Office of
The City Attorney
City of San Diego

MEMORANDUM
MS 59

(619) 533-5800

DATE: April 6, 2012

TO: Honorable Mayor and City Councilmembers

FROM: City Attorney

SUBJECT: Use of Affordable Housing Funds to Fulfill Alleged Statutory Obligations under the California Community Redevelopment Law

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INTRODUCTION

On February 1, 2012, the former Redevelopment Agency of the City of San Diego (Former RDA) dissolved by operation of Assembly Bill x1 26 (AB 26). At that time, the City of San Diego, solely in its capacity as the designated successor agency to the Former RDA (Successor Agency), assumed the authority, rights, powers, duties, and obligations of the Former RDA under the California Community Redevelopment Law, set forth at California Health and Safety Code sections 33000 through 33855 (Redevelopment Law). San Diego Resolution No. R-307238 (Jan. 12, 2012); Cal. Health & Safety Code § 34173(b).

During a meeting on February 28, 2012, the City Council of the City of San Diego (Council), acting in its capacity as the Successor Agency's board of directors, adopted the Second Amended and Restated Enforceable Obligation Payment Schedule (Second Amended EOP Schedule) and authorized the transmittal of the initial draft of the first Recognized Obligation Payment Schedule (Initial Draft ROP Schedule) to the San Diego County Auditor-Controller (County Auditor). San Diego Resolution No. R-307297 (Mar. 1, 2012). The Second Amended EOP Schedule and the Initial Draft ROP Schedule (collectively, Payment Schedules) reflect payments to be made by the Successor Agency in order to fulfill enforceable obligations, as defined in AB 26, during the balance of the current 2011-12 fiscal year.

One material change reflected in the Second Amended EOP Schedule, as compared to the earlier versions, involved the addition of "general reservation of rights" language (Reservation Language) related to the retention and expenditure of the unencumbered balance of 20 percent set-aside, low and moderate income housing funds (Housing Funds) and the unencumbered

balance of bond proceeds. *See* Attachment A for the full text of the Reservation Language.[1] As explained in the Reservation Language, the Successor Agency has reserved the right to retain possession of the Housing Funds until the proper disposition of the Housing Funds has been clarified by subsequent legislation or court order. The Successor Agency also has reserved the right to amend the Payment Schedules in the future to enable the Successor Agency to collect and expend new Housing Funds to the extent necessary to comply with any statutory affordable housing obligations that are determined to be applicable despite the implementation of AB 26.[2]

During the Council meeting on February 28, 2012, questions arose with respect to whether the Reservation Language is the most effective way to achieve the dual purposes of protecting the City's General Fund and preserving the ability to use the Housing Funds for production of new affordable housing units. This Memorandum addresses those questions.

It is important to note that the provisions of the Redevelopment Law related to expenditure of the Housing Funds are multi-faceted and complex. This Memorandum focuses on the specific questions raised by Councilmembers during the Council meeting on February 28, 2012, and is not intended to address all legal issues that may arise with respect to expenditure of the Housing Funds as a result of the implementation of AB 26. *See* Attachment B, entitled Responses to Affordable Housing Comments Raised Regarding the Amended and Restated Enforceable Obligation Payment Schedule. Attachment B is a copy of an attachment to a recent staff report, which provides a comprehensive discussion of numerous affordable housing issues.

QUESTIONS PRESENTED

1. In light of the passage of AB 26, is the Successor Agency required to fulfill any unmet obligations related to inclusionary affordable housing under the Redevelopment Law?

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[1] A discussion concerning the unencumbered balance of bond proceeds would involve a separate legal analysis and is outside the scope of this Memorandum.

[2] The purpose of the Reservation Language is to protect the City's interests in a problematic situation caused by a fundamental disagreement between the State of California (State) and affordable housing proponents concerning the retention and expenditure of the unencumbered Housing Funds under AB 26. The State seeks to require the Successor Agency to transfer the unencumbered Housing Funds to the County Auditor for pro rata distribution to local taxing entities. The affordable housing proponents seek to require the Successor Agency to expend the unencumbered Housing Funds, and to collect new Housing Funds, in order to fulfill unmet statutory affordable housing obligations that allegedly remain applicable despite the passage of AB 26. The Payment Schedules include line items, such as the Cooperation Agreement for Payment of Costs Associated with Certain Redevelopment Agency Funded Projects, dated February 28, 2011 (Cooperation Agreement), that identify the future expenditure of all Housing Funds currently held by the Successor Agency as well as the collection of a future stream of property taxes to be deposited with the Housing Funds. Even if such line items are invalidated, however, the Successor Agency will continue to retain, but not expend, the Housing Funds until at least one of two triggering events has occurred. The first triggering event is a legislative amendment to AB 26 or a final court ruling confirming that the Successor Agency's disposition of the unencumbered Housing Funds to the County Auditor will not result in the Successor Agency's violation of any applicable affordable housing provisions in the Redevelopment Law, any existing bond covenants, or any applicable tax-related restrictions on the expenditure of bond proceeds. The second triggering event is a signed agreement from the State or the County of San Diego committing to defend and indemnify the Successor Agency and the City against any lawsuits, claims, damages, and losses arising from the Successor Agency's allegedly wrongful disposition of the unencumbered Housing Funds to the County Auditor.

2. In light of the passage of AB 26, is the Successor Agency required to ensure the development of affordable housing on all properties that were acquired with the Housing Funds?

3. Will the level of risk to the City's General Fund be increased if the Successor Agency amends the Payment Schedules to include specific line items for expenditure of the unencumbered Housing Funds toward the production of new affordable housing in the absence of a specific contract supporting the expenditure?

SHORT ANSWERS

1. Probably not. Although AB 26 does not expressly eliminate the inclusionary affordable housing obligations, AB 26 appears to deprive the Successor Agency of any current and future sources of redevelopment funds to fulfill those obligations. Thus, a strong argument can be made that the inclusionary affordable housing obligations in the Redevelopment Law presently amount to an unfunded State mandate, in violation of the California Constitution.

2. No. The Successor Agency does not have an absolute statutory obligation to develop affordable housing on any property acquired using the Housing Funds. Instead, the statutory remedy for failure to develop affordable housing within the applicable five-year or ten-year period is that the Successor Agency must sell the affected property and deposit the proceeds with the Housing Funds. AB 26 appears to require any such unencumbered Housing Funds to be transferred to the County Auditor for pro rata distribution to the local taxing entities.

3. Yes. The inclusion of specific line items in the Payment Schedules for affordable housing projects, in the absence of an existing contract, will increase the level of risk to the City's General Fund. By including such line items in the Payment Schedules, the City and the Successor Agency may be deemed to have admitted that the statutory affordable housing obligations continue to apply despite the implementation of AB 26 and the resulting lack of redevelopment funds. It is possible that the City could be required to provide its own funding to fulfill those alleged obligations even if redevelopment funds are no longer available.

