

1 ANDREW J. WIEGEL, ESQ. SBN 75204  
2 CURTIS F. DOWLING, ESQ. SBN 188091  
3 LAW OFFICES OF WIEGEL & FRIED  
4 414 Gough Street, Second Floor  
5 San Francisco, CA 94102-4416  
6 Tel.: (415) 552-8230

7  
8 Attorneys for Plaintiff & Petitioner  
9 JOHN HICKEY BROKERAGE

ENDORSED  
FILED  
San Francisco County Superior Court

JUN 14 1999

ALAN CARLSON, Clerk  
BY: CYNTHIA S. [unclear]  
Deputy Clerk

10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA  
IN AND FOR THE CITY & COUNTY OF SAN FRANCISCO  
UNLIMITED CIVIL JURISDICTION

JOHN HICKEY BROKERAGE, a  
California corporation  
Plaintiffs & Petitioners

v.

CITY & COUNTY OF SAN  
FRANCISCO; SAN FRANCISCO  
PLANNING COMMISSION; SAN  
FRANCISCO RESIDENTIAL RENT  
STABILIZATION AND ARBITRATION  
BOARD; WILLIAM VELASQUEZ;  
LOLA MCKAY; DOES 1 through 100,  
inclusive

Defendants & Respondents

Case No.: 303023

~~PROPOSED~~ ORDER GRANTING WRIT  
OF MANDATE

The motion of petitioner JOHN HICKEY BROKERAGE for a peremptory writ of  
mandate came on regularly for hearing on May 25, 1999, at 9:30 a.m., in department 301 of the  
above-entitled Court, before the Honorable David A. Garcia, presiding. Petitioner JOHN  
HICKEY BROKERAGE was represented by Andrew J. Wiegel, Curtis F. Dowling, and Jak S.  
Marquez of Wiegel & Fried, respondents CITY & COUNTY OF SAN FRANCISCO, the SAN  
FRANCISCO PLANNING COMMISSION, and the SAN FRANCISCO RESIDENTIAL RENT  
STABILIZATION AND ARBITRATION BOARD were represented by deputy city attorney

1 Andrew W. Schwartz, and respondent LOLA McKAY was represented by Raquel Fox of the  
2 Tenderloin Housing Clinic. After consideration of all papers and oral argument by counsel, this  
3 matter was taken under submission. After further review, this court makes the following ruling:

4           The Ellis Act (Gov. Code §§ 7060 et seq.) preempts San Francisco Planning Code  
5 § 209.10 to the extent it requires a conditional use permit to owner-occupy property which is  
6 already zoned for residential dwelling and which is withdrawn from the rental market pursuant to  
7 the provisions of the Ellis Act. In creating uncertainty as to whether an owner of withdrawn  
8 property can make a use of that property which is already permitted as of right, § 209.10 poses an  
9 impermissible obstacle to, and attaches a prohibitive price on, such withdrawal of property already  
10 zoned for residential dwelling, and to be subsequently used by property owners after withdrawal  
11 for owner-occupancy. See Bullock v. City & County of San Francisco, (1990) 221 Cal.App.3d  
12 1072; Los Angeles Lincoln Place Investors, Ltd. v. City of Los Angeles, (1997) 54 Cal.App.4th  
13 53. Section 209.10 also impermissibly bases land use decisions concerning the subsequent uses of  
14 such withdrawn property on the goal of keeping such property in the rental market, if at all  
15 possible. See First Presbyterian Church v. City of Berkeley, (1997) 59 Cal.App.4th 1241, 1253.

16           This court further finds that JOHN HICKEY BROKERAGE is not required to  
17 exhaust any administrative remedies which may be available under § 209.10 prior to asserting its  
18 claim of preemption. See Professional Fire Fighters, Inc. v. City of Los Angeles, (1963) 60  
19 Cal.2d 276, 287.


*DW* 20           ~~This court further finds that § 209.10, to the extent that it requires a property  
21 owner to apply for permission from the SAN FRANCISCO PLANNING COMMISSION to  
22 make a use which that property owner is already permitted to make as a matter of right, is  
23 arbitrary, capricious, and irrational. Notwithstanding this fact, § 209.10 then compounds this  
24 facial defect by exempting owners of buildings with two units or less from its requirements, while  
25 compelling owners of buildings with 3 units or more to seek permission to make a use already  
26 permitted as of right. There is no rational basis for applying § 209.10 in this manner. Section  
27 209.10 therefore partially facially violates the Equal Protection Clauses of the 14th Amendment of  
28 the United States Constitution and Art. I, § 7 of the California Constitution.~~

1 This court further finds that the Ellis Act preempts § 12.18 of the Rules and  
2 Regulations of the San Francisco Residential Rent Stabilization and Arbitration Board. As the  
3 members of the Rent Board are not elected, but rather “serve at the pleasure of the Mayor” (see  
4 San Francisco Administrative Code § 37.4(a)), § 12.18 is not a “regulation adopted after public  
5 notice and hearing by a public body of a public entity, if the members of the body have been  
6 elected by the voters of the public entity,” as required by Government Code § 7060.5.

7 WHEREFORE, the Writ of Mandate is HEREBY GRANTED. The CITY &  
8 COUNTY OF SAN FRANCISCO, and its officers, agents, boards, directors, commissions,  
9 agencies, employees, servants, and otherwise, and specifically including the SAN FRANCISCO  
10 PLANNING COMMISSION, are HEREBY ORDERED to forever refrain and desist from  
11 applying San Francisco Planning Code § 209.10 to or against any attempt of petitioner, or of  
12 petitioner’s successors-in-interest, to reside in or owner-occupy 53-59 Alvarado Street, San  
13 Francisco, California, or to or against any attempt of a similarly-situated property owner to  
14 owner-occupy withdrawn property when residential dwelling is otherwise a use permitted as of  
15 right under applicable zoning restrictions. The CITY & COUNTY OF SAN FRANCISCO, and  
16 its officers, agents, boards, directors, commissions, agencies, employees, servants, and otherwise,  
17 and specifically including the SAN FRANCISCO RESIDENTIAL RENT STABILIZATION  
18 AND ARBITRATION BOARD, are further HEREBY ORDERED to forever refrain and desist  
19 from applying § 12.18 of the Rules and Regulations of the San Francisco Residential Rent  
20 Stabilization and Arbitration Board to or against anyone, including petitioner and its successors-  
21 in-interest with respect to 53-59 Alvarado Street, San Francisco, California.

22 Let a peremptory writ of mandate issue to this effect.

23 Dated: 6/11, 1999

24   
25 HON. DAVID A. GARCIA  
26 JUDGE OF THE SUPERIOR COURT

27 John Hickey Brokerage v. C.C.S.F., et al.  
28 S.F. Superior Court case #303023