MARY JO LANZAFAME
ASSISTANT CITY ATTORNEY

JOAN DAWSON
DEPUTY CITY ATTORNEY

OFFICE OF
THE CITY ATTORNEY
CITY OF SAN DIEGO

Jan I. Goldsmith
CITY ATTORNEY

1200 THIRD AVENUE, SUITE 1620
SAN DIEGO, CALIFORNIA 92101-4178
TELEPHONE (619) 236-6220
FAX (619) 236-7215

OPINION NUMBER 2010-6

DATE: November 24, 2010

SUBJECT: Use of Redevelopment Agency Funds to Pay for Debt Service for Phase II Expansion of the San Diego Convention Center or Future Convention Center Projects

REQUESTED BY: Honorable City Council President and City Councilmembers

PREPARED BY: City Attorney

INTRODUCTION

On October 19, 2010, the San Diego City Council (City Council) asked the City Attorney for a Legal Opinion on whether the City of San Diego's Redevelopment Agency (Redevelopment Agency) can fund debt service related to the Phase II expansion of the San Diego Convention Center (Convention Center) and whether the Redevelopment Agency can pay for any future improvements to the Convention Center. This Legal Opinion expands upon the narrow advice provided in a June 9, 2010, confidential communication from outside legal counsel to the Redevelopment Agency.

QUESTION PRESENTED

Under what circumstances can the Redevelopment Agency fund construction of or improvements to the Convention Center?

SHORT ANSWER

The Redevelopment Agency must act in accordance with the provisions of the California Community Redevelopment Law (CRL), at California Health and Safety Code (Health and Safety Code) sections 33000-34160.

The construction of the Phase II expansion of the Convention Center has been completed; therefore, if authorized, the use of Redevelopment Agency funds to pay for the debt service for the Phase II expansion would be through a reimbursement agreement, under Health and Safety Code section 33445, subsections (c) or (d). The concept of a reimbursement agreement under section 33445 has been authorized by the California Legislature since 1969. However, there is a

dearth of case law on interpretation of or use of reimbursement agreements. It is our view that the City and the Redevelopment Agency must find that the Convention Center expansion was and is of benefit to the redevelopment project area, serves a redevelopment project purpose, and is consistent with the redevelopment project implementation plan. It is not clear, for purposes of a reimbursement agreement, whether the City Council, or other legislative body, must also determine that no other reasonable means of financing the construction is now available, in light of the fact that the Phase II expansion has already been completed with alternative financing. Assuming this finding must be made, whether the City Council can make this finding, or any of the requisite findings are questions of fact. If the City and the Redevelopment Agency were to enter into a reimbursement agreement, the City may consider filing a validation action to ensure the use of Redevelopment Agency funds is legally supported before implementation of the agreement.

If the Redevelopment Agency were to pay all or a part of the cost of future improvements to the Convention Center, the provisions of Health and Safety Code section 33445, subsection (a) would control, which require the City Council to determine all of the following:

1. That the installation or construction of the buildings, facilities, structures, or other improvements that are publicly owned are of benefit to the redevelopment project area by helping to eliminate blight within the project area or providing housing for low- or moderate-income persons.

2. That no other reasonable means of financing the installation or construction of the buildings, facilities, structures, or other improvements that are publicly owned, are available to the City.

3. That the payment of funds for the cost of buildings, facilities, structures, or other improvements that are publicly owned is consistent with the redevelopment project implementation plan.

The findings under subsection (a) are legislative in nature, and must be supported by a legislative record with facts present at the time of the findings. Further, before the Redevelopment Agency commits to using tax increment funds for the purpose of paying for the cost of construction of any publicly owned building, the legislative body must hold a noticed public hearing, as required by Health and Safety Code section 33679.

BACKGROUND

The Convention Center is located at 111 West Harbor Drive, in the Marina district of San Diego, on land owned by the San Diego Unified Port District (District). It was built in 1989. The District owns the Convention Center, and leases it to the City through the Convention Center Expansion Financing Authority (Authority), a joint powers authority between the City and the District. The City operates the Convention Center through a Convention Center Management Agreement between the City and the District.

On June 21, 1994, the City and the District entered into a memorandum of understanding relating to expansion of the Convention Center. *See* San Diego Ordinance O-18443 (Nov. 25, 1997). To accomplish the Phase II construction, on September 1, 1998, the City entered into agreements with the Authority, whereby the District leased the existing Convention Center and the expanded Center (Phase II) to the Authority, the Authority issued $205,000,000 in lease revenue bonds to finance the Phase II construction, and the Authority leased the Convention Center to the City. The Phase II construction was substantially completed and opened in 2001. The City pays the Authority rental payments sufficient to pay the debt financing on the lease revenue bonds. *Id.* The City's lease payments (rental payments) are approximately $13.7 million annually, and are used by the Authority to pay the debt service on the bonds. *See generally* San Diego Ordinance O-18270 (Mar. 5, 1996); San Diego Ordinance O-18271 (Mar. 5, 1996); San Diego Resolution R-289349 (Oct. 28, 1997); San Diego Ordinance O-18443 (Nov. 25, 1997). *See also* Official Statement, $205,000,000 Convention Center Expansion Financing Authority Lease Revenue Bonds, Series 1998A, at 19.

The Convention Center is a publicly owned building as defined by the CRL, and it is located contiguous[1] to the Centre City Redevelopment Project area. *See* San Diego Ordinance O-19663 (Sept. 17, 2007); Fourth Implementation Plan for the Horton Plaza & Centre City Redevelopment Projects, approved by San Diego Redevelopment Agency Resolution R-04405 (June 19, 2009).

To date, the Redevelopment Agency has not been involved in the Convention Center expansion. There is no present contractual obligation of the Redevelopment Agency with the Authority, for the Redevelopment Agency to acquire, construct, or otherwise provide public facilities and public improvements for the Authority or the District.

ANALYSIS

I. THE CRL AUTHORIZES A REDEVELOPMENT AGENCY TO PAY FOR INSTALLATION OR CONSTRUCTION OF CERTAIN PUBLICLY OWNED BUILDINGS INSIDE OR CONTINGUOUS TO A REDEVELOPMENT PROJECT AREA UNDER CERTAIN CIRCUMSTANCES.

