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January 19, 2012

REPORT TO THE HONORABLE MAYOR AND CITY COUNCILMEMBERS

SUPPLEMENTAL COUNCIL DOCKET ITEM ON JANUARY 23, 2012, REGARDING  
ROLES OF SUCCESSOR AGENCY AND OVERSIGHT BOARD UNDER AB X1 26

### INTRODUCTION

It is anticipated that, during the 6:00 p.m. meeting on January 23, 2012, the City Council of the City of San Diego (Council) will discuss the future role of the successor agency and the oversight board in administering existing obligations and winding down operations of the Redevelopment Agency of the City of San Diego (Agency). The Council recently decided that the City will carry out the role of the Agency's successor agency and will assume the Agency's housing assets and functions in accordance with the State legislation that eliminates all redevelopment agencies (RDAs) throughout California. San Diego Resolution No. R-307238 (Jan. 12, 2012).

This Report provides a brief summary of the opinion recently issued by the California Supreme Court (Supreme Court) in response to litigation filed in July 2011 by the California Redevelopment Association, the League of California Cities, and other entities (CRA Litigation) to challenge the constitutionality of the two redevelopment-related bills commonly known as AB x1 26 (AB 26) and AB x1 27 (AB 27). This Report also generally describes pending lawsuits in Sacramento Superior Court and ongoing State legislative efforts that could delay, prevent, or modify the implementation of AB 26, which otherwise will result in the dissolution of all RDAs as of February 1, 2012. Finally, this Report discusses the governance structure of the City in its capacity as the Agency's successor agency, as well as the respective roles of a successor agency and an oversight board in implementing the provisions of AB 26.

### QUESTIONS PRESENTED

1. What is the role of a successor agency in implementing the provisions of AB 26?
2. What is the governance structure of the City in its capacity as the Agency's successor agency under AB 26?
3. What is the role of an oversight board in implementing the provisions of AB 26?

## SHORT ANSWERS

1. Under AB 26, a successor agency is designated to administer existing enforceable obligations of each former RDA and to wind down the operations of each former RDA, subject to the review and approval of the oversight board and certain State entities. Among other things, the successor agency must transfer to the local county auditor-controller, for pro rata distribution to certain local taxing entities, the unencumbered balance of the former RDA's funds and the proceeds of the sales of the former RDA's assets and properties, after such sales have been completed expeditiously at the oversight board's direction.

2. AB 26 is silent on the exact governance structure of a successor agency. In other words, AB 26 does not contain any provisions that purport to modify the current governance structure of the City, acting in its capacity as the successor agency to the Agency under AB 26. Consequently, the current governance structure of the City will remain the governance structure of the City in its capacity as the successor agency to the Agency under AB 26. The San Diego Charter directs the governance structure of the City, both in its general capacity as a municipal corporation and in its capacity as the Agency's successor agency under AB 26.

3. AB 26 requires the formation of an oversight board, composed of seven members, to oversee the actions and decisions of the successor agency. The oversight board must direct the former RDA to perform various actions, including the expeditious disposal of the former RDA's assets and properties in a manner aimed at maximizing value for the benefit of the local taxing entities. In addition, subject to final review and approval by the State Department of Finance, the oversight board must approve several specified types of actions by the successor agency before those actions become effective.

## BACKGROUND

### A. Two Redevelopment Bills

The two redevelopment bills, AB 26 and AB 27, were approved simultaneously by the State Legislature on June 15, 2011, and signed by Governor Edmund G. Brown Jr., on June 28, 2011. AB 26 contains two main components. First, under Part 1.8 of AB 26, all RDAs must generally refrain from undertaking new redevelopment activities during a so-called "freeze period" that commenced on June 28, 2011. Second, under Part 1.85 of AB 26 (Dissolution Provisions), all RDAs are dissolved, and successor agencies must wind down their operations, after the freeze period has ended. AB 27 allows cities and counties to continue to operate their counterpart RDAs by making "voluntary" continuation payments to the local county auditor-controller for distribution to local taxing entities.

### B. Supreme Court's Opinion

On December 29, 2011, the Supreme Court issued its final opinion in the CRA Litigation, which upheld AB 26 and invalidated AB 27. The Supreme Court concluded that AB 26 and AB 27 are severable from one another, such that AB 26 may be enforced independently from AB 27. The Supreme Court established a modified set of deadlines for the implementation of AB 26, to account for the circumstance in which the Supreme Court had suspended the Dissolution Provisions for approximately four months while deciding the merits of the CRA Litigation.

Barring the issuance of a contrary court order or the passage of new legislation, the Supreme Court's decision means that the Agency, as with all other RDAs throughout California, will be dissolved under AB 26 as of February 1, 2012, and will not be allowed to continue to operate by having the City make the continuation payments under AB 27.

### **C. Pending Lawsuits in Sacramento Superior Court**

Various local jurisdictions in California have filed at least two separate lawsuits in Sacramento Superior Court, raising legal arguments that were not decided by the Supreme Court in the CRA Litigation. It is possible that additional lawsuits have been, or will be, initiated soon. In each of the two known lawsuits, the plaintiffs have filed a motion seeking an immediate injunction against enforcement of AB 26. Judge Lloyd G. Connelly of the Sacramento Superior Court will hold a hearing on those two motions concurrently at 1:30 p.m. on January 27, 2012, and is expected to issue a ruling on the motions before RDAs are scheduled to dissolve on February 1, 2012, by operation of AB 26.

In the first lawsuit, the City of Cerritos and other cities and RDAs filed a Complaint for Declaratory and Injunctive Relief and a Petition for Writ of Mandate in Superior Court in the County of Sacramento on September 26, 2011 (Cerritos Litigation), challenging AB 26 on various constitutional grounds. The Superior Court postponed its consideration of the Cerritos Litigation pending the Supreme Court's issuance of its final opinion in the CRA Litigation. The plaintiffs in the Cerritos Litigation also filed an amicus brief in the CRA Litigation, which set forth the same constitutional arguments against AB 26 presented in the Cerritos Litigation. Footnote 2 of the Supreme Court's opinion in the CRA Litigation confirmed that the Supreme Court did not consider the arguments presented in that amicus brief, thereby leaving open the opportunity for cities and RDAs to pursue additional litigation challenging the validity or enforcement of AB 26.

