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REPORT TO REDEVELOPMENT AGENCY
OF THE CITY OF SAN DIEGO AD HOC COMMITTEE

COUNCILMEMBER EMERALD'S PROPOSAL FOR THE RESTRUCTURING OF THE REDEVELOPMENT AGENCY

INTRODUCTION

This Report addresses various legal and practical considerations pertaining to a proposal for the restructuring of the Redevelopment Agency of the City of San Diego (Agency) recently advanced by Councilmember Marti Emerald (Emerald RDA Proposal). The details of the Emerald RDA Proposal are described in a written report dated April 19, 2011, from Councilmember Emerald to the members of the Redevelopment Agency of the City of San Diego Ad Hoc Committee (Committee). Councilmember Emerald and Michael Jenkins delivered a presentation regarding the Emerald RDA Proposal during the Committee meeting held on April 25, 2011.

The Committee directed the Office of the City Attorney during the April 25 meeting to evaluate legal aspects of the Emerald RDA Proposal so that further discussion could occur during the next Committee meeting scheduled for May 16, 2011. In light of the time constraints, this Report focuses on several key considerations pertaining to the Emerald RDA Proposal, but does not contain an exhaustive discussion of those considerations and is not intended to address every relevant consideration. At the end of this Report, we have identified several remaining issues that may need to be explored with respect to the Emerald RDA Proposal. Some of the topics addressed in this Report are not unique to the Emerald RDA Proposal and may need to be evaluated in conjunction with other proposals for the restructuring of the Agency.

This Report is based on our current understanding of the Emerald RDA Proposal. If there is any future change in the Emerald RDA Proposal, we may need to revisit the analysis and conclusions set forth in this Report.

OVERVIEW OF EMERALD RDA PROPOSAL

The Emerald RDA Proposal calls for a restructuring of the Agency in order "to improve the Agency's effectiveness, efficiency, accountability, and transparency, while continuing and taking advantage of San Diego's strengths and successes." Emerald RDA Proposal at 3. There are four core elements of the Emerald RDA Proposal, as follows:

(a) The Agency's Board of Directors (Agency Board) would appoint the Executive Director, Finance Manager and legal counsel, either as employees or as direct contractors of the Agency.

(b) The Agency's operations would be consolidated as follows: (i) the mission and bylaws of Centre City Development Corporation, Inc. (CCDC) would be expanded to include all of the redevelopment project areas within the City of San Diego (City); (ii) the name of CCDC would be changed to the San Diego Development Corporation (Development Corporation); (iii) Southeastern Economic Development Corporation, Inc. (SEDC) and the City's Redevelopment Department would be merged into the Development Corporation; and (iv) the Development Corporation would undertake the discretionary development review process, in a manner similar to CCDC's current role, in redevelopment project areas throughout the City and would assist with development projects as an economic development tool in parts of the City not designated as redevelopment project areas.

(c) The Agency's affordable housing set-aside funds would be transferred to and managed by the San Diego Housing Commission (Housing Commission), a public agency formed by the Housing Authority of the City of San Diego (Housing Authority). The portion of tax increment revenues allocated to the affordable housing set-aside funds would be increased from the current level of 20 percent to a minimum of 35 percent, phased in over three years.

(d) The Mayor would serve as an ex officio, non-voting member of the Agency Board and would retain the authority to appoint the Chief Executive Officer of the Development Corporation.

Further details regarding the Emerald RDA Proposal are set forth in the written report dated April 19, 2011, submitted to the Committee by Councilmember Emerald.

QUESTIONS PRESENTED

1. What is the interplay between the Emerald RDA Proposal and potential State legislation seeking to eliminate or substantially reform redevelopment agencies?

2. What is the interplay between the Emerald RDA Proposal and the Cooperation Agreement for redevelopment projects approved on February 28, 2011?

3. If the Emerald RDA Proposal is pursued, what types of redevelopment-related decisions can be delegated by the Agency to the Development Corporation and the Housing Commission? Conversely, what types of redevelopment-related decisions must be made by the Agency Board or the San Diego City Council (Council), or both?

4. Is it legally permissible for the City's Redevelopment Department to merge into a nonprofit corporation such as CCDC? If not, how would the Emerald RDA Proposal need to be modified to avoid this dilemma?

SHORT ANSWERS

1. Over the past few months, various competing legislative proposals have emerged seeking to eliminate or substantially reform redevelopment agencies in California. There is some risk that efforts to restructure the Agency, such as the Emerald RDA Proposal, will be rendered moot by the approval of State legislation that purports to eliminate redevelopment agencies. There is also some risk that any restructuring proposal may need to be modified or revisited if State legislation is approved substantially reforming the operations of redevelopment agencies.