A. The CRL Authorizes the Use of Reimbursement Agreements Under Health and Safety Code section 33445.

Under the CRL, specifically Health and Safety Code section 33445, a redevelopment agency may pay the cost for construction of or improvements to publicly owned buildings

[1] "Contiguous" means "that the parcel on which the building, facility, structure, or other improvement that is publicly owned is located shares a boundary with the project area or is separated from the project area only by a public street or highway, flood control channel, waterway, railroad right-of-way, or similar feature." Cal. Health & Safety Code § 33445(f).

through a reimbursement agreement, in which a redevelopment agency agrees to reimburse the community, defined as "a city, county, city and county, or Indian tribe, band, or group which is incorporated or which otherwise exercises some local governmental powers," or other public corporation or entity for the construction of the building.[2] Cal. Health & Safety Code § 33002 (definition of "community").

Section 33445(d) specifically authorizes a reimbursement agreement between a redevelopment agency and a city where the cost of construction of a building or improvements has been paid by a joint powers entity, and the building has been or will be leased to the city. The redevelopment agency can enter into a reimbursement agreement with the city permitting reimbursement for the city's payments under the lease from redevelopment project area tax increments.[3] The applicable CRL language is as follows:

> (d) In a case where . . . the cost of the installation and construction of the building, facility, structure, or other improvement that is publicly owned *has been* paid by, a . . . joint powers entity, or other public corporation to provide a building, facility, structure, or other improvement that has been or will be leased to the community [the City], the contract may be made with, and the reimbursement may be made payable to, the community [the City].

Cal. Health & Safety Code § 33445(d) (emphasis added).

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[2] Redevelopment agencies are not authorized to use tax increment funds to build city halls or county administration buildings, except in certain limited situations. Cal. Health & Safety Code § 33445 (e)(1). Further, redevelopment agencies are not authorized to pay for the normal maintenance or operations of buildings, facilities, structures, or other improvements that are publicly owned. Cal. Health & Safety Code § 33445 (b)(3). Normal maintenance or operations do not include the construction, expansion, addition to, or reconstruction of, buildings, facilities, structures, or other improvements that are publicly owned, undertaken pursuant to section 33445. *Id.* at § 33445(b)(3).

[3] A primary funding source relied on by a redevelopment agency to finance its activities under the CRL is tax increment revenue. When tax increment financing is used, the CRL allows allocation of property taxes so that the taxing agency (the city) receives that portion of the taxes produced from the total assessed value of taxable property in the redevelopment project as shown upon the assessment roll in connection with the taxation of the property, last equalized prior to the effective date of the ordinance approving the redevelopment plan. Cal. Health & Safety Code § 33670. A redevelopment agency must incur loans, advances, or other indebtedness when carrying out the redevelopment plan in order to use tax increment funds. The redevelopment agency may receive that portion of the levied taxes in excess of the amount "to pay the principal of and interest on loans, monies advanced to, or indebtedness (whether funded, refunded, assumed, or otherwise) incurred by such redevelopment agency to finance or refinance, in whole or in part, such redevelopment project." *Id.*

Tax increment revenue must be spent on redevelopment activity, which includes redevelopment as prescribed in Health and Safety Code sections 33020 and 33021. The necessity for redevelopment is the existence of "blighted areas that constitute physical and economic liabilities, requiring redevelopment in the interest of health, safety, and general welfare of the people of these communities and of the state." Cal. Health & Safety Code § 33030(a). The California Supreme Court has warned that public agencies "'should be chary of the use of the [redevelopment] act unless, . . . there is a situation where the blight is such that it constitutes a real hindrance to the development of the city and cannot be eliminated or improved without public assistance. It never can be used just because the public agency considers that it can make a better use or planning of an area than its present use or plan.'" *Sweetwater Valley Civic Ass'n v. City of National City*, 18 Cal. 3d 270, 278 (1976) (citation omitted).

Section 33445 also authorizes reimbursement agreements between a city and a redevelopment agency for construction of public buildings that has been paid for initially by a city or other public corporation:

> (c)(1) When . . . the cost of the installation and construction of the building, facility, structure, or other improvement that is publicly owned . . . *has been*, or will be, paid or provided for initially by the community [a city] or other public corporation, the agency may enter into a contract with the community [a city] or other public corporation under which it agrees to reimburse the community [a city] or other public corporation for . . . all or part of the cost of the building, facility, structure, or other improvement that is publicly owned, . . . by periodic payments over a period of years.
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> (2) The obligation of the agency under the contract shall constitute an indebtedness of the agency for the purpose of carrying out the redevelopment project for the project area, and the indebtedness may be made payable out of taxes levied in the project area and allocated to the agency under subdivision (b) of section 33670 [tax increment funds] or out of any other available funds.

Cal. Health & Safety Code § 33445(c)(1)-(2) (emphasis added).

Section 33445, subsection (d) is more directly applicable to the Phase II expansion of the Convention Center, because it was paid for through the issuance of bonds by the Authority, a joint powers entity, with a lease of the Convention Center, including the Phase II expansion, to the City. Under this authority, the Redevelopment Agency may agree to make reimbursement to the City.

B. The Legislative History and Existing Case Law Supports Use of a Reimbursement Agreement.

The concept of a reimbursement agreement has been authorized by Health and Safety Code section 33445 since 1969. Cal. Stats. 1969, ch. 95, §1 (effective May 20, 1969).[4] However, there is a dearth of case law interpreting this section. To determine the statute's meaning, we look first to the plain language of the statute.[5] If the plain language is ambiguous, uncertain, or unclear, we may look to extrinsic sources, including the legislative history, to assist in interpretation.[6]

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[4] In 1969, Health and Safety Code section 33445 provided, in pertinent part:

> Notwithstanding the provisions of Section 33440 an agency may, with the consent of the legislative body, pay all or part of the value of the land for and the cost of the installation and construction of any building, facility, structure, or other improvement which is publicly owned either within or without a project area, to the extent that such buildings, facilities, structures, or other improvements are of benefit to the project area.
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> When the value of such land or the cost of the installation and construction of such building, facility, structure, or other improvement, or both, has been, or will be, paid or provided for initially by the community or other public corporation, the agency may enter into a contract with the community or other public corporation under which it agrees to reimburse the community or other public corporation for all or part of the value of such land or all or part of the cost of such building, facility, structure, or other improvement, or both, by periodic payments over a period of years.
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> The obligation of the agency under such contract shall constitute an indebtedness of the agency for the purpose of carrying out the redevelopment project for such project area, which indebtedness may be made payable out of taxes levied in such project area and allocated to the agency under subdivision (b) of Section 33670, or out of any other available funds.
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> In a case where such land has been or will be acquired by, or the cost of the installation or construction of such building, facility, structure or other improvement has been paid by, a parking authority, joint powers entity, or other public corporation to provide a building, facility, structure, or other improvement which has been or will be leased to the community, such contract may be made with, and such reimbursement may be made payable to, the community.