Among other things, the plaintiffs in the Cerritos Litigation contend that AB 26 violates the following laws: (i) the prohibition under the Contracts Clause against legislative impairment of existing obligations, such as various financing arrangements and bond agreements of RDAs; (ii) the constitutional requirement of a two-thirds legislative vote to adopt legislation that alters local agencies' pro rata shares of property tax revenues; (iii) the constitutional requirement of a two-thirds vote to adopt any appropriations bill; (iv) the "single subject rule" in the California Constitution; and (v) the constitutional requirement for the Governor to sign the main budget bill before signing AB 26.

In the second lawsuit, the City of Carlsbad and other cities and RDAs filed a Petition for Writ of Mandate and a Complaint for Declaratory Relief and Injunction on January 11, 2012 (Carlsbad Litigation). The plaintiffs in the Carlsbad Litigation raise a single legal issue; they cite Section 14 of AB 26 as the basis for their contention that AB 26 cannot become effective in light of the Supreme Court's invalidation of AB 27. Section 14 of AB 26 states that AB 26 shall take effect contingent upon the enactment of AB 27 and only if the text of AB 27 is added to the California Community Redevelopment Law. The plaintiffs assert that, as a result of its invalidation, AB 27 must be treated as if it never existed, and thus a necessary condition precedent to the effectiveness of AB 26 has not been met and cannot be met in the future.

#### **D. Ongoing State Legislative Efforts**

At least two proposed new bills have been drafted in response to the Supreme Court's decision. A "clean-up" bill, known as SB 654, seeks to remove several ambiguities and gaps in the overall scheme of AB 26, thereby allowing a more streamlined implementation of AB 26. Another bill, SB 659, seeks to postpone the dissolution deadline for RDAs for at least two months beyond February 1, 2012. The sole stated purpose of SB 659 is to delay the dissolution of RDAs temporarily in order to afford an opportunity to address important legal, financial, and practical issues related to the dissolution phase that could not otherwise be addressed after RDAs have been dissolved. If adopted, SB 659 also could allow sufficient time for RDAs to prepare for an orderly winding down of their operations, as well as for the State Legislature to craft potential new legislation that creates an alternative to the current redevelopment program and promotes job creation, urban renewal, and affordable housing in local jurisdictions.

In order to take effect immediately as urgency statutes, SB 654 and SB 659 would need to be passed by a two-thirds supermajority of the State Legislature and signed by the Governor. If SB 659 or similar postponement legislation has not been approved and signed before February 1, 2012, then all RDAs in California will be dissolved as of that date.

### **DISCUSSION**

#### **A. The Role of a Successor Agency**

##### **1. Introduction**

Under AB 26, a successor agency is designated to administer existing enforceable obligations of each former RDA and to wind down the operations of each former RDA, subject to the review and approval of the oversight board and certain State entities, including the State Controller and the State Department of Finance (DOF).

##### **2. Scope of Enforceable Obligations**

When the Dissolution Provisions become effective (scheduled for February 1, 2012), the definition of an "enforceable obligation" will be the same in most respects, but narrower in other respects, compared to the definition that applies during the freeze period in Part 1.8 of AB 26.<sup>1</sup> Cal. Health & Safety Code §§ 34167(d), 34171(d). The definition of an "enforceable obligation" will continue to include several main categories, as follows: (i) outstanding bonds, including debt service and reserve set-asides, owed by the former RDA; (ii) loans of moneys borrowed by the former RDA for a lawful purpose; (iii) payments required by the federal government, preexisting obligations to the State or obligations imposed by State law (except for statutory and contractual pass-through payments), and legally enforceable payments required in connection with the

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<sup>1</sup> This Office is evaluating to what extent various existing agreements and obligations of the Agency, including the debt-related agreements between the Agency and the City, and the Agency's operating agreements with Centre City Development Corporation (CCDC) and Southeastern Economic Development Corporation (SEDC), may be adversely affected when the narrower definition of an "enforceable obligation" becomes applicable under the Dissolution Provisions. A detailed evaluation of these issues is outside the scope of this Report.

employees of the former RDA, such as pension payments and obligations conferred through a collective bargaining agreement; (iv) judgments or settlements entered by a court of competent jurisdiction, and binding arbitration decisions against the former RDA; (v) any legally binding and enforceable agreement or contract that is not otherwise void as violating the debt limit or public policy; (vi) contracts or agreements necessary for the administration or operation of the successor agency, such as leases of office space and insurance expenses; and (vii) amounts borrowed from or payments owing to the Low and Moderate Income Housing Fund of the former RDA, which had been earlier deferred. Cal. Health & Safety Code § 34171(d)(1).

Yet, the Dissolution Provisions will cause the definition of an “enforceable obligation” to be narrowed in a couple of important ways. First, subject to limited exceptions, enforceable obligations will exclude all agreements, contracts, and arrangements between the former RDA and its sponsoring city.<sup>2</sup> Cal. Health & Safety Code § 34171(d)(2). Second, enforceable obligations will exclude agreements between the former RDA and other public agencies, to perform services or provide funding for governmental or private services or capital projects outside of redevelopment project areas that do not provide benefit to the redevelopment project and thus were not properly authorized.<sup>3</sup> Cal. Health & Safety Code § 34171(d)(3).

In addition, under a so-called “claw-back” provision, the State Controller is authorized to order the unwinding of all asset transfers between the former RDA and its sponsoring city that occurred after January 1, 2011, except to the extent that particular assets are “contractually committed to a third party for the expenditure or encumbrance of those assets” and “to the extent not prohibited by state and federal law.”<sup>4</sup> Cal. Health & Safety Code § 34167.5.