2. The Cooperation Agreement requires the City to complete redevelopment projects, activities, and programs utilizing funds provided by the Agency. Any proposed restructuring of the Agency, such as the Emerald RDA Proposal, that eliminates the City's Redevelopment Department may tend to undermine the integrity of the Cooperation Agreement because there will be no remaining City employees who specialize in the administration of the projects contemplated by the Cooperation Agreement. Also, implementation of the Emerald RDA Proposal would create the need for separate, potentially complex consulting or operating agreements between the City, on the one hand, and the Development Corporation and the Housing Commission (together with the Housing Authority), on the other hand.

3. Generally, the Agency could delegate to the Development Corporation and the Housing Commission the ability to carry out the day-to-day administration of redevelopment matters within their purview, and to execute certain contracts and make certain expenditures within the Agency-approved budget, so long as applicable State law does not require the Agency Board or the Council, or both, to make such decisions or take such actions itself. To accomplish this objective, the Agency would need to enter into a consulting agreement, an operating agreement or an equivalent agreement with each of the Development Corporation and the Housing Commission in order to memorialize and set forth the delegated powers and authority.

4. While CCDC and SEDC are both nonprofit corporations and could potentially merge with each other, the Redevelopment Department is a City department, not a separate corporation or other business entity, and could not legally merge into the Development Corporation. Should the implementation of the Emerald RDA Proposal result in reduction of the City work force or other changes to the status of City employees, the City must comply with applicable Civil Service Rules, Personnel Regulations, and provisions of the existing memoranda of understanding with the City's affected employee organizations.

DISCUSSION

I. POTENTIAL STATE LEGISLATION ADVERSELY AFFECTING REDEVELOPMENT AGENCIES

A. Proposed Legislation Eliminating Redevelopment Agencies.

On January 10, 2011, Governor Edmund G. Brown, Jr. released his proposed State budget for the 2011-2012 Fiscal Year (Proposed State Budget), which is directed to the Senate and the Assembly of the California Legislature (State Legislature). The Proposed State Budget contemplates that the State Legislature will adopt new legislation that, among other things, eliminates redevelopment agencies as of July 1, 2011, diverts an estimated $1.7 billion in tax increment revenue during the 2011-2012 Fiscal Year to the State's general fund, and re-allocates unencumbered tax increment revenue during the 2012-2013 Fiscal Year and ensuing fiscal years to cities, counties, school districts, and certain special districts in accordance with the existing general allocation being used for property taxes.

In response to the Proposed State Budget, two parallel draft bills, known as Assembly Bill 101 (AB 101) and Senate Bill 77 (SB 77), have been drafted for the State Legislature's consideration. AB 101 and SB 77 seek to eliminate all redevelopment agencies as of July 1,

2011, and to establish successor agencies charged with liquidating the assets of redevelopment agencies and winding down their operations, subject to limited exceptions for existing debt obligations and certain contractual obligations. The actions and expenditures of each successor agency would need to be approved by a newly-formed oversight board and could be reviewed by the County Auditor and the State Controller. In mid-March, the State Assembly voted on SB 77 several times and ultimately fell one vote short of approving SB 77 by the two-thirds supermajority vote necessary for the adoption of urgency legislation. No votes have been taken yet on AB 101 in the State Legislature or on SB 77 in the State Senate.

The fate of AB 101 and SB 77 is uncertain at this juncture. While there has been widespread speculation that Governor Brown is no longer relying on the elimination of redevelopment agencies to help solve the budget gap in the 2011-2012 Fiscal Year, it is possible that the State Legislature could take another vote at any time that results in the two-thirds supermajority vote, making the legislation effective immediately. It is also possible that the State Legislature could pursue a simple majority vote, causing the legislation to become effective as of January 1, 2012, or arguably sooner if the legislation is tied to a budget bill. AB 101 and SB 77, if approved, may be quite susceptible to legal challenge on several constitutional grounds.

B. Proposed Legislation Reforming Redevelopment.

There have been multiple legislative proposals seeking to reform, rather than eliminate, the operation of redevelopment agencies. One such proposal, known as Senate Bill 286 (SB 286), which has been endorsed by the California Redevelopment Association (CRA), would implement various reform measures, such as imposing stricter requirements on making findings of blight, limiting the percentage of total land area of a jurisdiction that may be included in project areas, prohibiting the use of tax increment for specific purposes such as golf courses and professional sports facilities without voter approval, requiring performance audits, and providing more public oversight. Another proposal, known as Senate Bill 450 (SB 450), focuses mainly on use restrictions and audit requirements related to the expenditure of affordable housing set-aside funds. In addition, the CRA has proposed a legislative concept that would allow redevelopment agencies to make voluntary payments to local educational agencies from tax increment for up to ten years commencing in the 2011-2012 Fiscal Year in exchange for the ability to extend the effective life of redevelopment plans.

As with AB 101 and SB 77, the fate of proposed reform-based legislation is uncertain at this juncture. Both SB 286 and SB 450 were considered during a recent State Senate committee meeting, but neither bill has been put to a vote in the State Legislature.