ANALYSIS

I. THE INCLUSIONARY AFFORDABLE HOUSING OBLIGATIONS HAVE MOST LIKELY BEEN ELIMINATED AS A RESULT OF AB 26

The Redevelopment Law sets forth certain inclusionary affordable housing obligations applicable to each redevelopment agency (RDA). For instance, each RDA must set aside and expend at least 20 percent of its tax increment revenue (i.e., the Housing Funds) in order to increase, improve, and preserve the local supply of dwelling units affordable to households of moderate income and below. Cal. Health & Safety Code §§ 33334.2(a), 33334.3(a)-(c). Each RDA must ensure, before each redevelopment plan expires, that at least 15 percent of all new and substantially rehabilitated dwelling units developed within the redevelopment project area are affordable to households of moderate income or below, and that at least 40 percent of such dwelling units (or 6 percent of the total residential production) are affordable to and occupied by very low income households. Cal. Health & Safety Code § 33413(b)(2)(A). Additionally, each

RDA must ensure that the Housing Funds are being used to meet the proportional needs of each income category and age classification. Cal. Health & Safety Code § 33334.4(a)-(b).

With limited exceptions not applicable here, AB 26 does not repeal the provisions of the Redevelopment Law. AB 26 is silent with respect to the continued applicability of any unmet inclusionary affordable housing obligations under the Redevelopment Law. Nothing in AB 26 expressly relieves the Successor Agency from ongoing compliance with those obligations. Yet, AB 26 appears to deprive the Successor Agency of any current and future sources of redevelopment funds that could be used to fulfill such obligations.[3]

AB 26 requires the Successor Agency to transfer the entire unencumbered balance of the Housing Funds currently held by the Successor Agency to the County Auditor, who in turn must make a pro rata distribution of such monies to the local taxing entities. Cal. Health & Safety Code §§ 34176(a), 34177(d), 34182(c)(4). AB 26 does not define precisely what is meant by the phrase "unencumbered balance" in relation to the Housing Funds. Nonetheless, the State Department of Finance (DOF) has expressed its opinion that AB 26 requires the Housing Funds to be transferred to the County Auditor to the extent that they are not already committed to a specific project or purpose.[4] The affordable housing proponents have asserted that the future expenditure of unencumbered Housing Funds to fulfill unmet affordable housing obligations is an enforceable obligation under AB 26 on the basis that the expenditure is an obligation imposed by State law. *See* Cal. Health & Safety Code § 34171(d)(1)(C). Unfortunately, the DOF has not recognized the viability of this assertion. Rather, the DOF has indicated that a contractual commitment in favor of a private third party is required to establish an enforceable obligation for a new affordable housing project. The DOF apparently takes the view that AB 26 requires the Payment Schedules to identify a project name, a contractual obligation, and a payee with respect to each enforceable obligation. *See* Cal. Health & Safety Code §§ 34169(g)(1), 34177(l)(1).

As to future funding, AB 26 abolishes the concept of tax increment revenue, declares that all former tax increment revenue is deemed to be property tax revenue, and directs the County

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[3] The City has decided to serve as both the Successor Agency and the Housing Successor Agency. San Diego Resolution No. R-307238 (Jan. 12, 2012). AB 26 does not clearly distinguish between the respective roles and functions of the Successor Agency and the Housing Successor Agency in all respects. For instance, AB 26 provides for property taxes and administrative cost allowances to be distributed to the Successor Agency, but not directly to the Housing Successor Agency, to pay enforceable obligations and to cover administrative expenses. Any reference in this Memorandum to the Successor Agency shall be deemed to refer to the Housing Successor Agency to the extent that the expenditure of Housing Funds and the ownership and use of housing assets are involved.

[4] During a joint committee meeting of the State Assembly on March 7, 2012, Assembly Member Ben Hueso asked whether the DOF will respect the goal to expend the current balance of the Housing Funds, including any bond proceeds, for the original intended purposes. The DOF's representative, Pedro Reyes, responded that encumbered funds, meaning funds that have been committed to a specific project or purpose, will be protected, but that unencumbered funds will be "swept" and transferred to the County Auditor for pro rata distribution to the local taxing entities. Assembly Member Hueso stated that this problem should be corrected through new legislation. Mr. Reyes responded that legislative proposals are pending to resolve this problem. Mr. Reyes presumably intended to refer to proposed Senate Bill 654 and proposed Assembly Bill 1585, both of which would amend AB 26 to confirm that the entire balance of the Housing Funds held by each former RDA must be retained and expended locally for affordable housing purposes, as well as proposed Senate Bill 986, which would amend AB 26 to confirm that all bond proceeds issued to a former RDA will be deemed to be encumbered and cannot be transferred to the County Auditor under AB 26.

Auditor to distribute property tax revenue to the Successor Agency in semi-annual installments only to the extent necessary to allow payment of items listed in the applicable six-month Recognized Obligation Payment Schedule and to cover the administrative cost allowance. Cal. Health & Safety Code §§ 34182(c)(1), 34183(a)(2)-(3), 34189(a). Thus, AB 26 does not provide any mechanism for future tax revenues to be collected and deposited into the Housing Fund for use in connection with new affordable housing projects. Therefore, the most reasonable conclusion is that the inclusionary affordable housing obligations in the Redevelopment Law constitute an unfunded State mandate, in violation of the California Constitution.

"Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the state shall provide a subvention of funds to reimburse that local government for the costs of such program or increased level of service . . . ." Cal. Const., art. XIIIB, § 6. A local agency is not required to implement or give effect to a statute if two elements are met: (1) the State Legislature, the California Commission on State Mandates (State Commission), or any court has determined that the statute mandates a new program or higher level of service requiring reimbursement of local agencies; and (2) the State Legislature has not provided reimbursement for compliance with the program in the Budget Act for the applicable fiscal year. Cal. Gov't Code § 17581(a). Further, if the State Legislature deletes from the annual Budget Act funding for a statutory mandate, a local agency may file an action for declaratory relief in Sacramento Superior Court to declare the mandate unenforceable and to enjoin enforcement of the mandate for the applicable fiscal year. Cal. Gov't Code § 17612(c). In any event, the local agency must first exhaust its administrative remedies by filing a claim with the State Commission, seeking a determination that a reimbursable State mandate has been created without the provision of adequate reimbursement by the State Legislature. *Tri-County Special Education Local Plan Area v. County of Tuolumne*, 123 Cal. App. 4th 563, 573 (2004).