### **3. Designation and Authority of the Successor Agency**

When the Dissolution Provisions become effective, “successor agencies” are designated as successor entities to the former RDAs. Cal. Health & Safety Code § 34173(b). As of that effective date, the successor agencies are vested with all authority, rights, powers, duties, and obligations previously vested with the former RDAs under the California Community Redevelopment Law. Cal. Health & Safety Code § 34173(b). Also, as of that effective date, all assets, properties, contracts, leases, books and records, buildings, and equipment of the former RDAs are transferred to the control of the successor agency, for administration in accordance with the Dissolution Provisions. Cal. Health & Safety Code § 34175(b).

In each instance, the successor agency is presumed to be the city, county, or other entity that initially authorized the creation of the former RDA, unless such entity elects not to serve as

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<sup>2</sup> The Dissolution Provisions recognize the validity of certain agreements between the former RDA and its counterpart city, including: (i) agreements for indebtedness obligations entered into at the time of issuance of the indebtedness, but no later than December 31, 2010, and solely for the purpose of securing or repaying those indebtedness obligations; (ii) agreements that provided loans or other startup funds for the former RDA that were entered into within two years of the RDA’s formation; and (iii) a joint exercise of powers agreement in which the former RDA is a member of the joint powers authority. Cal. Health & Safety Code §§ 34171(d)(2), 34178(b).

<sup>3</sup> This Office is not presently aware of any existing agreements between the Agency and other public entities that would be automatically excluded from the scope of enforceable obligations under this statutory provision.

<sup>4</sup> To date, the State Controller has not exercised its rights under this claw-back provision with respect to the City or the Agency. The Supreme Court did not rule on the validity of the claw-back provision in the CRA Litigation, and several legal arguments could be advanced in opposition to any attempted enforcement of the claw-back provision.

the successor agency by adopting a resolution to that effect and transmitting the resolution to the local county auditor-controller on or before January 13, 2012. Cal. Health & Safety Code § 34173(d)(1). If the presumed successor agency timely elects not to serve as the successor agency, then the successor agency becomes the first “local agency” (i.e., any city, county, or special district located in the same county as the former RDA) to provide the local county auditor-controller with a duly adopted resolution electing to serve as the successor agency. Cal. Health & Safety Code § 34173(d)(2). If no local agency elects to serve as the successor agency, then a new “designated local authority” is automatically formed to become the successor agency, and the Governor must appoint three residents of the county to serve as the governing board of the designated local authority. Cal. Health & Safety Code § 34173(d)(3).

Additionally, the Dissolution Provisions allow for the designation of what has commonly been referred to as the “housing successor agency” with respect to the housing assets and functions previously performed by the former RDA. The city or county that initially authorized the creation of the former RDA may elect to serve as the housing successor agency. Cal. Health & Safety Code § 34176(a). If such city or county does not elect to serve as the housing successor agency, then the housing successor agency becomes the local housing authority in the territorial jurisdiction of the former RDA or, in the absence of any local housing authority, the State Department of Housing and Community Development. Cal. Health & Safety Code § 34176(b). All rights, powers, duties, and obligations of the former RDA related to housing functions, except for the unencumbered balance of the Low and Moderate Income Housing Fund, are transferred to the housing successor agency. Cal. Health & Safety Code §§ 34176(a)-(b), 34177(d), (g). The successor agency must transfer the unencumbered balance of the Low and Moderate Income Housing Fund to the local county auditor-controller, who in turn will distribute those funds as property tax revenues on a pro rata basis to local taxing entities. Cal. Health & Safety Code § 34177(d).

As described above, the Council recently decided that the City will carry out the role of the Agency’s successor agency and its housing successor agency. San Diego Resolution No. R-307238 (Jan. 12, 2012). Consequently, when the Dissolution Provisions become effective, the City, in its capacity as the successor agency, will assume the Agency’s assets, rights, and obligations under the California Community Redevelopment Law, subject to some limitations described below.

#### **4. Administration of Property Tax Revenues**

When the Dissolution Provisions become effective, the successor agency must create and administer a Redevelopment Obligation Retirement Fund (Retirement Fund) in order to pay the former RDA’s enforceable obligations, and the local county auditor-controller must create and administer a Redevelopment Property Tax Trust Fund (County Trust Fund) for the benefit of local taxing entities and the holders of the former RDA’s enforceable obligations. Cal. Health & Safety Code §§ 34170.5, 34182(c)(2). Although the Dissolution Provisions abolish the concept of tax increment revenue, the county auditor-controller must deposit into the County Trust Fund any amounts that traditionally would have been calculated as tax increment revenue; those amounts are deemed to be normal property tax revenues, allocable on a pro rata basis to local taxing entities (e.g., cities, counties, local school districts, and special districts) in a fourth priority position, as identified in clause (iv) of the paragraph immediately below. Cal. Health &

Safety Code §§ 34172(d), 34182(c)(1), 34188. The county auditor-controller may charge the County Trust Fund for the costs of administering the Dissolution Provisions. Cal. Health & Safety Code § 34182(e).

After deducting its administrative costs, the county auditor-controller must make semi-annual distributions from the County Trust Fund on May 16, 2012, and June 1, 2012, and on each January 16 and June 1 thereafter, in the following order of priority: (i) the local affected taxing entities receive the amount of any statutory and contractual pass-through payments that would have been owed if the former RDA had not been dissolved; (ii) the successor agency receives, for deposit into the Retirement Fund, the amount of all payments owed with respect to enforceable obligations of the former RDA, as shown in certain payment schedules; (iii) the successor agency receives the administrative cost allowance set forth in an administrative budget approved by the oversight board; and (iv) local agencies and school entities receive their pro rata share of the remaining balance, subject to a deduction for any pass-through payments made in accordance with clause (i) above. Cal. Health & Safety Code §§ 34183(a), 34185, 34188(a)(2).

#### **5. Actions and Decisions of the Successor Agency**

The successor agency's actions and decisions under the Dissolution Provisions can be divided into four general categories: (i) compliance with enforceable obligations; (ii) preparation of an administrative budget; (iii) administration and winding down of the former RDA's operations; and (iv) disposition of the former RDA's funds and assets.