Cal. Stats. 1969, ch. 95, § 1.

[5] "A fundamental rule of statutory construction is that a court should ascertain the intent of the Legislature so as to effectuate the purpose of the law. In construing a statute, our first task is to look to the language of the statute itself. When the language is clear and there is no uncertainty as to the legislative intent, we look no further and simply enforce the statute according to its terms." *DuBois v. Workers' Comp. Appeals Bd.*, 5 Cal. 4th 382, 387-88 (1993) (citations omitted). "Our role in construing a statute is simply to ascertain and to declare what is in terms or in substance contained in the statute, not to insert what has been omitted." *Esberg v. Union Oil Co.*, 28 Cal. 4th 262, 270 (2002).

[6] "As with any statutory construction inquiry, we must look first to the language of the statute. 'To determine legislative intent, a court begins with the words of the statute, because they generally provide the most reliable indicator of legislative intent.' If it is clear and unambiguous our inquiry ends. There is no need for judicial construction and a court may not indulge in it. 'If there is no ambiguity in the language, we presume the Legislature meant what it said and the plain meaning of the statute governs.'" *Diamond Multimedia Sys. Inc. v. Superior Court*, 19 Cal. 4th 1036, 1046-47 (1999) (citations omitted). However, language that appears unambiguous on its face may be shown to have a latent ambiguity and thus a court may turn to extrinsic sources, including the ostensible objects to be achieved and the legislative history. *People v. Coronado*, 12 Cal. 4th 145, 151 (1995).

The provisions authorizing reimbursement agreements are clearly part of the statutory scheme. A question remains as to whether there are requisite findings that must be made and if so, what findings prior to authorization of a reimbursement agreement. The legislative history is helpful in answering that question.

In 1970, the California Legislature (Legislature) amended section 33445 to require that a redevelopment agency and the local legislative body make "a determination by resolution" that the publicly owned building, facility, structure, or other improvement being financed by the redevelopment agency is "of benefit to the project area . . . or to any other project area within the jurisdiction of such agency and the legislative body." Cal. Stats. 1970, ch. 1238, p. 2227, § 1.7. The legislative provided that the determination by the agency and the local legislative body "shall be final and conclusive as to the issue of benefit to the project area." *Id.*

The Legislature amended section 33445 again in 1976 to provide, in pertinent part, that a redevelopment agency may pay all or part of the construction of a publicly owned facility if the legislative body determines that the facility is of benefit to the project area and "no other reasonable means of financing such buildings, facilities, structures, or other improvements are available to the community." Cal. Stats. 1976, ch. 1336, p. 6060, §13.

In 1993, as part of the Community Redevelopment Law Reform Act (A.B. 1290), the Legislature added a requisite determination under section 33445 that the payment of funds for the cost of buildings, facilities, structures, or other improvements, "will assist in the elimination of one or more blighting conditions inside the project area." Cal. Stats. 1993, ch. 942 (A.B. 1290), § 29. The Legislature amended this determination in 1994 to provide, in pertinent part, that "the cost of buildings, facilities, structures, or other improvements will assist in the elimination of one or more blighting conditions inside the project area or provide housing for low- or moderate-income persons, and is consistent with the implementation plan adopted pursuant to Section 33490." Cal. Stats. 1994, ch. 936 (S.B. 732), §15.

By amendment in 2009, the Legislature rewrote section 33445 so that the requisite determinations of the legislative body, now set forth in subsection (a), are linked to the authorization of a redevelopment agency to pay for the cost of installation and construction of any publicly owned building, while the authorization for reimbursement agreements are set forth in different subsections, specifically (c) and (d). Cal. Stats. 2009, ch. 555 (S.B. 93), §1.

Subsection (a) of section 33445 now provides, in pertinent part:

> [A]n agency may, with the consent of the legislative body, pay all or a part of . . . the cost of the installation and construction of any building, facility, structure, or other improvement that is publicly owned and is located inside or *contiguous* to the project area, if the legislative body determines all of the following:

> (1) That . . . the installation or construction of the buildings, facilities, structures, or other improvements that are publicly owned are of benefit to the project area by helping to eliminate blight within the project area or providing housing for low- or moderate-income persons.
>
> (2) That no other reasonable means of financing the . . . installation or construction of the buildings, facilities, structures, or other improvements that are publicly owned, are available to the community.
>
> (3) That the payment of funds for . . . the cost of buildings, facilities, structures, or other improvements that are publicly owned is consistent with the implementation plan adopted pursuant to section 33490.

Cal. Health & Safety Code § 33445(a) (emphasis added).[7]

As part of the Legislature's discussion related to the most recent amendment to Health and Safety Code section 33445 (S.B. 93), the reimbursement agreement was characterized as follows:

> [A] redevelopment agency can pay for public works projects if the agency's legislative body (e.g., the underlying city council or county board of supervisors) determines that: 1. The public works benefit the project area or the immediate neighborhood. . . . 2. No other reasonable means of financing are available. 3. Paying for the public works helps eliminate blight inside the project area (or provides affordable housing) and is consistent with the agency's implementation plan. . . . When the underlying city or county or another public corporation pays for public works, a redevelopment agency can contract to reimburse the city, county, or other public corporation and pay off the contract with property tax increment

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[7] Health and Safety Code section 33445(g) provides:

> Notwithstanding section 33445.1, an agency may pay for all or part of the value of the land for and the cost of the installation and construction of any building, facility, structure, or other improvement that is publicly owned and is partially located in the project area, but extends beyond the project area's boundaries, if the legislative body makes the determinations required by subdivision (a).