In this instance, the State Legislature created various inclusionary affordable housing obligations in the Redevelopment Law, but later adopted AB 26, which has effectively deprived RDAs of adequate funding to satisfy those obligations in the current 2011-12 fiscal year and all future fiscal years. Unless the State Legislature amends AB 26 to clarify either that the inclusionary affordable housing obligations no longer apply or that redevelopment funds will be made available to enable compliance with such obligations, the Successor Agency and the City may need to pursue the available remedies with respect to an unfunded State mandate.[5]

In San Diego's situation, the magnitude of the apparent unfunded State mandate is substantial. For instance, City staff has indicated that a range of 267 to 292 new affordable housing units would need to be produced in order to fulfill the unmet affordable housing production obligations in five redevelopment project areas. To use a hypothetical example for illustrative purposes only, if the Successor Agency would need to provide an average subsidy of $100,000 in order to produce each new affordable housing unit, then the total required subsidy could be as

[5] Based on our communications with other municipal attorneys, the majority view among California redevelopment attorneys is that the inclusionary affordable housing obligations have been effectively eliminated as a result of the implementation of AB 26. The main rationale in support of this majority view is that the implementation of AB 26 has plainly created an unfunded State mandate.

high as $29.2 million.[6] City staff has indicated that the unencumbered balance of the Housing Funds is approximately $65 million.[7] Yet, unless AB 26 is amended, it is anticipated that the seven-member oversight board (Oversight Board) or the DOF will direct the Successor Agency to transfer this entire unencumbered balance to the County Auditor, as discussed above.

II. THE REDEVELOPMENT LAW DOES NOT IMPOSE AN ABSOLUTE OBLIGATION TO DEVELOP AFFORDABLE HOUSING ON PROPERTIES INITIALLY ACQUIRED WITH AFFORDABLE HOUSING FUNDS

The Redevelopment Law contains a special provision governing the development of all real property initially acquired using the Housing Funds. Under that provision, the RDA must initiate activities consistent with the development of the real property for affordable housing purposes within five years after the date of acquisition of the real property using the Housing Funds. Such activities may include, but are not limited to, the approval of zoning changes or the execution of a disposition and development agreement. The legislative body (i.e., the Council) may adopt a resolution extending the five-year period for an additional five years. If physical development of the real property for affordable housing purposes has not commenced within the applicable time limit, then the real property must be sold, and the proceeds of the sale, less transaction costs, must be deposited with the Housing Funds. Cal. Health & Safety Code § 33334.16.

The affordable housing proponents have asserted that the Payment Schedules should identify the properties initially acquired using the Housing Funds. Contrary to this assertion, the mere ownership of real property acquired using the Housing Funds is not an enforceable obligation under AB 26. The City, in its capacity as the Housing Successor Agency under AB 26, will retain ownership of properties initially acquired using the Housing Funds, even if such properties are not listed in the Payment Schedules. Cal. Health & Safety Code §§ 34176, 34177(g).

The affordable housing proponents have contended that the future expenditure of the Housing Funds to complete the development activities contemplated by California Health and Safety Code section 33334.16 (section 33334.16) is an enforceable obligation under AB 26 on the basis that it is an obligation imposed by State law. *See* Cal. Health & Safety Code § 34171(d)(1)(C). As explained in Part I of this Memorandum, however, the DOF has not recognized the viability of an enforceable obligation for affordable housing production in the absence of an existing contractual commitment in favor of a third party. Moreover, section 33334.16 does not impose an absolute requirement on RDAs for the development of affordable housing on a site initially acquired using the Housing Funds. Instead, section 33334.16 imposes a time limit of either five years or ten years on the initiation of physical development. If this time limit is not met, the

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[6] This hypothetical example assumes that many of the new affordable housing units will need to be produced outside of the affected redevelopment project area due to constraints within the affected project area, such as lack of adequate land supply. Any new units produced outside of the affected project area will count at only a 50 percent rate toward the affordable housing production requirements. Cal. Health & Safety Code § 33413(b)(2)(A)(ii). In addition, the per-unit subsidy may be substantially higher than $100,000, when factoring in direct construction costs as well as staff time in negotiating each subsidy agreement and monitoring compliance with statutory requirements.

[7] The vast majority of this unencumbered balance is being held by the City under the Cooperation Agreement. For purposes of this Memorandum, the Housing Funds being held by the City are hypothetically assumed to be unencumbered to the extent that they have not been contractually committed to a specific project or purpose.

statutory remedy is that the real property must be sold and the proceeds of the sale must be deposited with the Housing Funds. If the sale of real property is required under this statutory provision, the current wording of AB 26 will compel the proceeds of the sale to be transmitted to the County Auditor for pro rata distribution to the local taxing entities. Cal. Health & Safety Code §§ 34176(a), 34177(d), 34182(c)(4).

In any event, funding for the future development of the sites initially acquired by the Former RDA using the Housing Funds has been included in the Cooperation Agreement, which in turn has been incorporated into the Payment Schedules. Thus, assuming that the Cooperation Agreement remains intact, the City will be able to develop those sites using Cooperation Agreement funds. If the Cooperation Agreement does not remain intact, but AB 26 is amended to allow the retention and expenditure of the Housing Funds for new projects, then the Successor Agency may amend the Payment Schedules, as may be appropriate, to include the development costs for those sites. The Reservation Language expressly allows the Payment Schedules to be amended in the future if legislative clarity on this point becomes available.

III. THE INCLUSION OF SPECIFIC, NON-CONTRACTUAL LINE ITEMS IN THE PAYMENT SCHEDULES FOR THE PRODUCTION OF NEW AFFORDABLE HOUSING UNITS IS NOT JUSTIFIED UNDER A COST-BENEFIT ANALYSIS

The affordable housing proponents assert that specific line items for expenditures toward the production of new affordable housing units should be added to the Payment Schedules even if there is no project-specific contract supporting the expenditures and even if the new units already have been included in the Cooperation Agreement, which is listed in the Payment Schedules. In our view, however, a basic cost-benefit analysis dictates that the Successor Agency should not follow this approach.

On the cost side of the equation, there are several disadvantages to the Successor Agency's addition of specific line items to the Payment Schedule in direct response to the request of the affordable housing proponents. The main disadvantage is that the addition of specific line items in order to fulfill the alleged statutory affordable housing obligations may be viewed as an admission that those statutory obligations have survived the implementation of AB 26. This alleged admission might be used as evidence against the Successor Agency and the City in any future litigation concerning this topic.

As discussed in Parts I and II of this Memorandum, the more reasonable legal interpretation is that the statutory affordable housing obligations have been eliminated by AB 26, which has effectively created an unfunded State mandate. If the State Commission determines that those obligations continue to apply despite AB 26 but that they do not amount to a reimbursable State mandate, then the City may be required to pay tens of millions of dollars in order to fulfill those obligations. Without redevelopment funds or other reimbursement from the State, the City presumably would need to make the payments from its General Fund.[8] While AB 26 does

[8] If necessary, the City and the Successor Agency may be able to pursue at least a couple of alternative options in order to minimize any fiscal impact to the City's General Fund in the event that the statutory affordable housing obligations are determined to be a non-reimbursable State mandate. First, the Council could approve an amendment

contain a limited liability provision under which the Successor Agency's liability is generally limited to the value of the assets and funds received by the Successor Agency, that provision is poorly worded, and it is uncertain whether that provision has any applicability to the City acting in its capacity as the Housing Successor Agency.