In the first category, the successor agency must perform obligations required pursuant to any enforceable obligation. Cal. Health & Safety Code § 34177(c). The successor agency must maintain reserves in the amount required by all documents governing the issuance of outstanding bonds to the former RDA. Cal. Health & Safety Code § 34177(b). Also, the successor agency must make payments toward enforceable obligations only to the extent that such obligations are included in certain payment schedules. Cal. Health & Safety Code § 34177(a).

Commencing on February 1, 2012, and continuing until the first Recognized Obligation Payment Schedule (ROP Schedule) becomes operative, the successor agency must make payments in accordance with the Enforceable Obligation Payment Schedule (EOP Schedule) most recently adopted by the former RDA. Before adopting the EOP Schedule, however, the successor agency must exclude certain agreements from the universe of enforceable obligations.<sup>5</sup> The successor agency may amend the EOP Schedule at any public meeting, and the EOP Schedule is subject to the approval of the seven-member oversight board as soon as the board has sufficient members to form a quorum. Cal. Health & Safety Code § 34177(a)(1).

On or before March 1, 2012, the successor agency must prepare an initial draft of the ROP Schedule covering the months of May and June 2012. Cal. Health & Safety Code § 34177(l)(2)(A). On or before April 15, 2012, the successor agency must prepare an initial draft of the ROP Schedule covering the six-month period from July 1, 2012, through December 31, 2012. Thereafter, a new ROP Schedule must be prepared on a forward-looking basis for each

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<sup>5</sup> As discussed in footnote 2 and the related text in Part A.2 of this Report, the Dissolution Provisions state that, upon the effectiveness of the Dissolution Provisions, all agreements between the former RDA and its sponsoring city are deemed invalid, subject to limited exceptions.

six-month fiscal period. Cal. Health & Safety Code § 34177(l)(1), (3). Each ROP Schedule must identify one or more of the following sources of funds that will be used to pay each enforceable obligation: (i) the Low and Moderate Income Housing Fund; (ii) bond proceeds; (iii) reserve balances; (iv) the administrative cost allowance; (v) the County Trust Fund; or (vi) other revenue sources, including rents, concessions, asset sale proceeds, interest earnings, and any other revenues derived from the former RDA, as approved by the oversight board. Cal. Health & Safety Code § 34177(l)(1).

To be deemed valid, each ROP Schedule must be (a) reviewed and certified, as to its accuracy, by the local county auditor-controller, (b) submitted to and approved by the oversight board, and (c) submitted to the local county auditor-controller, the State Controller, and the DOF. Cal. Health & Safety Code § 34177(l)(2). Those three county and State entities have standing to file a lawsuit to prevent a violation of the Dissolution Provisions and to obtain injunctive or other appropriate relief. Cal. Health & Safety Code § 34177(a)(2).

With the approval of the oversight board, the successor agency is allowed to make payments for enforceable obligations from sources other than those listed in the ROP Schedule. Cal. Health & Safety Code § 34177(a)(4). Until the ROP Schedule governing the first six months of the 2012-13 fiscal year becomes effective, the successor agency is prohibited from accelerating payment or making any lump sum payments that are intended to prepay loans unless such accelerated repayments were required prior to the effectiveness of the Dissolution Provisions. Cal. Health & Safety Code § 34177(a)(5).

In the second category of actions and decisions, the successor agency must prepare a proposed administrative budget for each six-month fiscal period and submit the budget to the oversight board for its approval. Cal. Health & Safety Code § 34177(j). The successor agency also must provide to the local county auditor-controller an estimate of administrative costs to be paid from the County Trust Fund for each six-month fiscal period. Cal. Health & Safety Code § 34177(k). The successor agency is allocated an “administrative cost allowance” to be paid from the County Trust Fund in an amount approved by the oversight board. Subject to a minimum amount of \$250,000 in any fiscal year, the administrative cost allowance equals up to 5 percent of the property tax allocated to the successor agency for the 2011-12 fiscal year and up to 3 percent of the property tax allocated to the Retirement Fund for each fiscal year thereafter.<sup>6</sup> Cal. Health & Safety Code § 34171(b).

In the third category, the successor agency must expeditiously wind down the affairs of the former RDA pursuant to the Dissolution Provisions, subject to the direction of the oversight board. Cal. Health & Safety Code § 34177(h). The successor agency must enforce all rights of

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<sup>6</sup> Thus, commencing in the 2012-13 fiscal year, the amount of the administrative cost allowance received by the successor agency will depend on the cumulative amount of payments to be made toward the retirement of enforceable obligations during the applicable six-month period, as shown in the approved ROP Schedule. Under normal circumstances, the Agency would have expected to receive greater than \$170 million in tax increment revenues during the 2012-13 fiscal year. To cite a hypothetical example for illustrative purposes only, if the City as successor agency is scheduled to receive \$60 million in property tax revenues from the County Trust Fund during the 2012-13 fiscal year in order to pay the Agency’s existing enforceable obligations pursuant to the Dissolution Provisions, then the City as successor agency will receive \$1,800,000, constituting 3 percent of such property tax revenues, as the administrative cost allowance during the 2012-13 fiscal year from the County Trust Fund.

the former RDA for the benefit of the local taxing entities, including the collection of loans, rents, and other revenues owed to the former RDA. Cal. Health & Safety Code § 34177(f). The successor agency must oversee the development of properties until the contracted work has been completed or the former RDA's contractual obligations can be transferred to other parties. In that regard, the successor agency must use bond proceeds "for the purposes for which bonds were sold unless the purposes can no longer be achieved, in which case, the proceeds may be used to defease the bonds." Cal. Health & Safety Code § 34177(i).

