

MEMORANDUM OF LAW

DATE: July 17, 1990

TO: Maureen Stapleton, Deputy City Manager
FROM: City Attorney
SUBJECT: Assignment of Redevelopment Tax Increment
Set-Aside Funds to the San Diego Trust Fund

At the request of Assistant City Attorney Curtis M. Fitzpatrick, I have reviewed a memorandum on the above-mentioned topic which was prepared by Roger A. Clay, Jr., Esq., of Goldfarb & Lipman (attached). Mr. Clay has proposed a method whereby Redevelopment Tax Increment 20 percent Set-Aside Funds ("Set-Aside Funds") be channeled to the San Diego Trust Fund ("Trust Fund") for the creation of housing for the "homeless, very low income, and low income households and to assist first-time median income homebuyers." See page 2 of Mr. Clay's memo.

I have addressed this issue generally in two previous Memoranda of Law, dated March 20, 1990 and March 22, 1990. Those memoranda concluded that while Set-Aside Funds could be turned over to the Trust Fund, it was imperative that the requirements of California Redevelopment Law (California Health & Safety section 33000 et seq.) be strictly adhered to and in accordance with that directive, safeguards be put in place to insure that adherence.

This Memorandum of Law will examine Mr. Clay's proposal, the legal issues which arise therefrom and their possible resolution.

Mr. Clay's Proposal

Mr. Clay's proposal contains the following elements.

1. That Set-Aside Funds may be transferred to the Trust Fund provided the Trust Fund's use of the Set-Aside Funds are consistent with the redevelopment law.
2. That there currently exists sufficient information to make the project benefit finding required by Health & Safety Code section 33334.2(g) to enable the transferred funds to be used outside of the redevelopment project area from which they were generated.
3. That this finding needs to be made for each redevelopment project area (i.e., Marina, Southcrest, etc.) but not each time the transferred funds are spent, provided the finding is reviewed (and revised as necessary) on a regular basis by the City Council and the City Council sitting as the Board of the Redevelopment Agency.

Legal Issues

Health & Safety Code section 3334.2(a) states in pertinent part:

Not less than 20 percent of all taxes which are allocated to the agency pursuant to Section 33670 allowing for agency use of tax increment funds shall be used by the agency for the purposes of increasing and improving the community's supply of low- and moderate-income housing available at affordable housing cost . . . to persons and families of low or moderate income . . . and very low income households. . . .

While there clearly exists a commonality of mission between this code section and the Trust Fund, they are not identical and the differences need to be accounted for. Some Set-Aside Funds may be transferred to the Trust Fund in furtherance of its goal of providing affordable housing, but the following issues need to be addressed:

1. Section 3334.2(a) mandates that the funds be used for low- to moderate- income housing along with housing for very-low income households. The income requirements of the Trust Fund would preclude any of the Set-Aside Funds placed in it from being used for moderate income housing. The types of activities that could be cut off include:

a. Building housing for moderate income families, even though such housing may be necessary for the housing element adopted by the Agency in the Redevelopment Plan.

b. Building mixed-income developments which include housing for moderate income families.

c. Building replacement housing for moderate-income persons or families, even though that housing is mandated by Section 33413 if moderate income housing is destroyed or condemned in carrying out the purposes of the adopted redevelopment plan.

A redevelopment plan generally lasts thirty years. Over that period of time, the housing needs within the project area would probably change, depending in part on the success of the redevelopment plan. It could be inconsistent with the goals of the particular redevelopment plan to limit the Agency's options in spending its Set-Aside Funds.

Mr. Clay notes that the resolution transferring funds would be reviewed and revised on a regular basis. It would seem that the resolution must also look at the housing balance that is to be achieved in a particular redevelopment area and only transfer

that amount of funds necessary to achieve its housing needs for the income group which is targeted by the Trust Fund.

2. Health & Safety Code section 33334.2(a) states that the Agency may not have to set-aside 20 percent of its tax increment for a particular project if certain findings can be made. These findings have to be made on an annual basis. While it is a policy decision as to whether the findings can be met, it should be kept in mind that as to some redevelopment project areas, setting aside 20 percent of its tax increment may not be in the best interests of furthering the redevelopment project's goals (the first and foremost goal being the elimination of blight).