Another disadvantage of adding specific line items to the Payment Schedules for affordable housing projects with no project-specific contract is that this approach would cause logistical problems and internal inconsistency in the Payment Schedules. For instance, the addition of specific line items would lead to redundancy because the pertinent affordable housing projects already have been included in the Cooperation Agreement, which in turn is included in the Payment Schedules. The addition of specific line items would send a mixed message about the City's continued reliance on the viability of the Cooperation Agreement. The addition of specific line items also would result in unnecessary complexity, in that the Payment Schedules already contain hundreds of line items and would be supplemented with many more line items to include duplicative expenditures toward affordable housing projects. Finally, the addition of specific line items would lead to confusion in trying to interpret the effect of duplicative expenditures in the Payment Schedules and to calculate the total amount of property taxes that should be allocated to the Successor Agency for enforceable obligations. The Successor Agency and the City will be benefited by a streamlined review, certification, and approval of the Payment Schedules at the earliest possible opportunity. Unnecessary complexity in the Payment Schedules would undermine this goal.

On the benefit side of the equation, little to no practical advantage would result from adding specific line items to the Payment Schedules for affordable housing projects with no project-specific contracts. The affordable housing advocates have relied upon the premise that adding specific line items to the Payment Schedules would help to preserve funding for affordable housing projects. In our view, this is a flawed premise that ignores the reality of the process by which the Payment Schedules will be reviewed, certified, and approved under AB 26. For example, when the County Auditor undertakes the certification process for the Initial Draft ROP Schedule, it is expected that the County Auditor will adopt the same position expressed by the DOF, namely that an enforceable obligation for the expenditure of the Housing Funds does not exist in the absence of a contractual commitment in favor of a third party. It is anticipated that the County Auditor will meticulously review each line item and will ask the Successor Agency to provide documentation supporting the inclusion of each line item. If a particular line item is not supported by an existing contract, it is anticipated that the County Auditor will remove that line item from the Initial Draft ROP Schedule before the certification process has been completed. If a particular line item is certified despite the absence of an existing contract, it is

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to various redevelopment plans that effectively merges some or all of the redevelopment project areas. In this way, the City could use a surplus of affordable housing produced in one or more project areas to offset a deficit of affordable housing produced in one or more other project areas. Any decision to merge project areas would be subject to the review and approval of the Oversight Board. Cal. Health & Safety Code § 34180(d). Second, the City could aggregate the affordable housing units produced in multiple project areas if the Council makes a finding, "based on substantial evidence, after a public hearing, that the aggregation will not cause or exacerbate racial, ethnic, or economic segregation." Cal. Health & Safety Code § 33413(b)(2)(A)(v). It is possible, although unclear in AB 26, that this finding would be subject to the review and approval of the Oversight Board. The City's reliance upon either one of the above options may be subject to a future legal challenge by any member of the public.

also possible that the line item will be removed by the Oversight Board or the DOF before they approve the Payment Schedules.

The affordable housing proponents contend that the inclusion of specific line items for affordable housing projects in the Payment Schedules is no more risky than the inclusion of the Cooperation Agreement in the Payment Schedules. We strongly disagree, due to the inherent distinction between a contractual obligation and a statutory obligation.

On the one hand, the City can take certain steps to control the level of financial risk associated with its contractual obligations under the Cooperation Agreement. For instance, the City can decide not to proceed with certain Projects under the Cooperation Agreement pending the final outcome of the Payment Schedules. Also, the City can include provisions in each contract involving the expenditure of Cooperation Agreement funds, by which the developer, contractor, or consultant agrees that the sole source of payment will be redevelopment funds and that the City's General Fund or other assets will not incur any liability whatsoever. We are informed that the City has consistently taken these steps in order to avoid or minimize risk to the City's General Fund. We are also informed that, as to the five redevelopment project areas in which a deficit of affordable housing production currently exists, the City has not yet committed or expended funds in reliance upon the Cooperation Agreement. Thus, if the Cooperation Agreement is ultimately invalidated as a result of AB 26, it is anticipated that little to no risk will accrue to the City's General Fund.

On the other hand, subject to very limited alternative options discussed in footnote 8 above, the City cannot take similar steps to avoid or minimize risk to the City's General Fund if the inclusion of specific line items for affordable housing projects in the Payment Schedules leads to a court ruling that the City has admitted to the continued applicability of statutory affordable housing obligations and if those obligations are deemed to be a non-reimbursable State mandate. In that scenario, the City will have taken an irreversible action that results in a massive financial burden being imposed on the City's General Fund to ensure the future production of hundreds of new affordable housing units.

In our view, the potential disadvantages greatly outweigh the potential advantages associated with inclusion of specific line items in the Payment Schedules for affordable housing projects with no project-specific contracts. Due to the lingering legal ambiguities created by AB 26, the Reservation Language aims to strike a reasonable balance between the dual purposes of protecting the City's General Fund and preserving the ability to use the Housing Funds for production of new affordable housing units. The Reservation Language confirms that, even if the Cooperation Agreement does not remain intact, the Successor Agency will continue to retain, but not expend, the unencumbered balance of the Housing Funds until legislative or judicial clarity regarding the disposition of those Housing Funds becomes available. The Reservation Language also enables the Successor Agency to add line items for affordable housing projects through a future amendment to the Payment Schedules if subsequent legislation or court order clearly permits this approach. In this manner, the Reservation Language provides the Successor Agency with adequate flexibility to react to evolving circumstances, but avoids imposing an adverse fiscal impact on the City at the present time.

The Reservation Language is not a unique concept. Indeed, it is consistent with written guidance concerning the operation of housing successor agencies under AB 26, recently distributed by a statewide team of redevelopment attorneys and consultants acting on behalf of the California Redevelopment Association (CRA Guidance Document). *See* Attachment C. More specifically, the CRA Guidance Document recommends that the Successor Agency "retain possession of the unencumbered Housing Fund (i.e., not send these funds to the County Auditor-Controller) until further clarification is made (perhaps by the passage of SB 654 or AB 1585)." We believe that this recommended approach is the most prudent alternative in light of the considerable legal ambiguities created by AB 26.

CONCLUSION

In the DOF's view, AB 26 has effectively deprived the Successor Agency and the City of any current and future sources of funding for the production of new affordable housing, absent an existing contract. As such, the most reasonable legal interpretation is that any unmet obligations related to production of inclusionary affordable housing under the Redevelopment Law have been eliminated by the implementation of AB 26. This interpretation has not been confirmed, however, in any legislative amendment to AB 26 or any court ruling.

In the absence of legislative or judicial clarity, we believe that the inclusion of the Reservation Language in the Payment Schedules constitutes the most effective way to achieve the dual purposes of protecting the City's General Fund and preserving the ability to use the Housing Funds for production of new affordable housing units. When legislative or judicial clarity becomes available, we will revisit what is the most prudent course of action at that time.