In the fourth category, the successor agency must dispose of the former RDA's funds and assets in specified ways. The successor agency must remit to the local county auditor-controller, for pro rata distribution to local taxing entities, the unencumbered balance of the former RDA's funds, including the unencumbered balance of the Low and Moderate Income Housing Fund. Cal. Health & Safety Code § 34177(d). The successor agency also must transfer the housing functions and encumbered assets to the housing successor agency. Cal. Health & Safety Code § 34177(g). Finally, the successor agency must dispose of the former RDA's assets and properties, as directed by the oversight board, in an expeditious manner aimed at maximizing value. To the extent that the oversight board determines that the proceeds from the sales of assets and properties are not needed for approved development projects or to wind down the affairs of the former RDA, the successor agency must transfer those proceeds to the local county auditor-controller, for pro rata distribution to local taxing entities. Cal. Health & Safety Code §§ 34176(a), 34177(e), 34181(c).

The Dissolution Provisions set forth a mechanism for a city to retain any properties or other assets of the former RDA for future redevelopment activities, so long as the city provides all of the funding for those activities and the city enters into a compensation agreement with the other local taxing entities to make payments to them in proportion to their relative shares of the base property tax for the value of the assets retained by the city. Cal. Health & Safety Code § 34180(f)(1). If the affected parties cannot agree on the valuation of the retained assets, then the local county assessor will determine the value based on the fair market value of the assets as of the 2011 property tax lien date. Cal. Health & Safety Code § 34180(f)(2).

## **6. Liability of the Successor Agency**

The Dissolution Provisions state: "The liability of any successor agency, acting pursuant to the powers granted under [Part 1.85 of AB 26], shall be limited to the extent of the total sum of property tax revenues it receives pursuant to [Part 1.85] and the value of the assets transferred to it as a successor agency for a dissolved [RDA]." Cal. Health & Safety Code § 34173(e). This limited liability provision has been commonly interpreted as shielding a city's general fund from additional risk or exposure if the city carries out its role as the former RDA's successor agency. Given that the limited liability provision has not been interpreted by any courts, however, it is uncertain whether the provision will fully protect a city's general fund in all possible situations.

Nonetheless, an explanation of the legislative intent of the limited liability provision recently offered by the author of AB 26, Bob Blumenfield, could be expected to carry significant weight in any future interpretation of such provision by the courts. More specifically,

Mr. Blumenfield sent a letter dated January 10, 2012, to the Chief Clerk of the California State Assembly, in which Mr. Blumenfield apparently sought to alleviate certain concerns that had been expressed by the City of Los Angeles and other municipalities in deciding whether to serve as the former RDA's successor agency. Mr. Blumenfield stated: "Nothing in [AB 26] implies that cities or counties are anything but distinct legal entities from successor agencies, and therefore the liabilities of the former [RDAs] and the successor agencies do not become the liabilities of the corresponding cities or counties." Mr. Blumenfield also concluded: "The intent of [AB 26] is clear: the assets and liabilities of successor agencies are separate and distinct from those of the cities and counties themselves."

## **B. Governance Structure of the City as the Successor Agency**

AB 26 is silent on the exact governance structure of a successor agency. In other words, AB 26 does not contain any provisions that purport to modify the current governance structure of the City, acting in its capacity as the successor agency to the Agency under AB 26. Thus, the current governance structure of the City will remain the governance structure of the City in its capacity as the successor agency to the Agency under AB 26.

San Diego is a charter city. As such, the San Diego Charter (Charter) creates and forms our municipal government, "distribut[ing] the powers and duties of the various departments, boards and officers, and provid[ing] the manner in which the . . . powers shall be exercised." 2A McQuillin Mun. Corp. § 9:3 (3rd ed. 2011). When a charter creates a public office or body, the charter is the source of the body's or officer's authority and responsibilities. For example, the Charter creates and establishes the City Council and the Mayor, among other Charter officers and bodies. The City Council and the Mayor have designated responsibilities and authority given to them by the Charter. However, unless expressly permitted by the Charter, one Charter officer or body may not limit or impede the performance of another. *See* City Att'y MOL-2006-2 (Jan. 23, 2006) (Mayor may not interfere with Charter duties of Auditor and Comptroller).

### **1. The City Council is the Legislative Body of the City**

All legislative powers of the City, including the power to set policy, are vested in the City Council, subject to the terms of the Charter and the Constitution of the State of California, except such legislative powers as are reserved to the people by the Charter and the State Constitution. San Diego Charter §§ 11, 270(a). The Charter specifically prohibits Councilmembers from delegating their legislative power or responsibility in adopting any ordinance or resolution which raises or spend public monies, including, but not limited to, the City's annual budget ordinance or any part thereof, the annual ordinance setting compensation for City employees, or any ordinance or resolution setting public policy. San Diego Charter § 11.1. However, Charter section 11.1 does not preclude the City Council from delegating authority, other than its legislative power, to another public official. "The essentials of the legislative function are the determination and formulation of the legislative policy. Generally speaking, attainment of the ends, including how and by what means they are to be achieved, may constitutionally be left in the hands of others." *Kugler v. Yokum*, 69 Cal. 2d 371, 376 (1968). Thus, a legislative body may declare a policy and fix a primary standard for proper implementation of the policy, then delegate the actual implementation of the policy to a public officer. For example, the City Council delegates authority to the Mayor to spend City money on contracts in accordance with

guidelines it establishes by ordinance. *See* Memorandum dated July 30, 2010, addressed to the Mayor and City Councilmember, titled "Delegation of Decision-Making in Proposed Revenue and Reform Ballot Measure."

Further, the City Council has the right to determine its own rules and order of business as provided for in Charter section 14, including a process for the selection of a presiding officer who shall have responsibility for chairing meetings of the Council and managing the docket process. The City Council's rules and order of business are set out in the Permanent Rules of the Council, Chapter 2, Article 2, Division 1, section 22.0101 of the San Diego Municipal Code.

