separate instances in the "As defendant" or "As plaintiff" spaces or both as appropriate.

(4) With respect to every item of business to be discussed in closed session pursuant to Government Code Section 54957, either:
THREAT TO PUBLIC SERVICES OR FACILITIES Name, title and agency of law enforcement officer(s) to be conferred with:

or:
PUBLIC EMPLOYEE APPOINTMENT/HIRING
Title/description of position(s) to be filled:

SAN FRANCISCO ADMINISTRATIVE CODE CHAPTER 67 (SUNSHINE ORDINANCE)

PUBLIC EMPLOYEE PERFORMANCE EVALUATION
Position and, in the case of a routine evaluation, name of employee(s) being evaluated:

or:
PUBLIC EMPLOYEE DISMISSAL
Number of employees affected:

or:
(5) With respect to every item of business to be discussed in closed session pursuant to Government Code Section 54957.6, either:
CONFERENCE WITH NEGOTIATOR—COLLECTIVE BARGAINING
Name and title of City's negotiator:

Organization(s) representing:
_____ Police officers, firefighters and airport police
_____ Transit Workers
_____ Nurses
_____ Miscellaneous Employees

Anticipated issue(s) under negotiation:
_____ Wages
_____ Hours
_____ Benefits
_____ Working Conditions
_____ Other (specify if known)

**Memorandum
Privileged & Confidential**

DATE: October 19, 2011
PAGE: 15
RE: Anonymous v. DCA Sullivan (11066)

All

Where renegotiating a memorandum of understanding or negotiating a successor memorandum of understanding, the name of the memorandum of understanding:

In case of multiple items of business under the same category, lines may be added and the location of information may be reformatted to eliminate unnecessary duplication and space, so long as the relationship of information concerning the same item is reasonably clear to the reader. As an alternative to the inclusion of lengthy lists of names or other information in the agenda, or as a means of adding items to an earlier completed agenda, the agenda may incorporate by reference separately prepared documents containing the required information, so long as copies of those documents are posted adjacent to the agenda within the time periods required by Government Code Sections 54954.2 and 54956 and provided with any mailed or delivered notices required by Sections 54954.1 or 54956.

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.***

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**

**Memorandum
Privileged & Confidential**

DATE: October 19, 2011
PAGE: 16
RE: Anonymous v. DCA Sullivan (11066)

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.

**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.

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;
[]

**Memorandum
Privileged & Confidential**

DATE: October 19, 2011
PAGE: 17
RE: Anonymous v. DCA Sullivan (11066)

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**

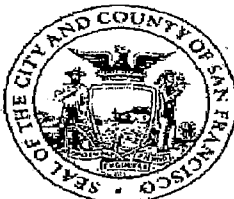
(a) Every agenda for regular meetings shall provide an opportunity for members of the public to directly address the legislative body on any item of interest to the public, before or during the legislative body's consideration of the item, that is within the subject matter jurisdiction of the legislative 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.

Sep 07 11 03:45p Sunshine Ord. Task Force
Sep 07 11 03:18p [redacted] [redacted]

415-554- [redacted] p.4
415- [redacted] p.4



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 Land Use Committee Meeting

Name of individual contacted at Department or Commission Charles Sullivan
City Attorney

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

Sunshine Ordinance Section 67.21(i) Protect and secure rights to public
(If known, please cite specific provision(s) being violated) information

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

67.7 Agenda Requirements, 67.7-1 Public Notice
67.33 Dept Head Declaration.

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]@gmail.com

Date Sept 7, 2011

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).