C. Effect of State Legislative Efforts on the Emerald RDA Proposal.

There is considerable uncertainty about the fate of redevelopment agencies, due to the looming prospect of State legislation that may seek to eliminate redevelopment agencies or substantially reform their operations. If onerous State legislation is adopted despite the objections of the CRA and local redevelopment agencies, then it is likely that protracted, costly litigation will ensue, which could leave the viability of redevelopment agencies in doubt for months if not years.

Any efforts to restructure the Agency will consume considerable time, expense, and resources. There is some risk, albeit difficult to quantify, that those efforts will be rendered moot by the approval of State legislation eliminating redevelopment agencies in the relatively near future. In addition, there is some risk that any restructuring proposal may need to be modified or revisited if State legislation is approved substantially reforming the operations of redevelopment agencies. It is virtually impossible to predict the outcome of the State legislative process relative to redevelopment agencies at this point. The Agency Board will need to make a policy decision whether to incur the risk of pursuing the restructuring of the Agency during a climate of legislative uncertainty, as well as potential litigation uncertainty.

Implementation of the aspect of the Emerald RDA Proposal involving a delegation of certain duties to the Housing Commission could consume a particularly large amount of time, expense and resources, for the reasons discussed in Parts II and III below. The inclusion of the Housing Commission in the Agency's organizational structure could be precluded, or could result in complications, if State legislation is approved with respect to redevelopment agencies. For instance, AB 101 and SB 77, while ambiguously phrased to some extent, would likely eliminate the current distinction between general tax increment revenue and 20 percent affordable housing set-aside tax increment revenue beginning in the 2011-2012 Fiscal Year. Under that proposed legislation, all future tax increment revenue, which normally would have been allocated to redevelopment agencies to be used for affordable housing, public improvements, or other redevelopment purposes, will be in jeopardy of being diverted by the State to non-redevelopment purposes. In addition, SB 450 would impose new use restrictions and audit requirements related to the expenditure of affordable housing set-aside funds, thereby potentially affecting the Housing Commission's role on the Agency's behalf in implementing affordable housing projects.

II. COOPERATION AGREEMENT FOR REDEVELOPMENT PROJECTS

A. Cooperation Agreement and Subsequent Asset Transfers.

The City and the Agency have entered into the Cooperation Agreement for Payment of Costs Associated with Certain Redevelopment Agency Funded Projects dated February 28, 2011 (Cooperation Agreement). City Clerk Document No. RR-306632 (Feb. 28, 2011); Agency Secretary Document No. D-04618 (Feb. 28, 2011). Under the Cooperation Agreement, the Agency must pay to the City an amount equal to the costs to the City to carry out certain Projects listed in the Schedule of Projects attached as Exhibit 1 to the Cooperation Agreement. Cooperation Agreement, § II(1). The Schedule of Projects anticipates the total expenditure of $4,107,090,901 toward the Projects, consisting of redevelopment projects, activities, and programs to be implemented in each of the redevelopment project areas throughout the City for the duration of each applicable redevelopment plan. The City must accept funds received from the Agency pursuant to the Cooperation Agreement and deposit such funds into one or more special accounts of the City to be held and expended only for the purpose of satisfying the City's obligations under the Cooperation Agreement. *Id.* § III(1). The City must devote those funds to completion of the Projects in several specified ways. *Id.* § III(2). Moreover, the City must complete the work pertaining to each Project in accordance with the "Schedule of Performance" column set forth in the Schedule of Projects, subject to the City's compliance with all applicable laws, statutes, and regulations. *Id.* § III(3).

The City and the Agency also have entered into the First Amendment to the Cooperation Agreement dated March 11, 2011 (First Amendment). City Clerk Document No. RR-306632 (Mar. 11, 2011); Agency Secretary Document No. D-04618 (Mar. 11, 2011). The First Amendment confirmed the Agency's ability to prepay, as an advance to the City, any payments due to be made by the Agency to the City under the Cooperation Agreement, and further confirmed the City's obligation to utilize those funds for Projects to be carried out by the City during the 2010-2011 Fiscal Year and subsequent fiscal years. On or about March 11, 2011, the Agency transferred to the City approximately $289.4 million to be deposited into special accounts related to the Projects under the Cooperation Agreement. It is anticipated that, consistent with the Cooperation Agreement, the vast majority of future tax increment revenue received by the Agency will be similarly transferred to the City to be deposited into special funds earmarked for completion of the Projects.

In mid-March, the Council and the Agency Board authorized the transfer of various real estate assets and other assets from the Agency to the City to be utilized for municipal purposes in accordance with the applicable redevelopment plans. San Diego Resolution R-306680 (Mar. 15, 2011); Redevelopment Agency Resolution R-04654 (Mar. 15, 2011). During the ensuing several business days, the Agency transferred to the City, by recorded quitclaim deeds, fee title ownership of approximately 95 real estate assets and assigned to the City, by separate assignment agreements, all of the tangible and intangible assets related to those real estate assets. The Agency retained fee title ownership of various other real estate assets, several of which are now encumbered by a recorded deed of trust in the City's favor to secure miscellaneous forms of debt owed by the Agency to the City.