JAN I. GOLDSMITH, CITY ATTORNEY

By: */s/ Kevin Reisch*
Kevin Reisch
Deputy City Attorney

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Attachments
cc: Jay M. Goldstone, Chief Operating Officer
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Andrea Tevlin, Independent Budget Analyst
MS-2012-7

ATTACHMENT A TO CITY ATTORNEY MEMORANDUM

General Reservation of Rights Language in Payment Schedules

The provisions of AB 26, together with the provisions of California Community Redevelopment Law that have not been altered by AB 26, are vague, ambiguous, and internally inconsistent with respect to the disposition and expenditure of (i) low and moderate income housing funds and (ii) bond proceeds. To the extent that housing funds and bond proceeds have not already been contractually committed for a specific project or purpose, it is uncertain to what extent the funds and proceeds need to be reflected in the payment schedules under AB 26. The Successor Agency is informed that fundamental disagreements exist on these topics between the State of California, on one hand, and affordable housing advocates and bondholders, on the other hand. To date, these fundamental disagreements have not been resolved through any legislative amendment to AB 26 or any final court ruling.

In this instance, the payment schedule includes line items, particularly with reference to the Cooperation Agreement dated February 28, 2011 between the City and the Successor Agency (as successor to the former RDA), that identify the future expenditure of all housing funds and bond proceeds currently being held by the Successor Agency. However, if any such line items are invalidated for any reason, the Successor Agency's present intent is to continue holding the applicable housing funds and bond proceeds, but to refrain from expending those funds and proceeds unless the expenditure is required under an existing contract. In such event, the Successor Agency intends to continue holding such funds and proceeds in separate, earmarked accounts until such time that one of the following occurs: (a) a future legislative amendment to AB 26 is approved, or a final, non-appealable order by a court of competent jurisdiction is issued, confirming that the Successor Agency's disposition of such funds and proceeds to the local County Auditor-Controller will not result in the Successor Agency's violation of any applicable affordable housing provisions in California Community Redevelopment Law, any existing bond covenants, or any applicable tax-related restrictions on the expenditure of bond proceeds; or (b) the State of California or the County of San Diego provides the City with a signed agreement committing to defend and indemnify the Successor Agency and the City against any lawsuits, claims, damages and losses arising from the Successor Agency's allegedly wrongful disposition of such funds and proceeds to the local County Auditor-Controller.

In addition, the Successor Agency reserves the right to amend all applicable payment schedules in the future to allow the Successor Agency's collection and expenditure of new housing funds to the extent necessary to comply with any statutory obligations that are deemed to remain binding on the Successor Agency despite the passage of AB 26. By way of example only, affordable housing advocates may be successful in their present assertion that all successor agencies have a continuing obligation to collect and expend new 20% tax increment housing funds over the remaining life of each redevelopment project area in order to fulfill any allegedly unmet affordable housing obligations.

ATTACHMENT B TO CITY ATTORNEY MEMORANDUM

RESPONSES TO AFFORDABLE HOUSING COMMENTS RAISED REGARDING THE AMENDED AND RESTATED ENFORCEABLE OBLIGATION PAYMENT SCHEDULE

INTRODUCTION

On January 31, 2012, the Redevelopment Agency of the City of San Diego (Former RDA) adopted the Amended and Restated Enforceable Obligation Payment Schedule (First Amended EOPS), which identified all payments to be made toward "enforceable obligations" under AB 26 during the period of January 1, 2012 through June 30, 2012. Cal. Health & Safety Code §34169(g)(2). Agency Resolution No. R-04694 (January 31, 2012).

The purpose of this Attachment is to address concerns recently raised by affordable housing advocates with respect to a variety of affordable housing items and their relation to the First Amended EOPS. This Attachment may also serve as an inventory and summary of the affordable housing activities of the Former RDA from its inception on May 6, 1958 to its dissolution on February 1, 2012.

DISCUSSION

I. Affordable Housing Production Obligations of Former RDA

In general, the California Community Redevelopment Law requires each redevelopment agency to set aside at least 20% of its tax increment revenues to help finance the preservation, improvement or production of housing affordable to households of very low-, low- and moderate-incomes. The CRL states that these low- and moderate-income housing funds (LMIHF) are to be spent in proportion to a community's housing needs. In addition, the CRL requires each redevelopment agency to assure that at least 15% of all housing units constructed in a redevelopment project area are affordable to persons at or below moderate incomes and, given the significant need for housing affordable to very-low income households, at least 40% of the 15% (or 6% of the total residential production) must be affordable to very low-income households. Cal. Health & Safety Code §§ 33334.2(a), 33334.4(a), 33334.4(b), and 33413(b)(2)(A)(i).

A. Comment Raised: The EOPS should be amended to include the current, unencumbered LMIHF now held by the Successor Agency.

Response: While AB 26 contains some internally contradictory language on this point, the common statutory interpretation is that AB 26 requires the Successor Agency to transfer the unencumbered balance of LMIHFs to the County Auditor-Controller for pro rata distribution to the local taxing entities. Cal. Health & Safety Code §§ 34176(a), 34177(d). However, the

provisions of AB 26, together with the provisions of CRL that have not been altered by AB 26, are vague, ambiguous and internally inconsistent with respect to the disposition and expenditure of LMIHFs. Because fundamental disagreements exist on this topic between subject matter experts, and because these disagreements have yet to be resolved through any legislative amendment to AB 26 or final court ruling, the Successor Agency is including a general reservation of rights on the Second Amended and Restated Enforceable Obligation Payment Schedule (Second Amended EOPS). This general reservation of rights seeks to protect the City's general fund from liability with regard to any disposition of the LMIHF. The basic concept is that the Successor Agency will retain the current balance of the LMIHF, but will not expend the LMIHF except as required under existing enforceable obligations, until such time that legislative or judicial clarity is established to resolve the fundamental disagreements between subject matter experts.

B. Comment Raised: The EOPS should be amended to include future LMIHFs and/or to include projected inclusionary housing production obligations for the lifetime of each redevelopment project area plan.

Response: On January 17, 2012, the Western Center on Law and Poverty (Western Center) issued a memorandum asserting that redevelopment agencies have a continuing statutory obligation to set aside 20% of tax increment, projected over the lifetime of a redevelopment project area, and that this "housing indebtedness" is a statutory obligation that should be included as an "enforceable obligation" on the EOPS.

AB 26 does not address the survival of affordable housing production obligations imposed by State law and does not provide for future funding sources to meet any such statutory production obligations. As stated in paragraph I.A. above, the Successor Agency is including a general reservation of rights on the Second Amended EOPS that is intended to protect the City's general fund from liability, until such time that legislative or judicial clarity is established to resolve the fundamental disagreements between subject matter experts. Specifically, the Successor Agency has reserved the right to amend the EOPS in the future to capture a future stream of property tax revenue, if Western Center prevails in its above-described assertion.