In addition, Health and Safety Code section 33334.6(c) and (d) allows the Agency to deposit less than 20 percent of its tax increment into its Low and Moderate Housing Fund (see section 6 below) if findings can be made that existing obligations cannot be met if the full 20 percent is deposited into the Low and Moderate Housing Fund (the "Fund") or the "deposit of less than the amount required . . . is necessary in order to provide for the orderly and timely completion of public and private projects, programs, or activities approved by the agency prior to January 1, 1986" The code section provides a rather precise definition of what an "existing obligation" is, and while it

deals with redevelopment projects created prior to January 1, 1986, an analysis of existing obligations would have to be done on projects created prior to that date and a determination would have to be made as to whether the full deposit would be even feasible.

3. A finding that transfers Set-Aside Funds to the Trust Fund would need factual specificity in order to be legally sufficient. The more specific the three-year program plan required by Municipal Code section 98.0506 is as to what programs it will fund in redevelopment project areas (or outside the redevelopment project area with the appropriate project benefit findings) and how the programs are consistent with those redevelopment project area's housing element, the more easily funds can be transferred to the Trust Fund.

4. Generally speaking, the Agency has greater power to condemn property than the City does. Given particular projects where eminent domain may be necessary, it would be advantageous (or even necessary) to have the Agency retain its Set-Aside Funds when assembling property for housing.

5. Health & Safety Code section 33385 requires the formation of a Project Area Committee ("PAC") when a "substantial number of low- and moderate-income families are to be displaced by the redevelopment projects" A PAC not only reviews

and makes recommendations regarding a proposed redevelopment plan but also remains in place for a minimum of three (3) years following the adoption of the plan. Among its tasks during that period, a PAC is to give advise on "the planning and provision of residential facilities or replacement housing for those to be displaced by project activities." Section 33386. By law then, a PAC would have to be included in the loop regarding the planning of residential projects funded by tax increment, regardless of whether the projects were administered by the Agency or the Trust Fund.

6. By law, Set-Aside monies must be kept in a separate Low and Moderate Housing Fund (the "Fund") until used. Section 33334.3(a). Interest earned on the Fund and "other income to the agency for loans, advances or grants or any kind from the Low and Moderate Income Fund, shall accrue to and be deposited in, the fund" Section 3334.3(b). It appears from Mr. Clay's

Memorandum that interest earned on this account could accrue to the Trust Fund (see page 7). This is not the case. The monies must remain segregated until used. It is reasonable to say that "used" may mean appropriated, but until that time, any and all monies and interest have to remain in the Fund.

7. The Agency has certain obligations under the law to provide replacement housing for low- and moderate- income housing that is destroyed as a result of redevelopment (Section 33413); at least 15 percent of all housing in a redevelopment project area must be restricted for low- and moderate- income households. Whatever arrangement which can be made to accommodate the Redevelopment Law and the Trust Fund must take into account the requirements that the Agency be able to control and plan for replacement housing in a redevelopment project area.

CONCLUSION

As you can see, the transferring of Set-Aside Funds to the Trust Fund is feasible in some cases, provided the requirements of Redevelopment Law are complied with. However, how these requirements are met varies in each individual redevelopment project area.

If it is determined that some Set-Aside monies be transferred to the Trust Fund, it is suggested that a careful analysis be performed in each project area which takes into account the points raised by this Memorandum (as they are applicable per project area) and following that analysis, the resolutions spoken of by Mr. Clay could be brought to the City and the Agency. That analysis would include the housing needs of the project areas, those needs which could best be met by transferring funds to the Trust Fund and those which would be

best met by the Agency retaining Set-Aside Funds. The resolutions would then be reviewed on a yearly basis to determine if more or less Set-Aside Funds should be transferred to the Trust Fund given changing conditions over the previous year and projections for the following year.

Furthermore, should Set-Aside monies be transferred, a Memorandum of Understanding should be drafted between the Agency and the Housing Commission acting as the administrator of the Trust Fund which clearly sets out the requirements and understandings of the parties regarding the Trust Fund's use of Set-Aside funds and the mechanics of insuring those requirements are met.

If you have any further questions regarding this issue, please contact me.

JOHN W. WITT, City Attorney

By

Allisyn L. Thomas

Deputy City Attorney

ALT:lc:pev:612.2(x043.2)

Attachment

cc Curtis M. Fitzpatrick, Asst. City Attorney

Kurt Chilcott, Economic Dev. Div., Prop. Dept.

Pam Hamilton, CCDC

Jerome Groomes, SEDC

Bruce Ballmer, Esq., Special Counsel

to the Redevelopment Agency

Roger A. Clay, Jr., Esq.

Steve Mikelman, Housing Commission

ML-90-81