## **2. The Mayor is Responsible for the Administration of the Affairs of the City**

Similarly, the Charter lays out the responsibilities of the Mayor. Pursuant to Article XV of the Charter, all executive authority, power, and responsibility conferred upon the City Manager in Article V (Executive and Administrative Service), Article VII (Finance), and Article IX (The Retirement of Employees) shall be transferred to, assumed by, and carried out by the Mayor. San Diego Charter § 260. One of the responsibilities of the City Manager listed in Article V is the duty to supervise the administration of the affairs of the City, except as otherwise specifically provided in the Charter. San Diego Charter § 28. Another responsibility of the City Manager listed in Article V is the responsibility for planning the activities of the City government and for adjusting such activities to the finances available, including the preparation of a complete financial plan for the ensuing year and the responsibility for the administration of such a plan when adopted by the Council. *Id.* Article V also confers upon the City Manager the responsibility for assembling estimates covering the financial needs of the City, verifying these estimates against the information relative to past expenditures and income, preparing the budget document and supporting schedules, and presenting the budget to the Council. *Id.*

In addition to exercising the authority, power, and responsibilities conferred upon the City Manager as described in Charter section 260, the Mayor has additional rights, powers, and duties outlined in Charter section 265. A few of those additional rights, powers, and duties include the duty to recommend to the Council such measures and ordinances as he or she may deem necessary or expedient, to make such other recommendations to the Council concerning the affairs of the City as the Mayor finds desirable, and to attend and be heard at any regular or special open session meeting of the Council, but not the right to vote at such meetings. San Diego Charter § 265(b)(3)-(4). Also, the Mayor and all non-managerial officers of the City have the duty to inform the Council of all material facts or significant developments relating to all matters under the jurisdiction of the Council as provided under the Charter, except as may be otherwise controlled by the laws and regulations of the United States or the State of California. The Mayor and all non-managerial officers shall also comply promptly with all lawful requests for information made by the Council. San Diego Charter § 32.1. *See also* City Atty. LO-2007-1.

## **3. The Charter will Guide the Governance of the City as the Successor Agency**

As discussed in Part A.5 above, one obligation of the City as the successor agency is to prepare the ROP Schedule for each six-month fiscal period. City staff, under the supervision of the Mayor, has been working to prepare the ROP Schedules that will apply during the calendar year 2012. It is anticipated that each ROP Schedule will be placed on the Council agenda for

consideration by the City Council. Only after the City Council has considered and approved the pertinent ROP Schedule will such ROP Schedule be forwarded to the oversight board.

As also discussed in Part A.5 above, another obligation of the City as the successor agency is to prepare a proposed administrative budget for each six-month fiscal period and to submit the budget to the oversight board for its approval. Consistent with Charter sections 260 and 28, it is anticipated that City staff, under the supervision of the Mayor, will prepare each proposed administrative budget. Again, each proposed administrative budget will be placed on the Council agenda for its consideration. The City Council may approve, or approve with modifications, each administrative budget before it is submitted to the oversight board.

Each successor agency is tasked with continuing to oversee the development of properties until the contracted work has been completed or the contractual obligations of the former RDA can be transferred to other parties. It is anticipated that existing agreements, such as Disposition and Development Agreements (DDAs) and Owner Participation Agreements (OPAs) between the Agency, the City, and the developer, for some redevelopment projects will need to be amended to accommodate a change in the scope of development or a change in the financial structure, or for other purposes.

In approving several of these projects, the Council authorized the Mayor, as the Executive Director of the Agency, to execute the agreement, to carry out and implement the purposes set forth in the Resolution according to its terms, and to administer the Agency's obligations, responsibilities, and duties to be performed under the Resolution and the agreement. It is anticipated that the Mayor and his staff would continue to administer the City's obligations, as the successor agency, under these agreements. However, the Council may, if it chooses, modify or rescind this authorization. If the pertinent Resolution or agreement requires a proposed amendment to be approved by the Agency's governing board in a given situation, then the proposed amendment will be presented for approval by the City Council, acting in its capacity as the governing board of the successor agency. Any such amendment also would be subject to the review and approval of the oversight board and the DOF, as explained in Part C below.

Finally, the City, as the successor agency, must expeditiously wind down the affairs of the Agency, subject to the direction of the oversight board. It is currently unknown exactly what steps will need to be taken to wind down the affairs of the Agency, and those steps may be dictated in large part by the oversight board and the DOF, as discussed in detail in Part C.2 below. Yet, nothing in AB 26 currently precludes a successor agency from establishing policies or protocols to wind down the former RDA's affairs. Thus, the City Council could establish a set of policies, or the City Council and the Mayor could work together to devise a set of policies, to be implemented by the Mayor in winding down the Agency's affairs.

## **C. The Role of an Oversight Board**

### **1. Appointment of the Oversight Board's Members**

The Dissolution Provisions require the formation of an oversight board, composed of seven members, to oversee the actions and decisions of the successor agency. The members of the oversight board must elect a chairperson and report the name of the chairperson and other

members to the DOF on or before May 1, 2012. Cal. Health & Safety Code § 34179(a). The Governor may appoint individuals to fill any member position on the oversight board that has not been filled by May 15, 2012, or any member position that remains vacant for more than sixty days. Cal. Health & Safety Code §§ 34171(f), 34179(b).

The seven members of the oversight board are selected as follows: (i) the county board of supervisors appoints two members, at least one of whom must be a member of the public; (ii) the mayor for the city that created the former RDA appoints two members,<sup>7</sup> one of whom will represent the former RDA's employees, selected from the recognized employee organization representing the largest number of the former RDA's employees employed by the successor agency at the time of appointment;<sup>8</sup> (iii) the largest special district, by property tax share, with