It is important to note that the Cooperation Agreement between the City of San Diego and the Former RDA dated February 28, 2011 includes funding to fulfill the estimated affordable housing production obligation for each of the 14 redevelopment project areas throughout the City. Each such estimate is based upon the projected number of residential units to be produced within the project areas during the lifetime of their respective plans and the overall number of affordable housing units produced through January 31, 2012. The unmet housing need for the term of the Cooperation Agreement is estimated at approximately 1,500 units with estimated project costs of approximately $372,000,000. The Cooperation Agreement

provides for approximately $371,750,000 in future funding for affordable housing projects, which collectively are estimated to comprise a total of 1,487 new residential units.

C. Comment Raised: The EOPS should be amended to include funding to address any current deficits in the Former RDA's affordable housing production obligations.

Response: The CRL sections that impose the statutory housing obligations, primarily including §§ 33413(b) and 33334.4(a), were not amended by AB 26. However, an "enforceable obligation" is defined in AB 26 to include specific existing agreements. Cal. Health & Safety Code § 34171. Also, as discussed above, the common statutory interpretation is that AB 26 requires the Successor Agency to transfer the unencumbered balance of LMIHFs to the County Auditor-Controller for pro rata distribution to the local taxing entities. Cal. Health & Safety Code §§ 34176(a), 34177(d). AB 26 does not provide a future funding source to meet unfulfilled production goals. Including such production goals on the EOPS would potentially create an unfunded State mandate, placing the City's general fund at risk by assuming that the production goals are required to be met without any assurance that a future property tax revenue stream will exist to meet those goals.

The Second Amended EOPS is a balanced and strategic approach to retaining as many community improvement projects as can be justified while at the same time minimizing risk to the City's general fund. If SB 654 (Steinberg), AB 1585 (Perez) or similar proposed legislation is enacted to allow the local retention and expenditure of the entire balance of LMIHF for affordable housing purposes, then the Successor Agency may have an adequate funding source to produce at least some of the remaining units. A future amendment to the EOPS may be appropriate after the adoption of any such legislation.

As of January 31, 2012, between the City (under the Cooperation Agreement) and the Former RDA, there is an unencumbered balance in the LMIHF of approximately $65 million. It is uncertain at this time whether the State Controller will seek to unwind the prior transfer of the LMIHF from the Former RDA to the City that occurred in March 2011 pursuant to the Cooperation Agreement. In any event, if either of the Steinberg or Perez bills becomes law, roughly 260 affordable units could be built with the LMIHF on-hand. This assumes an estimated cost of $250,000 per affordable unit – which includes project management, monitoring/auditing for the lifetime of the affordability covenant, and actual project subsidy.

The following table summarizes the unmet affordable housing obligations under Health and Safety Code § 33413(b):

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Table 1: Redevelopment Agency – 33413(b) Affordable Housing Production Obligations

Project Area	Deficit	Notes*
CCDC	None	19% affordable / 62% VL
SEDC	52 VL units	36% affordable production overall, but currently at 10% VL – threshold is 40%
Barrio Logan	None	39% affordable / 65% VL
City Heights	None	17 % affordable / 90% VL
College Community	25 units w/in or 50 outside	Currently at: 9% affordable / 12% VL
College Grove	None	16% affordable / 43% VL
Crossroads	15 VL units	17% affordable production overall, but currently at 9% VL – threshold is 40%
Grantville	12 units	Currently at: 0% affordable / 0% VL
Linda Vista	None	N/A
Naval Training Center	163 units	All units produced outside project area. Currently at: 11% affordable / 44% VL
North Bay	None	29% affordable / 44% VL
North Park	None	28% affordable / 67% VL
San Ysidro	None	36% affordable / 78% VL
TOTAL	267-292	

*VL = Very Low Income

While Table 1 above lists the unmet affordable housing obligations on a project-area by project-area basis, an argument could also be made for considering the production accomplishments and obligations of the Former RDA as a whole.

The provisions of AB 26 no longer segregate the LMIHF by project area boundaries. The concept of tax increment has been abolished as of February 1, 2012, and is now simply regarded as property tax revenue. If one examines the Agency's production accomplishments as a whole, there are no outstanding affordable housing obligations. Table 2 below illustrates an overall affordable housing production of 20% in relation to the market rate residential production and an overall production of very-low units at 62% of affordable housing production.

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Table 2: Cumulative Redevelopment Agency Affordable Housing Production

Total Housing Units Produced (Market Rate and Affordable)	25237

Total Affordable Housing Units Required	VL	L/M	Total
	1515	2271	3786

HOUSING PRODUCTION		Produced			Less Replacement Units			Less Other Project Area #s			Total Production		
		VL	L/M	TOTAL	VL	L/M	TOTAL	VL	L/M	TOTAL	VL	L/M	TOTAL
Completed													
CCDC	19936	2556	1411	3967	30	45	75	0	0	0	2526	1366	3892
SEDC	473	17	155	172	0	0	0	0	0	0	17	155	172
Barrio Logan	452	282	166	448	74	87	161	111	33	144	97	46	143
City Heights	1115	452	29	481	117	0	117	160	10	170	175	19	194
College Community	436	9	73	82	0	0	0	4	37	41	5	36	41
College Grove	45	6	8	14	0	0	0	3	4	7	3	4	7
Crossroads	253	10	50	60	0	2	2	6	8	14	4	40	44
Grantville	80	0	0	0	0	0	0	0	0	0	0	0	0
Linda Vista	0	0	0	0	0	0	0	0	0	0	0	0	0
North Bay	617	277	173	450	87	0	87	56	0	56	134	173	307
North Park	664	141	135	276	7	15	22	8	58	66	126	62	188
NTC	850	103	109	212	1	15	16	61	42	103	41	52	93
San Ysidro	316	87	44	131	0	0	0	31	30	61	56	14	70
Grand Total:	25237										3184	1967	5151

Affordable Housing Production %:	20%
Very Low to Total Production:	62%

No production deficit for Agency as a whole.
(Numbers include projects currently under construction.)

Section 33334.4(a) of the California Health & Safety Code, requires that the Agency expend LMIHFs to assist in the development of housing for persons of very low, low and moderate income in at least the same proportion as the total number of housing units needed for each of those income groups within the community as each of those needs have been identified in the most recent determination pursuant to Government Code Section 65584 (i.e., the regional share of the statewide housing need). The City of San Diego's regional share of housing need for persons of very low, low and moderate income is published in the Housing Element of the City's General Plan. According to the City's current FY 2005-2010 Housing Element, the proportional share of the housing need in San Diego is 23% very low income (10,645 units city-wide), 18% low income (8,090 units city-wide), 19% moderate income (8,645 units city-wide) and 40% above moderate income (18,362). Using this definition and a denominator based upon the need for affordable units (a total of 27,380 units), the threshold for the expenditure of low- and moderate income housing funds is 39% very-low income (10,645 units), 29% low income (8,090 units) and 32% moderate income (8,645 units).