However, a redevelopment agency may not pay for the normal maintenance or operation of buildings, facilities, structures, or other improvements that are publicly owned. Cal. Health & Safety Code § 33445(b). Normal maintenance or operations "do not include the construction, expansion, addition to, or reconstruction of, buildings, facilities, structures, or other improvements that are publicly owned otherwise undertaken pursuant to [section 33445]." Cal. Health & Safety Code § 33445(b).

> revenues. When a parking authority, joint powers entity, or public corporation pays for public works and then leases the property to the underlying city or county, a redevelopment agency can contract with the city or county for reimbursement.

S.B. 93, Bill Analysis, Senate Local Gov't Committee Hearing (Mar. 4, 2009).

There is an argument that the determinations, which are now set forth in subsection (a) of section 33445, were not and are not intended to apply to a reimbursement agreement between a redevelopment agency and a city, especially the finding that there is no other reasonable means of financing. A reimbursement agreement, as permitted under section 33445, contemplates that the construction of the publicly owned building *has been* paid for by another entity and a redevelopment agency is agreeing to make reimbursement. Therefore, it could be argued, that the finding of no other reasonable means of financing is not applicable.

As a general rule of statutory construction, a statute is to be read as a whole to give meaning to each of its parts.[8] Therefore, the better, and perhaps more conservative, view is that the legislative body must make the findings set forth in section 33445 for a reimbursement agreement to proceed. This view is supported by the opinion of *Meaney v. Sacramento Housing & Redevelopment Agency*, 13 Cal. App. 4th 566 (1993), rev. denied (May 20, 1993), the only published opinion this Office could find that interprets section 33445. This case was published in 1993. There have been subsequent amendments to section 33445; however, none of these amendments has substantially changed the provisions regarding reimbursement agreements.

Meaney involved a challenge by four school districts in the Sacramento area, which filed a complaint for a validation proceeding against the Sacramento Housing and Redevelopment Agency, the City of Sacramento, and the County of Sacramento. *Id.* at 572. The school districts challenged an agreement between the county and the redevelopment agency to build a new county courthouse, in part, on the ground that the agreement improperly provided for tax increment financing to pay the cost of the proposed courthouse. *Id.* The school districts alleged that the agreement was not authorized under Health and Safety Code section 33445. *Id.* The trial court sustained the defendants' demurrer to the original complaint as well as a first amended complaint, without leave to amend. The trial court entered an order dismissing the action. The appellate court reversed, holding that the school districts should have been permitted to challenge

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[8] The California Supreme Court has long held:

> The fundamental rule of statutory construction is that the court should ascertain the intent of the Legislature so as to effectuate the purpose of the law. Moreover, every statute should be construed with reference to the whole system of law of which it is a part so that all may be harmonized and have effect. If possible, significance should be given to every word, phrase, sentence and part of an act in pursuance of the legislative purpose. Such purpose will not be sacrificed to a literal construction of any part of the act.

Select Base Materials, Inc. v. Bd. of Equalization, 51 Cal. 2d 640, 645 (1959) (citations and quotations omitted).

the agreement by challenging the approval process: "Nothing in the School Districts' filings indicated that they conceded the regularity of the administrative proceeding or that the proceedings were beyond attack." *Id.* at 583. The California Supreme Court denied review of the *Meaney* decision.

The *Meaney* court did not deal directly with the issue of the legality of a reimbursement agreement after completion of a construction project. However, the *Meaney* case is instructive. The court held that section 33445 authorizes a redevelopment agency to pay for the construction cost and land value of publicly owned facilities which benefit the project area. *Id.* at 574. Further, the court analyzed the legislative history of section 33445, and discussed the legislative findings necessary under section 33445. The court said, "We . . . find in section 33445 no restriction on the authority of the [redevelopment] Agency to make payments out of such tax increment revenues." *Id.* Further, regarding reimbursement agreements, the court explained that "where a 'community or other public corporation' initially pays for the construction cost and land value of the public facility," section 33445 "authorizes the agency to enter into a contract with the public entity to reimburse it for these expenditures out of taxes allocated under section 33670 [tax increment] or 'any other available funds.'" *Id.* at 575.

The *Meaney* court also concluded that the determinations as required by section 33445 "fall within the category of legislative findings." *Id.* at 578-79. The court placed significance on the language in section 33445, which has been in the statute since 1970, providing that the requisite determinations of the legislative body under the statute are "final and conclusive." *Id.* at 578.

The *Meaney* court explained:

> We read the provision making the determinations 'final and conclusive' to mean that the evidentiary basis for the findings is beyond the reach of judicial scrutiny; the courts may not inquire whether the findings are supported by substantial evidence or by any evidence at all in the administrative record. This conclusion, however, does not preclude judicial review of the procedures followed by the agency and the local legislative body in making the determinations or of the question whether the determinations comply with section 33445.

Id. at 578-79.

The *Meaney* court analyzed the legislative history of section 33445, in reaching its conclusions:

> It is highly significant, we think, that section 33445 requires not only that the local legislative body consent to the tax increment financing of public facilities but also that it make the two required determinations of fact. Clearly, the Legislature intended the two

> required determinations to represent something beyond mere *consent* to the financing. The legislative history underscores this observation.
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> As originally enacted, section 33445 required only the consent of the legislative body. In 1970, it was amended to require the legislative body both to consent and to make a "determination by resolution" that the public facility would benefit the redevelopment area. A 1976 amendment added the second determination regarding "other reasonable means of financing" and revised the language to state plainly that the two determinations were a condition to the power of the agency to engage in the tax increment financing.
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> . . . .
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> In short, our review of the statutory context and legislative history indicates that the Legislature intended that the two required determinations of section 33445 effectively limit potential abuses in tax increment financing. We must construe the statute in a manner that gives substance to this legislative intent. This means that the determinations should be made following public hearing of the "legislative body" complying with . . . the Ralph M. Brown Act and other applicable law governing the adoption of resolutions of this kind.

Id. at 579-80 (citations omitted).