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<sup>7</sup> At the Council meeting on January 10, 2012, during which the Council decided to have the City serve as the Agency's successor agency, Council President Tony Young asked whether the Mayor could use his first appointment to select one of the Councilmembers to serve on the oversight board. Our office responded at that time that a Councilmember's acceptance of a membership on the oversight board, simultaneously with his or her participation as a member of the successor agency's governing board, is probably not prudent in light of a legal doctrine known as the incompatibility of public offices. Under this doctrine, the simultaneous holding of two public offices creates an incompatible situation, in the absence of statutes suggesting a contrary result, if there is a possibility of any significant clash of duties or loyalties between the two offices, if the dual holding of offices would be improper for reasons of public policy, or if either officer may exercise supervisory, audit, or removal rights over the other officer. *People ex rel. Chapman v. Rapsey*, 16 Cal. 2d 636, 640-44 (1940); Cal. Gov't Code § 1099(a). If the two offices are incompatible, "the mere acceptance of the second incompatible office *per se* terminates the first office as effectively as a resignation." *Rapsey*, 16 Cal. 2d at 644; *see also* Cal. Gov't Code § 1099(b). We note that the Dissolution Provisions state: "Notwithstanding Section 1099 of the Government Code [i.e., the statute codifying the incompatibility of public offices doctrine], or any other law, any individual may simultaneously be appointed to up to five oversight boards and may hold an office in a city . . ." Cal. Health & Safety Code § 34179(i). This statutory provision may be viewed as evidence of legislative intent to bar the application of the incompatibility of public offices doctrine to an individual's dual service as both a member of the successor agency's governing board and a member of the oversight board.

Yet, we strongly recommend that the Mayor refrain from appointing either himself or any Councilmember to serve on the oversight board, for at least two reasons. First, if the above-described statutory provision is deemed to be illegal or inapplicable for any reason, then a draconian outcome will occur in which the appointed Mayor or Councilmember has automatically forfeited his or her initial public office due to the clear incompatibility of the two public offices. Second, for practical purposes, a significant clash of duties and loyalties will undoubtedly arise as a result of the dual roles served on behalf of the City and the oversight board. As discussed below, aside from its role in overseeing the decisions of the successor agency, the oversight board will owe a fiduciary duty to the holders of enforceable obligations and the local taxing entities benefitting from distributions of property taxes and liquidation proceeds that otherwise would be received or retained by the former RDA. Cal. Health & Safety Code § 34179(i).

<sup>8</sup> In this instance, the Agency has no current employees, but has traditionally contracted for redevelopment-related services to be provided by three separate entities, including the City's Redevelopment Department, CCDC, and SEDC. As such, it is unclear to what extent the Mayor can appoint the second member position on the oversight board, who is described in AB 26 as an employee or representative of the union representing the largest number of the former RDA's employees who are then employed by the successor agency. At the Council meeting on January 10, 2012, Councilmember Carl DeMaio asked this Office to evaluate whether the Agency or the City could take any prompt action to preserve the second member position to be appointed by the Mayor.

We believe there is no clear, easy solution to this issue, absent a legislative clarification of AB 26. The Agency is not permitted to hire any employees at this time because Part 1.8 of AB 26 expressly prevents any increases in the number of staff employed by the Agency beyond the number employed as of January 1, 2011, and also prohibits any increases in the pay, benefits, or contributions for any employee or service provider that had not been previously contracted. Cal. Health & Safety Code § 34165(c), (e). For the same reason, it is doubtful whether the City could designate current non-union employees of the City's Redevelopment Department, whose salaries and benefits are paid by redevelopment funds, to become union employees with potentially greater benefits.

territory in the former RDA's territorial jurisdiction, appoints one member;<sup>9</sup> (iv) the county superintendent of education appoints one member to represent schools, unless the county superintendent is appointed, in which case the appointment is made by the county board of education; and (v) the Chancellor of the California Community Colleges appoints one member to represent community college districts in the county. Cal. Health & Safety Code § 34179(a).

Additional guidance regarding the Mayor's two appointments to the oversight board may be instructive. Where State law creates a commission, agency, or similar entity and prescribes a certain process for appointing members to the entity's governing body, then State law will control over any conflicting Charter provision setting forth the procedure for appointment of City representatives. Where State law is silent on the appointing authority, no conflict exists between State law and the Charter. *See* City Att'y Report RC-2009-33 (Dec. 21, 2009); City Att'y Report RC-2006-9 (Feb. 28, 2006). Consistent with these established legal principles, the Charter states that the Mayor has "[s]ole authority to appoint City representatives to boards, commissions, committees and governmental agencies, unless controlling law vests the power of appointment with the City Council or a City Official other than the Mayor." San Diego Charter § 265(b)(12). In this instance, the Dissolution Provisions merely indicate that the Mayor has the authority to appoint two members of the oversight board, without imposing any restriction on such authority. As such, the Mayor's two appointments to the oversight board are not subject to confirmation by the City Council. Yet, nothing in the Dissolution Provisions expressly precludes the Mayor from voluntarily sharing his appointment authority with other officials, from soliciting nominees from the Councilmembers, or from agreeing that the Mayoral appointments will be subject to confirmation by the City Council.

An oversight board for a particular successor agency will cease to exist once all of the former RDA's indebtedness has been repaid. Cal. Health & Safety Code § 34179(m). Commencing on and after July 1, 2016, if multiple oversight boards still exist within a single county, a new, consolidated oversight board will be created to oversee the actions and decisions of all successor agencies within the county, and the members of the consolidated oversight board will be appointed in a manner similar to the appointment process described above. Cal. Health & Safety Code § 34179(j).

Each oversight board "shall have fiduciary responsibilities to holders of enforceable obligations and the taxing entities that benefit from distributions of property tax and other revenues . . . ." Cal. Health & Safety Code § 34179(i). Yet, all members of an oversight board

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Absent a legislative clarification of AB 26, we recommend that the Mayor appoint the second member position from among the current union employees of the City's Redevelopment Department or perhaps an officer or employee of the union representing those employees. This approach could be deemed reasonably consistent with the current legislative intent of AB 26, and also could avoid a situation in which the Mayor must effectively forfeit his second appointment and instead allow the Governor to fill that vacancy. We understand that approximately nine employees of the City's Redevelopment Department are current members of the San Diego Municipal Employees Association. Alternatively, the Mayor could appoint the second member position from among the current non-union employees of the City's Redevelopment Department, although that alternative approach may be deemed less consistent with the language of AB 26.