B. Current Structure of the Agency and Administration of Projects.

There are fourteen redevelopment project areas presently existing within the City. The City's Redevelopment Department administers redevelopment activities in eleven of the redevelopment project areas, including Barrio Logan, City Heights, College Community, College Grove, Crossroads, Grantville, Linda Vista, Naval Training Center, North Bay, North Park, and San Ysidro. CCDC administers redevelopment activities in two of the redevelopment project areas, namely Centre City and Horton Plaza. SEDC administers redevelopment activities in one of the redevelopment project areas, namely the Southeastern San Diego Merged Project Area, which consists of the recently-merged Component Areas known as Central Imperial, Gateway Center West, Mount Hope, and Southcrest. CCDC was created in 1975 and SEDC was created in 1980. They are both independent, nonprofit public benefit corporations incorporated under applicable State law.

Pursuant to resolutions adopted by the Council and the Agency Board on July 30, 1991, the City and the Agency entered into that certain "First Amended Agreement" under which the Redevelopment Department provides redevelopment-related services for the Agency's benefit. City Clerk Document No. RR-278441 (July 30, 1991); Agency Secretary Document No. 1843 (July 30, 1991). The First Amended Agreement does not apply to CCDC and SEDC. The Agency, on the one hand, and CCDC and SEDC, on the other hand, have entered into certain Amended and Restated Operating Agreements dated July 13, 2010, and June 9, 2010, respectively, under which the Agency has delegated to CCDC and SEDC certain powers and duties to be undertaken by those two corporations in the pertinent redevelopment project areas.

Agency Secretary Document No. D-04498 (July 15, 2010); Agency Secretary Document No. D-04499 (June 14, 2010).

CCDC does not currently have an agreement with the City pertaining generally to CCDC's performance of redevelopment activities for the City's benefit. SEDC and the City entered into an Operating Agreement dated March 9, 1981, providing that SEDC will perform services for the City's benefit related to economic development or redevelopment within SEDC's area of influence. City Clerk Document No. RR-253754 (Mar. 9, 1981). In light of the recent approval of the Cooperation Agreement, there is an effort underway to have the City, on the one hand, and CCDC and SEDC, on the other hand, enter into consulting or operating agreements (or an amended agreement, in the case of SEDC) describing the services to be provided by those two corporations for the City's benefit with respect to the two downtown redevelopment project areas and the Southeastern San Diego Merged Project Area, respectively.

C. Analysis with respect to the Emerald RDA Proposal.

The Cooperation Agreement contemplates that the City will undertake the completion of redevelopment projects, activities, and programs utilizing funds, primarily tax increment revenue, furnished by the Agency to the City. At present, the City holds a significant amount of funds earmarked for the Projects (approximately $289.4 million) and owns title to various real estate assets (approximately 95) to be utilized for municipal purposes in accordance with the applicable redevelopment plans.

In light of this background, two important points should be considered with respect to the interplay between the Emerald RDA Proposal and the Cooperation Agreement. First, any proposed restructuring of the Agency, such as the Emerald RDA Proposal, that eliminates the City's Redevelopment Department may tend to undermine the integrity of the Cooperation Agreement because there will be no remaining City employees who specialize in the administration of the Projects contemplated by the Cooperation Agreement under the California Community Redevelopment Law, set forth at California Health and Safety Code sections 33000-33855 (Community Redevelopment Law). Implementation of the Emerald RDA Proposal would result in the Projects being administered primarily by employees of the Development Corporation, a nonprofit corporation, and the Housing Commission, a public agency; both of those entities would be separate and distinct from the City. Some aspects of the Projects could be administered by City departments, such as: (1) the Real Estate Assets Department with respect to the management and operation of real estate assets transferred by the Agency to the City, and (2) the Engineering and Capital Projects Department, with respect to the construction of public improvements funded by redevelopment money under the Cooperation Agreement. Yet, the Emerald RDA Proposal would remove the City's redevelopment employees from the day-to-day administration of Projects, thereby creating a potential inconsistency with the City's contractual obligation under the Cooperation Agreement to facilitate completion of the Projects.

Second, assuming the Cooperation Agreement remains a valid and binding contract, implementation of the Emerald RDA Proposal would create the need for separate consulting or operating agreements between the City, on the one hand, and the Development Corporation and the Housing Commission (together with the Housing Authority), on the other hand. Under one of those agreements, the City would authorize the Development Corporation to undertake the Projects on the City's behalf under the Cooperation Agreement, except to the extent that the

Projects relate to affordable housing. Under the other agreement, the City would authorize the Housing Commission to undertake the affordable housing Projects on the City's behalf under the Cooperation Agreement. In addition, the Development Corporation and the Housing Commission may need to enter into an agreement or a memorandum of understanding with each other in order to memorialize their respective roles in carrying out the Projects. Without such an agreement, the roles of those two entities, acting on the City's behalf, may become somewhat blurred. For instance, some of the Projects may involve the use of redevelopment funds to finance both the construction of affordable housing (to be administered by the Housing Commission) and the construction of public improvements or the rehabilitation of non-housing aspects of the mixed use redevelopment project (to be administered by the Development Corporation). The contract between the City and the Housing Commission could perhaps be consolidated with the contract between the Agency and the Housing Commission discussed in Part III.E below.

