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REPORT TO THE HONORABLE
MAYOR AND CITY COUNCIL

VALIDITY OF THE PUBLIC FACILITIES FINANCING AUTHORITY

INTRODUCTION

On March 20, 2012, the City Council will consider approval of the Preliminary Official Statement of the Public Facilities Financing Authority (PFFA) for its water revenue refunding bonds, Series 2012A (Bonds). If that action is approved, the Bonds will be issued pursuant to Ordinance O-2012-50, approved by the City Council on February 14, 2012. Questions have arisen regarding the potential impact of Assembly Bill x1 26 (AB 26) on the ongoing viability of PFFA. AB 26, among other things, dissolved all redevelopment agencies in California, including the Redevelopment Agency of the City of San Diego (RDA), and the RDA was a member, along with the City, of PFFA. This report discusses the ongoing viability of PFFA, its powers, and alternatives the City Council may wish to consider if it determines not to proceed with the issuance of the Bonds by PFFA.

DISCUSSION

AB 26 raises three particular questions with respect to PFFA:

1. Does the joint powers agreement forming PFFA, now between the City, in its capacity as the successor agency to the RDA (Successor Agency), and the City, as a municipal corporation, remain viable in light of AB 26?
2. If so, does PFFA have the power to continue to issue bonds on behalf of the City where such power is conferred under the Marks-Roos Bond Pooling Act of 1985 (Marks-Roos Act) and not as a power common to the City and the Successor Agency?
3. If the City Council determines not to consummate the bond transaction with PFFA, what alternatives are available?

I. PFFA REMAINS VIABLE UNDER AB 26

PFFA is a joint powers authority established pursuant to a joint exercise of powers agreement (JPA Agreement) between the City and the RDA. The JPA Agreement defines the

purpose and the powers of PFFA. Specifically, the purpose of PFFA is to assist in “the financing of certain public capital facilities improvements of the City and the Agency.” JPA Agreement § 1. Among the powers conferred on PFFA is the power to issue bonds. JPA Agreement § 7. The power to issue bonds is conferred both as a joint power of the City and the Agency and as an additional power conferred under the Mark-Roos Local Bond Pooling Act of 1985 (Marks-Roos Act). JPA Agreement § 4.

AB 26 dissolved all redevelopment agencies in the state of California, including the RDA, effective February 1, 2012 and provided for a “successor agency” to become the “designated successor entity” to a former redevelopment agency.¹ By resolution effective January 12, 2012, the City elected to become the successor agency (Successor Agency) to the RDA. As of February 1, 2012, the Successor Agency assumed all of the rights, duties and obligations of the RDA, except as modified or constrained by AB 26.

The continuation of a joint powers authority is expressly addressed in AB 26 and codified at California Health and Safety Code section 34178. This provision purports to invalidate most agreements between cities and the redevelopment agencies created by such cities, but specifies that certain agreements “are not invalid and may bind the successor agency.” Cal. Health & Safety Code §34178(b). Among the agreements that are not invalidated are “[a] joint exercise of power agreement in which the redevelopment agency is a member of the joint powers authority.” Cal. Health & Safety Code § 34178(b)(3). Where a statute’s text evinces a plain meaning, our interpretation need go no further. *Olson et al v. Auto. Club of S. Cal.* 42 Cal. 4th 1142, 1147 (2008).

The language in AB 26 seems to be unambiguous with respect to the continuing validity of joint powers agreements; however, it creates a situation where the Successor Agency is in a contractual relationship with the City, as a municipal corporation. The City Attorney’s office has sought clarification from the California Department of Finance (Department), which is charged with enforcing and interpreting various provisions of AB 26, on whether the Department would conclude that PFFA remains a viable legal entity. The Department has stated that a joint powers authority is not invalid simply because a successor agency stands in the shoes of a former redevelopment agency. The City Attorney’s Office also discussed this issue with Orrick, Herrington & Sutcliffe (Orrick), bond counsel for the Bonds, and Nixon Peabody (Nixon), underwriters’ counsel for the Bonds. Both firms concur with the conclusion of the Department and acknowledged that they would be unable to issue their closing opinions for the Bonds if they could not reach this conclusion. While it is uncertain how a court might view the impact of AB 26 on PFFA, in light of the plain meaning of AB 26 and the interpretation of AB 26, a court could reasonably conclude that PFFA remains a viable legal entity.