Given the dearth of case law interpreting Health and Safety Code section 33445, interpretation of the section must come from the plain language of the statute as well as supporting legislative documents. Although reimbursement agreements are permissible under subsections (c) and (d), the provisions of subsection (a) do not appear to contemplate a situation where a building has been constructed without redevelopment agency funds and a redevelopment agency comes in later to pay the debt service.[9] However, there is nothing on the face of section 33445 that prohibits or precludes a reimbursement agreement after the building has been built. Further, subsections (c) and (d) of section 33445 both provide that when the cost of construction of the building or improvement "*has been*" paid or provided for initially by the city or other public corporation, the agency may enter into a reimbursement agreement. Cal. Health & Safety Code § 33445(c)-(d) (emphasis added). The use of the words, "has been," contemplates that the reimbursement agreement can come later. A court will reject a statutory

[9] The Phase II expansion of the Convention Center is distinguishable from the construction of Petco Park in that the use of Redevelopment Agency funds was contemplated for the ballpark from the initiation of the project. The Redevelopment Agency and the City entered into a Ballpark Cooperation Agreement, and made the requisite determinations. *See, e.g.*, Redevelopment Agency Resolution R-03110 (San Diego Resolution R-292800) (Feb. 22, 2000); Redevelopment Agency Resolution R-03327 (San Diego Resolution R-294822) (May 1, 2001); Redevelopment Agency Resolution R-04372 (San Diego Resolution R-304728) (Mar. 20, 2009).

interpretation that renders words or terms in a statute surplusage. *City of San Jose v. Superior Court*, 5 Cal. 4th 47, 55 (1993). Therefore, it is this Office's view that a reimbursement agreement may be made after a building has been paid or provided for initially by another public entity.

While an argument can be made that the findings set forth in subsection (a) of section 33445, especially the finding that there is "no other reasonable means of financing," may not be relevant to a reimbursement agreement, the better argument, based on the legislative history and the *Meaney* case, is that the legislative findings are required when redevelopment agency funds are to be used to pay for a publicly owned building located inside or contiguous to a redevelopment project area. This view considers subsection (a) of section 33445 together with the provisions in subsections (c) and (d), and in the context of the overall statutory scheme. *Horwich v. Superior Court*, 21 Cal. 4th 272, 276 (1999). Therefore, a reimbursement agreement between the Redevelopment Agency and the City or the Authority for the expenditure of redevelopment agency funds should be directly linked to construction of the publicly owned building or improvements. Further, the legislative body must make the requisite findings in subsection (a).

The determinations made by the Redevelopment Agency and the City pursuant to Health and Safety Code section 33445(a) "shall be final and conclusive." Cal. Health & Safety Code § 33445(b). As explained, this language has been interpreted to limit the scope of judicial review. *Meaney*, 13 Cal. App. 4th at 574. A court may review whether the procedures, including the noticed public hearing requirement, followed by the redevelopment agency and the legislative body in making the determinations, complied with section 33445. *Id.* at 578-79.

C. The Legislative Body – the City Council – Must Consent to the Redevelopment Agency Paying for Construction Costs of a Publicly Owned Building Inside or Contiguous to a Redevelopment Project Area, and Must Make Three Required Findings as Part of a Noticed Public Hearing.

Section 33445 authorizes a redevelopment agency to pay for the construction cost of certain publicly owned facilities that benefit a redevelopment project area, if certain conditions are met, namely that requisite determinations are made and a noticed public hearing is conducted.

1. First Requisite Determination: Construction or Expansion of the Publicly Owned Convention Center Must Be of Benefit to the Redevelopment Project Area by Helping to Eliminate Blight.

The first determination the City Council must make under Health and Safety Code section 33445(a) is "[t]hat the acquisition of land or the installation or construction of the buildings, facilities, structures, or other improvements that are publicly owned are of benefit to the project area by helping to eliminate blight within the project area." Cal. Health & Safety Code § 33445(a)(1).

The legal justification for the use of the extraordinary public powers authorized by the CRL is the elimination of blight. *Berman v. Parker*, 348 U.S. 26, 32-34 (1954). A determination of blight is a prerequisite to invoke redevelopment. *Beach-Courchesne v. City of Diamond Bar*, 80 Cal. App. 4th 388, 395 (2000). The CRL states: "It is found and declared that there exist in many communities blighted areas that constitute physical and economic liabilities, requiring redevelopment in the interest of the health, safety, and general welfare of the people of these communities and of the state." Cal. Health & Safety Code § 33030(a).[10] The elimination of blighted areas is the public purpose that has justified allowing a redevelopment agency to impose design controls, restrict uses, acquire property by eminent domain, and expend public funds. *See Redevelopment Agency v. Hayes*, 122 Cal. App. 2d 777, 783-84 (1954). *See also* Cal. Health & Safety Code §§ 33030-33039. By eliminating blight, the agency is carrying out state policy. *Redevelopment Agency v. City of Berkeley*, 80 Cal. App. 3d 158, 168 (1978).

A blighted area must be predominantly urbanized and have both physical and economic conditions that are "so prevalent and so substantial that it causes a reduction of, or lack of, proper utilization of the area to such an extent that it constitutes a serious physical and economic burden on the community that cannot reasonably be expected to be reversed or alleviated by private enterprise or governmental action, or both, without redevelopment." Cal. Health & Safety Code § 33030(b)(1); *see also* § 33031 (describing physical and economic conditions that cause blight); *Regus v. City of Baldwin Park*, 70 Cal. App. 3d 968, 981 (1977)(stating that blighting conditions must predominate and injuriously affect the entire project area). Regarding the definition of blight, *see, e.g., In re Bunker Hill Urban Renewal Project 1B*, 61 Cal. 2d 21, 45 (1964); *Gonzales v. City of Santa Ana*, 12 Cal. App. 4th 1335, 1342 (1993); *County of Riverside v. City of Murrieta*, 65 Cal. App. 4th 616, 624 (1998); *Beach-Courchesne*, 80 Cal. App. 4th at 395; *Graber v. City of Upland*, 99 Cal. App. 4th 424, 430-31 (2002).