Proportionate to the City-wide production of affordable units, the Former RDA has met the above minimum and maximum thresholds for expenditure of LMIHFs.

In addition, California Health & Safety Code §33334.4(b) states, "Each agency shall expend, over the duration of each redevelopment implementation plan, the monies in the Low and Moderate Income Housing Fund to assist housing that is available to all persons regardless of age in at least the same proportion as the number of low-income households with a member under the age of 65 years bears to the total number of low-income households of the community as reported in the most recent census of the United States Census Bureau."

Because the most recent 10-years of affordable housing production have fallen within the constructs of the 2000 census, the Former RDA has used those census numbers in its analysis of "senior" housing production. According to the 2000 census, there are 450,691 households in the City of San Diego. Of those households, 81,124 are "Senior Head of Household" (at least 65 years of age). Of those, "Senior Head of Household", 39,751 (49%) are low and moderate income. The total number of low and moderate income households in San Diego is 181,572. Therefore, the ratio of low and moderate income senior households to the total number of low and moderate income households is 21.89% (39,751/181,572). The expenditure of LMIHFs for "senior" affordable housing may not exceed 21.89% and it has not exceeded that threshold during the lifetime of the Former RDA.

II. For-Sale / Shared Equity Units and Units With Covenants Less Than 45 Years

A. Comment Raised: In addition to the general affordable housing inclusionary requirements, for-sale units developed with the Former RDA's assistance and sold, subject to a shared equity arrangement, would need to be replaced and should be included on the EOPS.

Response: Based on a thorough review of the historic records, there is no documentation indicating that the Former RDA has *ever* counted any such for-sale, shared-equity arrangement toward its inclusionary production requirements.

While the Former RDA has entered into shared-equity, first-time homebuyer assistance loans for certain for-sale units using LMIHFs, those units were not counted toward the Former RDA's overall inclusionary production requirements. The loans were simply considered as other authorized uses of LMIHFs.

At the January 31, 2012 meeting, City staff indicated there may have been instances when for-sale units with affordability covenants less than 45 years were not counted toward the Former RDA's inclusionary production requirements. There are some instances, however, when units with 10 or 15 year deed restrictions were appropriately credited toward the Former RDA's production obligations under a "grandfathering" situation, as described below.

Health and Safety Code section 33334.3(f)(1), which first became effective in the mid-1970s, sets forth the minimum duration of affordability covenants for dwelling units subsidized with LMIHFs. On January 1, 2002, AB 637 became effective, amending this section to expand the minimum duration of affordability covenants from 15 years to 55 years for rental units, and from 10 years to 45 years for owner-occupied, for-sale units. Therefore, under the CRL, the duration of the affordability covenant is dependent upon the timeframe in which the project was funded. In addition, the Former RDA's authority to "count" the units toward the affordable housing production requirements is dependent upon the extent to which the expenditure complied with

CRL provisions on affordability covenants in effect at the time such expenditures were made. In other words, when the affordable housing unit complied with the statutory requirements for affordable housing production in effect at the time the Former RDA made the expenditure from LMIHFs, the unit would count toward the Former RDA's production requirement and would not require "replacement" upon the expiration of the affordability covenant simply because intervening statutory changes now impose longer covenant requirements.

III. Replacement Housing and Relocation Assistance

Health and Safety Code section 33413(a) requires that whenever affordable dwelling units are demolished as the result of redevelopment activities, the redevelopment agency shall replace those units within four years. For units removed after January 1, 2002, an equal number of dwelling units, with an equal or greater number of bedrooms as those destroyed units, are to be provided. Notwithstanding section 33413(a), section 33413(f) states that a redevelopment agency may replace destroyed or removed dwelling units with a fewer number of replacement dwelling units, if the replacement units meet both of the following criteria: (1) the total number of bedrooms in the replacement units equals or exceeds the number of bedrooms in the units destroyed or removed, and (2) the replacement units are affordable to and occupied by the same income level of households as the destroyed or removed units.

There are no statutory obligations to replace market-rate units demolished or removed as a result of redevelopment activities, or to replace units demolished or removed as a result of private sector development (with no redevelopment involvement). There is also no statutory obligation to replace units demolished or removed prior to January 1, 1996 in redevelopment project areas with adopted Redevelopment Plans prior to 1976.

Health and Safety Code section 33413.5 requires a redevelopment agency to adopt a Replacement Housing Plan before it enters into certain funding agreements that would lead to the destruction or removal of dwelling units from the low- and moderate-income housing market.

A. <u>Comment Raised</u>: To the extent the Former RDA had outstanding replacement housing obligations at the time of its dissolution, those obligations should be included on the EOPS.

<u>Response:</u> The table below documents and summarizes the demolition and replacement housing activities of the Former RDA, as documented by approved replacement housing plans and past annual reports to the State Department of Housing and Community Development (HCD).

Table 3: Replacement Housing Summary

Redevelopment Agency of the City of San Diego - Replacement Housing Tracking - January 1, 1996 through January 31, 2012