III. DELEGATION OF REDEVELOPMENT-RELATED DECISIONS

The Emerald RDA Proposal envisions that the Development Corporation and the Housing Commission will administer different redevelopment activities on the Agency's behalf. This proposed structure triggers the need for evaluation of which redevelopment-related decisions must be made by the Agency Board or the Council, or both, and which decisions may be lawfully delegated to the Development Corporation and the Housing Commission.

A. Purposes and Formation of a Redevelopment Agency.

The Community Redevelopment Law describes the purpose, creation, and operation of the redevelopment agency for each public agency desiring to exercise redevelopment powers within its jurisdiction. A redevelopment agency is a public body, corporate, and politic, and may exercise the powers prescribed in the Community Redevelopment Law. Cal. Health & Safety Code §§ 33100, 33122. In addition, a redevelopment agency serves as "'an agency of the state for the local performance of governmental or proprietary function within limited boundaries.'" *Kehoe v. City of Berkeley*, 67 Cal. App. 3d 666, 673 (1977) (*citing* Cal. Gov't Code § 53090(a)). Where a redevelopment agency is formed by a city, the agency's territorial jurisdiction is all of the territory within the city's limits. Cal. Health & Safety Code § 33120. Yet, the city and the redevelopment agency formed by the city are separate and distinct legal entities. *Pacific States Enterprise, Inc. v. City of Coachella*, 13 Cal. App. 4th 1414, 1424 (1993).

Every city and county within the State is authorized to establish a redevelopment agency by having the legislative body adopt an ordinance declaring the need for the formation of a redevelopment agency within its jurisdiction. Cal. Health & Safety Code §§ 33101, 34115. The "legislative body" means "the city council, board of supervisors, or other legislative body of the community." Cal. Health & Safety Code § 33007. The "community" means, among other things, a city or a county. Cal. Health & Safety Code § 33002. In San Diego, for instance, the Council serves as the legislative body of the community.

When the legislative body declares the need for the formation of a redevelopment agency, there are three different options that may be pursued in order to establish the governance of the agency. First, the legislative body may establish itself as the governing body of the redevelopment agency, in which case all of the rights, powers, duties, privileges, and immunities

vested in the agency pursuant to the Community Redevelopment Law are vested in the legislative body, except as otherwise set forth in the Community Redevelopment Law. Cal. Health & Safety Code § 33200(a). Second, the mayor or the chairman of the board of supervisors, with the approval of the legislative body, may appoint either five or seven persons, who are resident electors of the community, to serve as the members of the governing body of the redevelopment agency. Cal. Health & Safety Code § 33110. Third, the legislative body may establish a community development commission for the purpose of giving the community the option of governing its redevelopment agency and its housing authority in a single, integrated operating board. Cal. Health & Safety Code §§ 34110, 34112, 34120(a). In San Diego, the Council has utilized the first option described above by declaring itself to be the governing body of the Agency (i.e., the Agency Board) pursuant to a resolution adopted on May 6, 1958.

B. Decisions to be Made by the Council and the Agency Board.

The Community Redevelopment Law specifies which actions must be approved by the legislative body (i.e., the Council), whether by ordinance or resolution, and which actions must be approved by the redevelopment agency's governing board (i.e., the Agency Board). For instance, the Council must adopt an ordinance approving a redevelopment plan for a redevelopment project area or any subsequent amendment thereto. Cal. Health & Safety Code §§ 33365, 33450. The Council must hold a noticed public hearing and adopt a resolution approving the sale or lease of Agency-owned property acquired in whole or in part with tax increment moneys, where the property will be sold or leased for development pursuant to the applicable redevelopment plan. Cal. Health & Safety Code § 33433(a)(1). Both the Council and the Agency Board must make certain statutory determinations before the Agency pays all or part of land acquisition costs and construction costs related to buildings, facilities, structures, or other improvements that are publicly owned and located inside or contiguous to a redevelopment project area. Cal. Health & Safety Code § 33445(a). The Agency Board must adopt an annual budget containing specified information, including all of the activities to be financed by the Low and Moderate Income Housing Fund (Affordable Housing Fund) established pursuant to California Health and Safety Code section 33334.3; the Agency Board also must approve any amendments to the annual budget. Cal. Health & Safety Code § 33606. The above-described actions comprise a representative sampling, not an exhaustive listing, of the types of redevelopment-related decisions commonly made by the Council or the Agency Board, or both.