No findings regarding the use of Redevelopment Agency funds for Phase II expansion of the Convention Center were made prior to the construction. Nothing on the face of the section 33445 precludes a finding that the Convention Center is of benefit to the Centre City Redevelopment Project area by helping to eliminate blight. The current language of the statute, which was amended in 2009, uses present tense to provide that the legislative body must determine that the construction or improvement is "of benefit to the project area by helping eliminate blight within the project area." Cal. Health & Safety Code § 33445(a)(1). The finding is neither retrospective nor prospective in nature. However, the City Council should be mindful that the Phase II expansion of the Convention Center has already been completed. As one California appellate court has stated, under the CRL, "blight must be found before redevelopment can be authorized, because, first, without evidence of blight there is no solid

[10] In 1993, the California Legislature restricted the statutory definition of blight and required better documentation of local officials' findings regarding the conditions of blight. Cal. Stats. 1993 ch. 942, § 29. "The legislative purpose of these statutory amendments is to focus public officials' attention and their extraordinary redevelopment powers on properties with physical and economic conditions that are so significantly degraded that they seriously harm the prospects for physical and economic development without the use of redevelopment." S.B. 1206 (2005-2006 Reg. Sess.) § 1(e).

justification for compelling taxpayers in one section of the community, for example those in the county, the school district, and in [a City] outside the Project area, to subsidize the cost of development of another section of the community by carrying a disproportionate share of the cost of local government." *Regus*, 70 Cal. App. 3d at 982.

In making the requisite finding under subsection 33445(a)(1), the City Council would have to determine, based on present facts, that the construction of the Phase II expansion of the Convention Center is of benefit to the Redevelopment Agency project area by helping to eliminate blight. Assuming a reimbursement agreement is contemplated, the City Council should review whether the Phase II expansion has eliminated blight and continues to do so.

If additional, future improvements are planned to the Convention Center, the City Council may determine these additional improvements are of benefit to the Redevelopment Agency project area, as specified by subsection 33445(a)(1).[11] However, that issue is not presently before the City Council or the Redevelopment Agency, and those findings would have to be made on facts at some point in the future.

2. Second Requisite Determination: No Other Reasonable Means of Financing the Construction or Expansion of the Convention Center Are Available.

There is an argument, discussed in Section I.B., that the legislative body does not have to determine that there is "no other reasonable means of financing" where a reimbursement agreement is contemplated because, by its terms, a reimbursement agreement involves a situation where the cost of construction "has been" paid with other funds, and the redevelopment agency is making reimbursement for the cost. However, this Office recommends that this determination be addressed should a reimbursement agreement be contemplated because the required determinations are intended to ensure proper application of redevelopment agency funds. *See Meaney*, 13 Cal. App. 4th at 579 (stating that the required factual determinations of section 33445 "effectively limit potential abuses in tax increment financing").

The legislative determination on the unavailability of other reasonable means of financing must be specific. *See Meaney*, 13 Cal. App. 4th at 581. It also must be made by the appropriate legislative body. *Id.* Under the CRL, "legislative body" is defined as "the city council, board of supervisors, or other legislative body of the community." Cal. Health & Safety Code § 33007. This issue was raised in the *Meaney* case, discussed in Section I.B. above. As explained, this case involved an agreement between the redevelopment agency and the county to help finance the costs of construction of a county courthouse as part of the city redevelopment project. Local school districts challenged the findings made by the city under section 33445. The

[11] A proposed Phase III expansion of the Convention Center is listed on the Centre City Development Corporation's website, as "under review." *See* http://www.ccdc.com/projects/interactive-map.html?primary_use=public_projects.

appellate court held that the term "legislative body" in section 33445 "can be most reasonably construed to refer to the legislative body affected by the factual determination." *Meaney*, 13 Cal. App. 4th at 581. The court explained:

> [I]n the case of a county building constructed within city limits, the city and the county are each qualified to make only one of the determinations. The city is competent to make a finding on the benefit to an area within its jurisdiction but
>
> has no warrant to delve into the finances of another governmental entity; the county can speak to its own finances but has no jurisdiction over urban planning within city limits.
>
> . . . .
>
> [I]f the two required determinations affect different legislative bodies, each must make a finding on the matter that concerns it. Here, the City must make a determination on the benefit to the project area and the County must make the required finding on the unavailability of other means of financing.

Meaney, 13 Cal. App. 4th at 580, 581.

Following the *Meaney* decision, the determination that "no other reasonable means of financing" is available should be made first by the legislative body or governing board of the public agency for whom the improvement is being developed. That determination, together with supporting information, should be included in the record for the legislative body of the community making the other section 33445 findings. *See* Joseph E. Coomes, Jr. et al., *Redevelopment in California*, at 221 (4th ed. 2009). "A cautious approach suggests that the legislative body should make all three of the findings under section 33445, relying in part on its own determination and in part on the earlier determination the public agency made that no other reasonable means of financing was available." *Id.*

Regarding Phase II of the Convention Center, there were three legal entities involved in the initial financing: the City, the District, and the Authority. The District owns the Convention Center, and the City operates it and maintains it by agreement. Pursuant to the expansion lease, dated September 1, 1998, the District leased the Convention Center to the Authority. The Authority issued lease revenue bonds to finance the Phase II expansion of the Convention Center. By agreement, the City pays the Authority rent and expenses that is intended to equal debt service on the lease revenue bonds. Because the City has a continuing legal obligation to pay rent and expenses to finance the lease revenue bonds, it is this Office's view that the City is the legislative body that must make the findings. However, a cautious approach suggests that the Authority and the District also consider the issue of "no other reasonable means of financing."

In analyzing the facts to make the determination, the statutory language in Health and Safety Code section 33445.1 (which relates to use of redevelopment agency funds to pay for publicly owned facilities or improvements located outside and not contiguous to a redevelopment project area) is instructive. This language is not directly applicable; however, it provides some guidance as to what a legislative body may consider in determining whether other means of financing is available. The section provides that the legislative body may take into account any relevant factors, including, but not limited to:

> (A) Legal factors, such as the eligibility of the improvements for funding under the governing statutes.
>
> (B) Economic factors, such as prevailing interest rates and market conditions.
>
> (C) Political factors, such as the priority of commitments of other public funding sources, the ability or willingness of property owners or taxpayers to bear the cost of any special assessments, taxes, or other charges, and the likelihood of obtaining voter approval, if required.