¹ See our January 19, 2012 Report to the Mayor and City Council entitled “Supplemental Council Docket Item on January 23, 2012, Regarding Roles of Successor Agency and Oversight Board Under AB 26” for more details on the authority and obligations of successor agencies. City Att’y Report 12-2 (Jan.19, 2012).

II. PFFA MAY ISSUE THE BONDS UNDER THE MARKS-ROOS ACT

If PFFA remains a viable entity, it must be determined what powers, if any, it may continue to exercise. The powers of a joint powers authority can be actual “joint powers” (powers each member agency could exercise separately) or powers conferred by statute. *See* Cal. Gov’t Code § 6500 et. seq. (joint powers); Cal. Gov’t Code § 6546 (issuance of revenue bonds to pay for public buildings); Cal. Gov’t Code § 6587 (issuance of bonds to pay costs of any public capital improvement). Powers granted to a joint powers authority by statute are in addition to powers held jointly. Cal. Gov’t Code § 6547 (“The power of the entity to issue revenue bonds is additional to the powers common to the parties of the joint powers agreement . . .”) (“This article [the Marks-Roos Local Bond Pooling Act of 1985] shall be deemed to provide a complete and supplemental method for exercising powers authorized by this article, and shall be deemed as being supplemental to the powers conferred by other applicable laws”).

As noted above, PFFA is authorized to exercise powers common to the City and the RDA and to exercise additional powers conferred under the Marks-Roos Act. AB 26 expressly states that “the successor agency’s rights, duties, and performance obligations under [the] joint exercise of powers agreement shall be limited by the constraints imposed on successor agencies [by AB 26].” Cal. Health & Safety Code § 34178(b)(3). This indicates that PFFA would no longer have powers previously shared by the City and the RDA if the Successor Agency did not have such powers under AB 26. Moreover, to the extent that the PFFA wishes to exercise powers on behalf of the Successor Agency rather than the City, this would require the approval of the oversight board created by AB 26. However, where PFFA is exercising powers exclusively on behalf of the City and such powers are conferred under the Marks-Roos Act and are not joint powers of the City and the Successor Agency, PFFA should not be constrained by AB 26. While the Department did not offer a conclusion on this issue, both Orrick and Nixon have concluded that PFFA may exercise powers granted under the Marks-Roos Act to issue the Bonds on behalf of the City. If the firms did not reach this conclusion they would be unable to issue their closing opinions on the Bonds. This Office concurs that it is reasonable to conclude that PFFA may issue the Bonds on behalf of the City.

III. ALTERNATIVES TO PFFA

While the recent passage of AB 26 leaves many questions unanswered, it is reasonable to conclude that PFFA remains a viable legal entity and that it retains the power to issue the Bonds on behalf of the City. That being said, in the event the City Council does not wish to consummate the transaction with PFFA, alternatives, such as removing the Successor Agency from PFFA or forming a new joint powers financing authority, are available. Removing the Successor Agency is complicated by the potential need to receive the consent of the oversight board, which is not expected to be formed until at least mid-April and may not be prepared to address specific items such as PFFA for several months. Creating a new joint powers financing authority would require substantial rewrites to the legal documents and the adoption of a new financing ordinance. Either of these options would extend the closing date for the Bonds well beyond the current projected closing date and potentially expose the City to adverse market movements.

CONCLUSION

It is reasonable to conclude that, under AB 26, PFFA remains a viable legal entity and retains the power to issue the Bonds on behalf of the City. This legal conclusion is not entirely without doubt and there are potential alternatives to the issuance of the Bonds by PFFA. However, any of the available alternatives would take time to enact and may expose the City to adverse movements in the bond market.

Respectfully submitted,

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