C. Delegation of Certain Decisions and Actions.

Neither the Council nor the Agency Board is legally permitted to delegate the obligation to make decisions or determinations or take actions required to be made or taken by them under the Community Redevelopment Law, unless a provision in the Community Redevelopment Law specifically provides for such delegation. Cal. Health & Safety Code § 33121.5. The Community Redevelopment Law provides for a number of administrative and general powers that may be exercised by the Agency without the express requirement of approval by the Council or the Agency Board. For instance, the Agency may enter into contracts and other instruments necessary or convenient to the exercise of its powers. Cal. Health & Safety Code § 33125(c). The Agency also may select, employ, and appoint employees, agents, officers, and counsel as it requires, subject only to any conditions and restrictions imposed by the Council on the expenditure or encumbrance of budgetary funds appropriated to the Agency's administrative fund. Cal. Health & Safety Code § 33126(a).

The Community Redevelopment Law generally provides that the Agency may enter into agreements with any agency or public body with respect to actions to be taken pursuant to any powers granted under the Community Redevelopment Law. Cal. Health & Safety Code § 33220(e). Two provisions of the Community Redevelopment Law specifically authorize the Agency to enter into a contract with any other agency, including a housing authority, under which such other agency furnishes "necessary staff services associated with or required by redevelopment and which could be performed by the staff of an agency." Cal. Health & Safety Code §§ 33126(b), 33206. Similarly, the California Housing Authorities Law, set forth at California Health and Safety Code sections 34200-34380 (Housing Authorities Law), states that a housing authority "may contract with the redevelopment agency of any city within the county to exercise its powers in the city pursuant to a contract with the redevelopment agency funded from the redevelopment agency's Low and Moderate Income Housing Fund for the purpose of increasing or improving the city's supply of low- and moderate-income housing." Cal. Health & Safety Code § 34312.5(b). These particular provisions are broad enough to permit the Agency to contract with the Development Corporation and the Housing Commission (together with the Housing Authority), respectively, for the performance of staff services on the Agency's behalf.

Generally, the Agency could delegate to the Development Corporation and the Housing Commission the ability to carry out the day-to-day administration of redevelopment matters within their purview, and to execute certain contracts and make certain expenditures within the Agency-approved budget, so long as the Community Redevelopment Law does not require the Agency Board or the Council, or both, to make such decisions or take such actions itself. Before delegating any administrative and general powers, however, the Agency would need to enter into a consulting agreement, an operating agreement, or an equivalent agreement with each of the Development Corporation and the Housing Commission in order to memorialize and set forth the delegated powers and authority. Absent such an agreement, the Development Corporation and the Housing Commission would have no express authority to act on behalf of, or in conjunction with, the Agency with respect to redevelopment matters.

In addition, the governing documents (i.e., the articles of incorporation and the bylaws, to the extent applicable) of each of the Development Corporation and the Housing Commission would need to be evaluated closely to ensure that they are broad enough to encompass the performance of redevelopment-related decisions and actions by those two entities on the Agency's behalf pursuant to the Community Redevelopment Law and on the City's behalf pursuant to the Cooperation Agreement.

D. Contract with Development Corporation.

Pursuant to an Amended and Restated Operating Agreement between the Agency and CCDC dated July 13, 2010, the Agency has delegated to CCDC certain powers and duties to be undertaken by CCDC in the two downtown redevelopment project areas. Agency Secretary Document No. D-04498. It is likely that the existing operating agreement between the Agency and CCDC could be used as a template for a new agreement, or could simply be amended, to delineate the expanded role to be undertaken by the Development Corporation in all of the redevelopment project areas throughout the City. In addition to the need for an operating agreement or an equivalent agreement between the Agency and the Development Corporation, a

consulting agreement or an equivalent agreement between the City and the Development Corporation would be required, as discussed in Part II above.

E. Contract with Housing Commission.

The Emerald RDA Proposal contemplates the transfer to the Housing Commission of the existing balance of and future tax increment revenues allocated to the Affordable Housing Fund (i.e., the set-aside affordable housing funds), to be increased from a 20 percent set-aside to a minimum of 35 percent set-aside phased in over three years. It is our understanding that the vast majority of the existing balance of the Affordable Housing Fund already has been transferred from the Agency to the City in accordance with the First Amendment to the Cooperation Agreement. The Agency also has pledged future tax increment revenues to the City under the Cooperation Agreement, including funds to be allocated to the Affordable Housing Fund.