Cal. Health & Safety Code § 33445.1(a)(3)(A)-(C).

As it relates to the Phase II expansion of the Convention Center, this finding may be difficult to make because the expansion was completed with alternative financing. Further, the City has budgeted for and paid the Convention Center bonds since 1998. *See, e.g.*, City of San Diego Fiscal Year 2011 Adopted Budget (lease revenue bonds being paid from transient occupancy tax and Port Authority contribution). However, the City is presently facing declining revenues and the potential of significant cuts to essential services. There may be changed material circumstances, justifying a determination that no other reasonable means of financing is available.

3. Third Requisite Determination: The Payment of Redevelopment Agency Funds Must Be Consistent with the Implementation Plan Adopted for the Project Area.

Prepared pursuant to the authority of the CRL and other applicable state and local provisions, the Centre City Redevelopment Project Plan (Redevelopment Plan) provides the Redevelopment Agency with powers, duties, and obligations contained in the Redevelopment Plan for the redevelopment, rehabilitation, and revitalization of the Project Area. *See* Redevelopment Plan, art. I, § 100.8, at 3. Any action of the Redevelopment Agency and of the City Council in carrying out redevelopment must comply with the Redevelopment Plan as well as provisions of the CRL. A redevelopment agency's plan functions as the agency's charter, governing its activities. The redevelopment agency plan also serves as a financing plan, authorizing the agency's use of particular financing tools to implement policies and procedures for the redevelopment of a designated project area. *See County of Santa Cruz v. City of Watsonville*, 177 Cal. App. 3d 831, 841 (1985) (stating that a redevelopment plan must be

written in terms that enhance a redevelopment agency's ability to respond to market conditions, development opportunities, and the desires and abilities of owners and tenants).

A redevelopment agency must adopt an implementation plan every five years that, in pertinent part, "shall contain the specific goals and objectives of the agency for the project area, the specific programs, including potential projects, and estimated expenditures proposed to be made during the next five years, and an explanation of how the goals and objectives, programs, and expenditures will eliminate blight within the project area." Cal. Health & Safety Code § 33490(a)(1)(A). An implementation plan may be amended by a redevelopment agency after conducting a public hearing on the proposed amendment. *Id.*

While the Convention Center is on land owned by the District, the area contiguous to the Convention Center, known as the Marina Sub Area, is covered by the Redevelopment Plan for the Centre City Redevelopment Project, which was most recently amended in 2007. San Diego Ordinance O-19663 (Sept. 17, 2007). Of note, section 110 of the Redevelopment Plan provides, in part,

> The objectives of this [Centre City Redevelopment] Project are to:
>
> . . . .
>
> Z. Strengthen the economic base of downtown through the installation of needed public improvements, including transit and parking facilities, to stimulate new commercial, residential, employment and economic growth, and to improve the circulation of people and vehicles."

Redevelopment Plan, at p. 6.

The Redevelopment Plan further provides that "Publicly-Owned Facilities" will include "Community Facilities," including "Cultural facilities – provision of museums, art galleries, music and drama theaters, and other such cultural facilities." Redevelopment Plan, Attachment No. 3.

The most recent implementation plan for the Centre City Redevelopment Project Area, adopted pursuant to Health and Safety Code section 33490, is the "Fourth Implementation Plan for the Horton Plaza & Centre City Redevelopment Projects for the Period July 2009-June 2014" (Implementation Plan), approved by the Redevelopment Agency on June 19, 2009. *See* Redevelopment Agency Resolution R-04405 (June 19, 2009). A stated project area goal in the Implementation Plan is to "[c]omplement the San Diego Convention Center by providing an adjacent facility to host large outdoor meetings." Implementation Plan, at 4. However, work on the Convention Center was not listed as a proposed expenditure. The current Implementation Plan would likely have to be amended by the Redevelopment Agency to support use of Redevelopment Agency funds for the Convention Center. *See* Cal. Health & Safety Code § 33490.

4. To Authorize a Reimbursement Agreement, the City Council Must Follow the Procedures Set Forth in Health and Safety Code section 33679.

If Redevelopment Agency funds are to be used, the procedures required by sections 33445 and 33679 must be followed for the reimbursement agreement to be valid. Section 33679 provides that before a redevelopment agency commits to use tax increment funds for construction of a publicly-owned building other than a parking facility, the legislative body must hold a noticed public hearing, with the notice published for at least two successive weeks. Cal. Health & Safety Code § 33679.[12]

Further, no later than the time of the first publication of the notice of the public hearing, a summary must be made available to the public for inspection and copying that includes: (1) estimates of the amount of tax increment funds to be used to pay for the construction of any publicly owned building, including interest payments; (2) the facts supporting the determinations required to be made by the legislative body – the City Council – pursuant to Health and Safety Code section 33445; and (3) a statement of the redevelopment purpose for which the taxes are being used. Cal. Health & Safety Code § 33679. If tax increment funds are to be used to pay for improvements, the CRL requires that the funds be used for redevelopment activity, which is of "primary benefit to the project area," as compared to general or broader community benefit. Cal. Health & Safety Code § 33678.

II. FAILURE TO COMPLY WITH THE CRL MAY RESULT IN A VALIDATION ACTION, SEEKING TO INVALIDATE THE FINDINGS.

The Redevelopment Agency is a separate and distinct legal entity from the City and may sue and be sued. Cal. Health & Safety Code §§ 33125(a), 33510 (regarding actions against agency for money or damages). Actions or determinations made by a redevelopment agency or legislative body may be challenged through a validation action. *See* Cal. Civ. Proc. Code § 863;

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[12] Health and Safety Code section 33679 provides:

> Before an agency commits to use the portion of taxes to be allocated and paid to an agency pursuant to subdivision (b) of Section 33670 for the purpose of paying all or part of the value of the land for, and the cost of the installation and construction of, any publicly owned building, other than parking facilities, the legislative body shall hold a public hearing. Notice of the time and place of the public hearing shall be published in a newspaper of general circulation in the community for at least two successive weeks prior to the public hearing. There shall be available for public inspection and copying, at a cost not to exceed the cost of duplication, a summary that includes all of the following:
>
> (a) Estimates of the amount of the taxes proposed to be used to pay for the land and construction of any publicly owned building, including interest payments.
>
> (b) Sets forth the facts supporting the determinations required to be made by the legislative body pursuant to Section 33445 or the findings required to be made by the legislative body pursuant to Section 33445.1.
>
> (c) Sets forth the redevelopment purpose for which the taxes are being used to pay for the land and construction of the publicly owned building.
>
> The summary shall be made available to the public for inspection and copying no later than the time of the first publication of the notice of the public hearing.