Land Use Committee Meeting May 24, 2011

Supervisor Malia Cohen	05/24/11	67.7 a - b, d Agenda Requirements, 67.7-1a Public Notice, 67.8 Agenda Disclosures, 67.15 a-b Public Testimony,	Stated that she would have preferred to have received the material ahead of time like the members in the audience however, Michael Yarne had spoken to her briefly the day before and therefore she was aware of the 14 pages of revisions had not been seen or read by members of the public. Shee votes to amend the Development Agreement and to forward the revisions before the full Board of Supervisors with less than 2 hours before it convenes.
Supervisor Scott Wiener	05/24/11	67.7 a - b, d Agenda Requirements, 67.7-1a Public Notice, 67.8 Agenda Disclosures, 67.15 a-b Public Testimony,	He is aware that members of the public have not seen or read the 14 pages of revisions. He votes to amend the Development Agreement and to forward the revisions before the full Board of Supervisors with less than 2 hours before it convenes.
Jennifer Matz - Executive Director Office Workforce Economic Development	05/24/11	67.7 a - b, d Agenda Requirements, 67.7-1 a, Public Notice, 67.8 Agenda Disclosures, 67.33 Dept Head Declaration	Executive Director Matz is Micharel Yarne's boss. There must be accountability regarding the affairs of the city. Employees must be supervised.
Michael Yarne - Project Manager His quote can be found 6 minutes : 10seconds at the beginning of the meeting regarding Parkmerced.	05/24/11	67.7 a - b, d Agenda Requirements, 67.7-1 a, Public Notice, 67.8 Agenda Disclosures, 67.15 a-b Public Testimony	At the beginning of the meeting regarding the 14 pages of revisions, Mr. Yarne states "generally organizational and technical clean up are made to the document. Changes are organizational in nature there are no substance to the changes only adding clarity to the document".

p4
p4

415-554-7854
415-554-7854

Sunshine Ord. Task Force
Sunshine Ord. Task Force

Sep 14 11 12:14p
Sep 14 11 11:52a

Land Use Committee Meeting May 24, 2011

Name	Date	Violation Section	Incident
Charles Sullivan, City Attorney He speaks shortly after Mr. Yarne His comments begin after Mr. Yarne, begins which is near the beginning of the tape.	05/24/11	67.7 a - b, d Agenda Requirements, 67.7-1a Public Notice, 67.8 Agenda Disclosures, 67.15 a-b Public Testimony, 67.21 (f) Access to Public Records	In his own words Attorney Sullivan admits to working on the 14 pages of revisions the night before the meeting. As a result, he is aware that only a few people have read the revisions. He violated the rights of the people by not allowing them to access public information and the opportunity to provide meaningful public comment.
Cheryl S. Adams, City Attorney Her comments are made near the very end of the meeting. The time on the tape is 3hrs:2min:50sec	05/24/11	67.7 a - b, d Agenda Requirements, 67.7-1a Public Notice, 67.8 Agenda Disclosures, 67.15 a-b Public Testimony, 67.21 (f) Access to Public Records	In her own words Attorney Adams states "The amendments made to the development agreement are within the scope for the notice of the meeting. You can move forward without additional public comments". These comments are made near the very end of the meeting.
John Rahaim, SF Planning Director	05/24/11	67.7 a - b, d Agenda Requirements, 67.1-1 a Public Notice, 67.8 Agenda Disclosures, 67.33 Dept Head Declaration	Mr. Rahaim's signature is on the document. At some point he must have been apprised of the changes to the documents. He knows that the mailing of the agenda and publication of the agenda are no longer the same because substantial changes have been made to the document. He is accountable as Dept Director.
Board Supervisor David Chitu	05/24/11	67.7 a - b, d Agenda Requirements, 67.7-1a Public Notice, 67.8 Agenda Disclosures, 67.15 a-b Public Testimony,	As President of the Board he violated his fiduciary responsibility twice by introducing the amendments at the meeting. Second the public did not have the opportunity to read the Phantom 14 pages of revisions. The amendments were forwarded to the full Board with less than 2 hours before it was to convened.

p. 5

415-554-7854

Sunshine Ord. Task Force

Sep 14 11 12:15p
Sep 14 11 11:52a



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 public 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 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

1 Dr. Carlton B. Goodlett Place
San Francisco, California 94102-4682

(415) 554-4653 Direct
(415) 554-4700 Reception
(415) 554-4715 Facsimile
(415) 554-6770 TTY
www.sfcityattorney.org