The Agency and the City are legally permitted to transfer the Affordable Housing Fund to the Housing Commission (Transfer of Funds) with the approval of the Housing Authority. Cal. Health & Safety Code § 34312.5(b). If the Agency and the City elect to proceed with the Transfer of Funds, then they should accomplish the Transfer of Funds pursuant to a consulting agreement, an operating agreement, or an equivalent agreement among the Agency, the City, the Housing Authority, and the Housing Commission (Affordable Housing Fund Agreement). The Housing Authority should be a party to an Affordable Housing Fund Agreement based on an above-quoted provision in the Housing Authorities Law, which specifically authorizes the Housing Authority to do so, and based further on the fact that the Housing Authority has established and governs the Housing Commission. Cal. Health & Safety Code § 34312.5(b). The Housing Commission also should be a party because the Housing Authority has delegated to the Housing Commission significant decision-making authority on behalf of the Housing Authority, and the Housing Commission implements day-to-day functions concerning affordable housing projects. Among other things, an Affordable Housing Fund Agreement should specify that the Housing Commission must: (1) use the Affordable Housing Fund for the purpose of preserving, increasing, and improving the City's affordable housing supply in a manner consistent with the Redevelopment Plan and the Five-Year Implementation Plan for each contributing redevelopment project area; (2) comply with all provisions of the Community Redevelopment Law in connection with the expenditure of moneys in the Affordable Housing Fund and provide periodic reports to the Agency confirming such compliance; (3) require any repayments of loans against the Affordable Housing Fund to be deposited into the Affordable Housing Fund for future use according to its purposes; and (4) establish a separate interest-bearing account in which the Affordable Housing Fund will be deposited and retained.

The Agency is legally permitted to allocate greater than 20 percent of its future tax increment revenue stream to the Affordable Housing Fund. The Community Redevelopment Law requires that "not less than 20 percent" of all tax increment revenues allocated to the Agency must be used by the Agency "for the purpose of increasing, improving, and preserving the community's supply of low- and moderate-income housing available at affordable housing cost . . . ." Cal. Health & Safety Code § 33334.2(a). In other words, the Community Redevelopment Law imposes a minimum threshold, but not any upper limit, on the percentage of tax increment revenue that the Agency may allocate to the Affordable Housing Fund. From a practical standpoint, however, the allocation of a percentage greater than 20 percent to the Affordable Housing Fund may have a substantial adverse impact on the Agency's ability to fund

the Projects contemplated under the Cooperation Agreement and to fulfill the goals and objectives of the Redevelopment Plan and the Five-Year Implementation Plan for each redevelopment project area, as well as to repay miscellaneous forms of substantial debt presently owed by the Agency to the City. This fiscal impact should be evaluated as a policy consideration in relation to the Emerald RDA Proposal.

F. Additional Factors Related to Housing Commission's Involvement.

There are several factors that would need to be evaluated before the Agency and the City decide to undertake the Transfer of Funds to the Housing Commission. We have summarized some of those factors below. There may be additional issues that would arise during the drafting and negotiation of any proposed Affordable Housing Fund Agreement.

The Agency, the City, and the Housing Commission should consider staffing issues related to an Affordable Housing Fund Agreement. Housing Commission staff is accustomed to implementing affordable housing projects in accordance with the Housing Authorities Law, which differs from the Community Redevelopment Law in many respects. To fulfill the Housing Commission's obligations under an Affordable Housing Fund Agreement in an effective manner, Housing Commission staff would need to possess adequate expertise to implement affordable housing projects in accordance with the Community Redevelopment Law, including the implementation of contracts and programs for the provision of affordable housing and ongoing compliance with State reporting requirements. The City's Redevelopment Department, in particular, has dedicated staff, including a full-time affordable housing coordinator, who is well-versed in complying with all requirements of the Community Redevelopment Law pertaining to affordable housing. The Emerald RDA Proposal seeks to address this point by allowing an opportunity for employment at the Housing Commission with respect to employees of the Redevelopment Department, CCDC, and SEDC who have particular experience in affordable housing matters.

The Agency should review the decision-making authority of the Housing Commission with respect to the use of moneys in the Affordable Housing Fund and consider modifying that authority, if appropriate, to ensure that all parties to an Affordable Housing Fund Agreement are in full compliance with the Community Redevelopment Law. The Housing Authority has delegated to the Housing Commission significant decision-making authority on behalf of the Housing Authority. Cal. Health & Safety Code §§ 34291, 34292; San Diego Municipal Code § 98.0301. This broad delegation of authority to the Housing Commission may not be consistent with restrictions imposed on the delegation of authority under the Community Redevelopment Law. Although the Housing Commission may assist the Agency and the City with implementation of affordable housing projects, neither the Agency Board nor the Council may delegate the obligation to make decisions or determinations or to take other actions required by the Community Redevelopment Law unless a provision therein specifically authorizes such a delegation. Cal. Health & Safety Code § 33121.5. Thus, the Agency Board and the Council would continue to be required to make all decisions or determinations and to take other actions in connection with the use and expenditure of moneys in the Affordable Housing Fund required of them by the Community Redevelopment Law, unless otherwise specifically permitted.

Even if the parties enter into an Affordable Housing Fund Agreement, the Agency (or its successor entity, if applicable) may need to maintain its responsibility under the Community

Redevelopment Law for reporting to the State in connection with the use and expenditure of moneys in the Affordable Housing Fund. Cal. Health & Safety Code §§ 33080-33080.8. At a minimum, the Agency would need to obtain periodic reports from the Housing Commission regarding compliance with all applicable requirements of the Community Redevelopment Law in connection with the use and expenditure of moneys in the Affordable Housing Fund.