Cal. Health & Safety Code §§ 33500(b),[13] 33501,[14] 33501.2; Cal. Gov't Code § 53511 (making validation statutes applicable to the "bonds, warrants, contracts, obligations, or evidences of indebtedness" of a local agency)[15]. *See also, e.g.*, *Graydon v. Pasadena Redevelopment Agency*, 104 Cal. App. 3d 631, 646 (1980) (holding that an action challenging the validity of a contract of a redevelopment agency for the construction of a parking garage was to be governed by Code of Civil Procedure section 860).

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[13] California Health and Safety Code section 33500 provides:

> (a) Notwithstanding any other provision of law, including Section 33501, an action may be brought to review the validity of the adoption or amendment of a redevelopment plan at any time within 90 days after the date of the adoption of the ordinance adopting or amending the plan.
> (b) Notwithstanding any other provision of law, including Section 33501, an action may be brought to review the validity of any findings or determinations by the agency or the legislative body at any time within 90 days after the date on which the agency or the legislative body made those findings or determinations.

[14] California Health and Safety Code section 33501 provides:

> (a) An action may be brought pursuant to Chapter 9 (commencing with Section 860) of Title 10 of Part 2 of the Code of Civil Procedure to determine the validity of bonds and the redevelopment plan to be financed or refinanced, in whole or in part, by the bonds, or to determine the validity of a redevelopment plan not financed by bonds, including without limiting the generality of the foregoing, the legality and validity of all proceedings theretofore taken for or in any way connected with the establishment of the agency, its authority to transact business and exercise its powers, the designation of the survey area, the selection of the project area, the formulation of the preliminary plan, the validity of the finding and determination that the project area is predominantly urbanized, and the validity of the adoption of the redevelopment plan, and also including the legality and validity of all proceedings theretofore taken and (as provided in the bond resolution) proposed to be taken for the authorization, issuance, sale, and delivery of the bonds, and for the payment of the principal thereof and interest thereon.
> (b) Notwithstanding subdivision (a), an action to determine the validity of a redevelopment plan, or amendment to a redevelopment plan, may be brought within 90 days after the date of the adoption of the ordinance adopting or amending the plan.

[15] California Government Code section 53511 provides:

> (a) A local agency may bring an action to determine the validity of its bonds, warrants, contracts, obligations or evidences of indebtedness pursuant to Chapter 9 (commencing with Section 860) of Title 10 of Part 2 of the Code of Civil Procedure.
> (b) A local agency that issues bonds, notes, or other obligations the proceeds of which are to be used to purchase, or to make loans evidenced or secured by, the bonds, warrants, contracts, obligations, or evidences of indebtedness of other local agencies, may bring a single action in the superior court of the county in which that local agency is located to determine the validity of the bonds, warrants, contracts, obligations, or evidences of indebtedness of the other local agencies, pursuant to Chapter 9 (commencing with Section 860) of Title 10 of Part 2 of the Code of Civil Procedure." California Code of Civil Procedure section 860 provides for a sixty-day limitations period.

While the determinations of the City Council under Health and Safety Code section 33445 are "final and conclusive," upon a challenge, a court may review the process and procedure followed in approving use of redevelopment funds for a project. *See Meaney*, 13 Cal. App. 4th at 578-79. In *Regus*, 70 Cal. App. 3d at 982, the court warned that by "misemploying the extraordinary powers of urban renewal a redevelopment agency captures pending tax revenues which it can then use as a grubstake to subsidize commercial development within the project area in the hope of striking it rich."

Should the City Council desire to enter into a reimbursement agreement with the Redevelopment Agency for the Convention Center expansion, the City may consider a validation proceeding prior to implementation to test the action. *See, e.g., City of Ontario v. Superior Court*, 2 Cal. 3d 335, 340-44 (1970) (stating that California Government Code section 53511 allows validation actions concerning "bonds, warrants, contracts, obligations, or evidences of indebtedness").

CONCLUSION

Health and Safety Code section 33445, in pertinent part, authorizes the Redevelopment Agency to pay the cost of construction of or improvements to a publicly owned building located in or contiguous to a redevelopment project area, if the legislative body – the City Council – determines that (1) the construction or improvements benefit the redevelopment project area by helping to eliminate blight in the project area; (2) no other reasonable means of financing is available to the City (and to the Authority); and (3) the payment of funds for the construction or improvements is consistent with the Redevelopment Agency's implementation plan.

Health and Safety Code section 33445 also authorizes the Redevelopment Agency to enter into a reimbursement agreement with the City or other public entity to pay for the construction or improvements to publicly owned buildings that have been initially paid for by the City or other public entity. There is nothing stated in section 33445 that precludes a reimbursement agreement at this time, even though Phase II of the Convention Center was initially paid for through alternative financing and the construction has been completed, so long as the City Council is able to make the requisite findings. However, the City Council must make the requisite findings based on facts as they exist at the present time. Because alternative financing has been used to date, it will be a question of fact whether all of the findings can be made. Health and Safety Code section 33445 may be applicable should there be a desire to make additional improvements to the Convention Center. Before the Redevelopment Agency commits to using tax increment funds for the purpose of paying all or part of the cost of installation or construction of any publicly owned building, the City Council must hold a noticed public hearing

and make available to the public, in advance, a written summary that includes: (1) estimates of the amount of tax increment funds to be used to pay for the construction of any publicly owned building, including interest payments; (2) the facts supporting the determinations required to be made by the legislative body – the City Council – pursuant to Health and Safety Code section 33445; and (3) the redevelopment purpose for which the taxes are being used.

JAN I. GOLDSMITH, CITY ATTORNEY

JAN I. GOLDSMITH, City Attorney

By _____
Joan F. Dawson
Deputy City Attorney

JFD:ccm
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