<sup>9</sup> The identity of the largest special district, by property tax share, is undetermined at this point. Presumably the San Diego County Tax Assessor's Office will need to confirm the identity. By way of example, the Los Angeles County Flood Control District has been confirmed as the largest special district with respect to the City of Los Angeles, according to a staff report recently prepared by redevelopment staff in Los Angeles.

are granted personal immunity for actions taken within the scope of their responsibilities as members. Cal. Health & Safety Code § 34179(d). Each member of an oversight board serves at the pleasure of the entity that appointed such member. Cal. Health & Safety Code § 34179(g). The members must serve on the oversight board without compensation or reimbursement for expenses. Cal. Health & Safety Code § 34179(c).

## **2. Duties and Decisions of the Oversight Board**

The oversight board must direct the successor agency to take five types of actions:

- The oversight board must direct the successor agency to dispose of all assets and properties of the former RDA that were funded by tax increment revenues of the former RDA, in an expeditious manner aimed at maximizing value. Alternatively, the oversight board may direct the successor agency to transfer ownership of certain assets that were constructed and used for a governmental purpose, such as roads, school buildings, parks, and fire stations, to the appropriate public jurisdiction pursuant to any related existing agreements. Cal. Health & Safety Code § 34181(a).
- The oversight board must direct the successor agency to terminate and cease performance under all existing agreements that do not qualify as enforceable obligations. Cal. Health & Safety Code § 34181(b).
- The oversight board must direct the successor agency to transfer the former RDA's housing assets, rights, and obligations to the housing successor agency. Cal. Health & Safety Code §§ 34177(d), (g), 34181(c).
- The oversight board must direct the successor agency to “[t]erminate any agreement, between [the former RDA] and any public entity located in the same county, obligating [the former RDA] to provide funding for any debt service obligations of the public entity or for the construction, or operation of facilities owned or operated by such public entity, in any instance where the oversight board has found that early termination would be in the best interests of the taxing entities.” Cal. Health & Safety Code § 34181(d).
- The oversight board must direct the successor agency to “[d]etermine whether any contracts, agreements, or other arrangements between [the former RDA] and any private parties should be terminated or renegotiated to reduce liabilities and increase net revenues to the taxing entities, and present proposed termination and amendment agreements to the oversight board for its approval. The board may approve any amendments to or early termination of such agreements where it finds that amendments or early termination would be in the best interests of the taxing entities.”<sup>10</sup> Cal. Health & Safety Code § 34181(d).

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<sup>10</sup> Similar language is included in the definition of an “enforceable obligation” that becomes applicable upon the effectiveness of the Dissolution Provisions. For instance, although judgments, settlements, and binding arbitration decisions are generally regarded as enforceable obligations, both the successor agency and the oversight board have

In addition, the oversight board must approve several specified types of actions by the successor agency before those actions become effective. Those actions include: (i) the creation of new repayment terms for outstanding loans if the repayment terms have not been specified prior to the effectiveness of the Dissolution Provisions; (ii) the refunding of outstanding bonds or other debt of the former RDA in order to achieve savings or finance increases in debt service, so long as additional debt is not created and debt service is not accelerated; (iii) the establishment of reserve amounts as required by any legal documents governing the issuance of outstanding bonds owed by the former RDA; (iv) the merger of redevelopment project areas; and (v) the continued acceptance of federal or state grants, or other forms of assistance from either public or private sources, where the financial assistance is conditioned upon the provision of matching funds, in an amount greater than 5 percent. Cal. Health & Safety Code § 34180(a)-(e).

### **3. Final Review by the State Department of Finance**

The DOF may review any action taken by the oversight board pursuant to the Dissolution Provisions. Consequently, all actions of the oversight board shall not be effective for three business days, pending the DOF's request for review. If the DOF timely requests a review of any action, then the action will not become effective until the DOF approves the action, and the DOF will have ten days from the date of its request to approve the action or return it to the oversight board for reconsideration. If the DOF returns the action for reconsideration, then the oversight board must resubmit the modified action for the DOF's approval, and the modified action shall not become effective until it is approved by the DOF. Cal. Health & Safety Code § 34179(h).

### **4. Procedures Governing the Oversight Board's Meetings**

"A majority of the total membership of the oversight board shall constitute a quorum for the transaction of business. A majority vote of the total membership of the oversight board is required for the oversight board to take action." Cal. Health & Safety Code § 34179(e). The oversight board may direct the successor agency's staff to perform work in furtherance of the oversight board's duties under the Dissolution Provisions. The successor agency must pay for all costs of meetings held by the oversight board, but such costs may be included in the successor agency's administrative budget. Cal. Health & Safety Code § 34179(c). The oversight board is deemed to be a local entity that must comply with the Ralph M. Brown Act, the California Public Records Act, and the Political Reform Act of 1974. Cal. Health & Safety Code § 34179(e). In addition to any noticing requirements generally applicable to proposed actions of the oversight board, all notices must be posted on the internet website of the successor agency or the oversight board. Cal. Health & Safety Code § 34179(f).

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the authority and standing to appeal any judgment or to set aside any settlement or arbitration decision that otherwise would qualify as an enforceable obligation. Cal. Health & Safety Code § 34171(d)(1)(D). Moreover, "nothing in [AB 26] shall prohibit either the successor agency, with the approval or at the direction of the oversight board, or the oversight board itself from terminating any existing agreements or contracts [of the former RDA] and providing any necessary and required compensation or remediation for such termination." Cal. Health & Safety Code § 34171(d)(1)(D).

### CONCLUSION

Under AB 26, a successor agency is designated to administer existing enforceable obligations of each former RDA and to wind down the operations of each former RDA, subject to the review and approval of the oversight board and certain State entities. The oversight board must direct the former RDA to perform various actions in winding down the former RDA's operations. Subject to the DOF's review and approval, the oversight board also must approve several specified types of actions by the successor agency before those actions become effective.

The current governance structure of the City will remain the governance structure of the City in its capacity as the successor agency to the Agency under AB 26. The Charter directs the governance structure of the City, both in its general capacity as a municipal corporation and in its capacity as the Agency's successor agency under AB 26.

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RC-2012-2