As a precautionary measure, Agency staff should consider contacting the respective bond counsel retained for any bonds issued by the Agency and secured by the Affordable Housing Fund to confirm whether the concept of an Affordable Housing Fund Agreement is permissible under applicable bond documents. Assuming an Affordable Housing Fund Agreement is permissible, bond counsel also would need to advise whether the applicable bond documents would require any disclosures to bond holders concerning the existence of an Affordable Housing Fund Agreement and the Transfer of Funds or require any other action of any of the parties involved with the issuance of the bonds.

G. Other Practical Considerations.

There are other practical considerations that may need to be weighed in connection with the Emerald RDA Proposal. For instance, the Emerald RDA Proposal seeks to improve the efficiency of the Agency. Yet, the establishment of a two-tiered structure, comprised of the Agency in the upper tier and the Development Corporation and the Housing Commission in the lower tier, may not achieve any economies of scale compared to the Agency's current structure or compared to another restructuring proposal with one tier, such as the "Agency-Employee" model. Among other things, the Housing Commission would likely need to negotiate a different set of loan documents for the Housing Commission's contribution of Affordable Housing Fund moneys versus other funds traditionally administered by the Housing Commission, given that different legal requirements and procedures will apply to the variety of funding sources. In addition, separate legal advice will need to be rendered on behalf of the Agency, the Development Corporation, and the Housing Commission. Any or all three of those entities could be sued separately and would likely need to be defended by separate legal counsel in the event of a dispute regarding a particular redevelopment project, program, or activity.

Further, it may be difficult to attract and retain a qualified, geographically representative set of board members for the Development Corporation. To be effective and responsive to the needs of the residents occupying each redevelopment project area, the board may need to include at least one representative from each of the 14 constituent project areas. The Emerald RDA Proposal calls for a board of nine members, but does not identify how those members will be selected in a way that ensures adequate geographical representation of all redevelopment project areas throughout the City. In addition, service on the board may require a very significant commitment of volunteer time because the board will need to address various redevelopment matters related to all of the project areas, not simply two project areas in the case of CCDC and one merged project area in the case of SEDC.

IV. MERGER OF SEDC AND REDEVELOPMENT DEPARTMENT INTO CCDC

As described above, the Emerald RDA Proposal envisions the merger of both SEDC and the Redevelopment Department into CCDC, which will become the Development Corporation.

Under general corporate law in California, a merger is a combination of two or more corporations or other business entities, where one or more merged corporations are completely merged into or absorbed by the surviving corporation in accordance with a duly approved agreement of merger. Cal. Corp. Code §§ 1100-1101. As the result of a corporate merger, the merged corporation loses its identity and becomes part of the surviving corporation, which retains its identity. A merger extinguishes the merged corporation, and the surviving corporation assumes all of the rights, privileges, debts, and liabilities of the merged corporation. Cal. Corp. Code § 1107(a).

The basic definition of a merger requires that two or more corporations or other business entities exist before the merger. CCDC and SEDC are both nonprofit corporations and could potentially merge with each other, subject to an in-depth evaluation of existing employment agreements and other logistical issues. Yet, the Redevelopment Department is a City department, not a separate corporation or other business entity, and could not legally merge into the Development Corporation. Thus, implementation of the Emerald RDA Proposal would not entail a true merger of the three existing redevelopment entities.

Should the implementation of the Emerald RDA Proposal result in reduction of the City work force or other changes to the status of City employees, the City must comply with applicable Civil Service Rules, Personnel Regulations, and provisions of the existing memoranda of understanding with the City's affected employee organizations. Any proposal for the restructuring of the Agency should be reviewed to ensure compliance with the San Diego Charter and the Meyers-Milias-Brown Act. An in-depth analysis of labor issues related to the Emerald RDA Proposal is beyond the scope of this Report.

V. REMAINING ISSUES TO BE EVALUATED

We have identified several other issues that may need to be explored with respect to the Emerald RDA Proposal, as follows:

(a) What City procedures and regulations would need to be amended and what labor issues and other factors may need to be addressed to allow the Development Corporation as a whole to undertake the discretionary development review process in a manner similar to CCDC's current role?

(b) Is it legally permissible for the Mayor to be appointed as an ex officio, non-voting member of the Agency Board, and, if so, are there any practical considerations that need to be weighed in this regard?

(c) What labor issues will be implicated if Redevelopment Development personnel are transitioned out of City employment?

We may identify additional issues upon further evaluation of the Emerald RDA Proposal. We intend to address the above-described issues and any additional issues in a future written report addressed to the Committee. Moreover, if the Emerald RDA Proposal is implemented in the future, the governing documents (i.e., the bylaws and the articles of incorporation, to the extent applicable) of the Agency, the Development Corporation, and the Housing Commission

will need to be closely scrutinized, and modified where appropriate, to ensure that they coincide with the goals and operational procedures of the Agency in its restructured form.

CONCLUSION

This Report addresses several important issues and factors to be considered with respect to the potential implementation of the Emerald RDA Proposal. Additional issues and factors may need to be addressed in a future report.

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