Project Area	Project Name	Number of Units Demolished/Displaced BDR Type	VL	L	Mod	Total # BDRS Dem'd	Replacment Units BDR Type	VL	L	Mod	Total # BDRS Replaced	Location of Replacment Units
Barrio Logan	Gateway Apartments / pre-construction	1	0	2	0	2	2	4	0	0	8	Gateway Family Apartments
		2	0	2	0	4						
Barrio Logan	Estrella Del Barrio-Mercado Del Barrio / pre-construction	3	0	2	0	6	1	0	1	0	1	Mercado Family Apartments
		4	0	1	0	4	3	0	3	0	9	
Barrio Logan	La Entrada / pre-construction	1	7	0	0	7	2	11	0	0	22	La Entrada
		2	4	0	0	8	3	2	0	0	6	
		3	2	0	0	6						
City Heights	Regional Transportation Center	2	19	0	0	38	1	40	0	0		Silvercrest Apartments
City Heights	Urban Village Retail	2	0	85	0	172	1	7	10	0	17	Mercado Family Apartments
		3	0	50	0	150	2	23	37	0	120	
		4	0	1	0	4	3	31	32	0	189	
City Heights	Urban Village Townhomes	1	26	0	0	26	1	4	0	0	4	CH Square Seniors
		2	9	0	0	18	2	2	0	0	4	Urban Village Townhomes
							3	29	0	0	87	Urban Village Townhomes
City Heights	Metro Villas / pre-construction	1	11	0	0	11	1	30	0	0	30	Metro Villas
		2	30	0	0	60	2	30	0	0	60	
		3	4	0	0	12	3	4	0	0	12	
		4	1	0	0	4	4	1	0	0	4	
		unknown	19	0	0	unknown						
City Heights	CH Square Seniors / pre-construction	1	3	0	0	3	1	5	0	0	5	CH Square Seniors
		2	1	0	0	2						
City Heights	Auburn Park / pre-construction	2	2	0	0	4	2	2	0	0	4	Auburn Park
Crossroads	Centrepointe - demolition	1	1	0	0	1	1	1	0	0	1	Auburn Park
		2	4	2	2	16	2	6	0	0	12	Auburn Park
							2	0	2	0	4	Village Green
North Bay	VVSD Phase II	beds	87	0	0	87	beds	87	0	0	87	VVSD Phase II
North Park	Renaissance Seniors	1	3	0	0	3	1	3	0	0	3	Renaissance Seniors
		2	6	0	0	12	2	6	0	0	12	Metro Villas
		3	1	0	0	3	3	1	0	0	3	Metro Villas
North Park	North Park Inn (Pathfinders)	studio	3	0	0	3	studio	3	0	0	3	Pathfinders (North Park Inn)
North Park	Florida Street (Kalos) / pre-construction	1	4	0	0	4	1	5	0	0	5	Florida Street (Kalos) upon construction completion
		2	1	2	2	10	2	1	4	0	10	
		3	2	2	1	15	3	3	3	0	18	
		4	1	0	0	4						
CCDC	Armed Servcies YMCA	1	7	0	0	7	1	7	0	0	7	Villa Maria
CCDC	East Village - Ballpark	1	0	1	1	2	1	0	1	1	2	Village Place
CCDC	SVDP	2 beds	75	0	0	150	2 beds	75	0	0	150	15th and Commercial (SVDP)
CCDC	Entrada	1	0	10	0	10	1	0	10	0	10	Entrada
		2	0	2	0	4	2	0	2	0	4	Villa Maria
SEDC	Hilltop and Euclid	1	2	0	0	2	2	1	5	0	12	Mayberry Townhomes
		2	4	1	0	10	3	3	0	0	9	
		4	0	2	0	8						
	TOTALS:		339	165	6	892		427	110	1	934	

Units: 504 Bdrms: 892 **Units: 538 Bdrms: 934**

Corrected 2-28-12

As of January 31, 2012, there were no outstanding replacement housing obligations.

Various representations have been made regarding the number of affordable housing units demolished by the Former Agency since FY 2000. After an audit of the adopted replacement housing plans for the time period of FY 2000 – FY 2011, and a review of the annual reports to HCD, staff has confirmed the number of affordable housing units demolished or removed as a result of the Former RDA's activity, and therefore requiring replacement, to be 365 units.

There is potential for a future replacement housing obligation for the proposed project at Ouchi Courtyards. This relates to a property now owned by the Successor Agency that contains three dwelling units affordable to low and moderate income households. However, those units have not yet been demolished and there is no agreement in place to finance the construction of the proposed Ouchi Courtyards affordable housing development, so the requirement to replace the units has not been triggered and a replacement housing plan has not yet been approved.

In addition to replacement housing obligations, there are *relocation* obligations imposed by various provisions of State law. These relocation obligations provide for assistance when a household is either temporarily or permanently relocated due to redevelopment activities.

There is one property now under the management of the Successor Agency with an outstanding relocation plan. The Centre City Manor Hotel is located on the site originally planned for the future St. Joseph's Park (the block bounded by Beech and Ash Streets, and Third and Fourth Avenues). On the site is a Single Room Occupancy Hotel (SRO) with 76 rooms. A relocation plan for the site was approved on January 12, 2010 by Resolution R-04478 and subsequently, a replacement housing plan was approved. To date, the SRO remains occupied and there is no agreement in place to finance the design and construction of St. Joseph's Park. Therefore, the requirement to relocate occupants of the SRO and/or replace demolished housing units has not yet been triggered.

IV. Properties originally purchased with LMIHF

Health and Safety Code section 33334.16 requires redevelopment agencies to initiate activities consistent with the development of real property for housing affordable to persons and families of low and moderate income, within 5 years from the date of acquisition, when such property is acquired with funds from LMIHF. These activities may include zoning changes or agreements entered into for the development and disposition of the property. There is a provision for an additional 5-year extension of time upon resolution of the legislative body and, in the event the redevelopment agency does not comply with this requirement, the property is to be sold and the moneys from the sale are to be deposited back into the LMIHF.

A. <u>Comment Raised</u>: Properties originally acquired with LMIHF should be added to the EOPS, if the property is not presently developed with affordable housing and

where there is no existing DDA/OPA or other financial assistance agreement in place to provide funding for the development of affordable housing on the property.

Response: The following table details the as-of-yet undeveloped parcels originally purchased by the Former RDA with LMIHFs. Please note there is a distinction between properties purchased by the Former RDA with LMIHF and transferred to the City in March 2011, versus properties purchased by the Former RDA with LMIHF that are currently owned by the Successor Agency.

Table 4: Redevelopment Agency – Undeveloped Parcels Purchased with LMIHF

Parcel Names	APN	Acquisition Date	5-Year Expiration	Asset Transfer to City Prior to Agency Dissolution	Notes
13th & Market	535-152-04	2006	Five-Year Extension approved in November 2011	Yes	A portion of a 40,000 square foot site (9 parcels). Agency (City) acquired 6 out of 9 parcels, 3 of which were reimbursed with 80% funds and are therefore not on this list.
	535-152-05	2007			
	535-152-12	2011	2016	No	
Fourth & Beech	533-451-02, 11, 16	2010	8/25/2015	No	Site assembly completed for Atmosphere project. ENA executed in 2010.
	533-541-10, 12	2011	3/4/2016	No	
14th & Broadway	534-205-08	2006	Five-Year extension approved in November 2011	Yes	Future East Village Fire Station – with mixed use residential.
Hilltop & Euclid	542-480-03, 10, 12	Various	Various Five-Year extensions granted, est. 2014 expiration	Yes	Site assembly for future affordable housing development.
	542-480-09, 14, 16				
	542-480-18				
	542-480-20				
Ouchi	548-242-30	2008	2013	No	Expired ENA for development

The mere ownership of real property is not an "enforceable obligation" as defined in section 34171(d)(1) of AB 26. The City, in its capacity as the Housing Successor Agency, will retain ownership of properties initially acquired with LMIHFs, even if such properties are not listed on the EOPS. In addition, the funding source for subsidizing the future development of an affordable housing project on any LMIHF-funded property is uncertain.

AB 26 did not amend the provisions of the CRL addressing the time frame in which to develop land purchased with LMIHFs and/or the remedies in the event the land remained undeveloped after the expiration of said time frames. Therefore, the Successor Agency may need to sell any property purchased with LMIHFs to the extent that the development time frame expires in the

future, and any such proceeds from the sale may need to be appropriated as discussed in Section I of this Attachment, unless subsequent legislation clarifies otherwise.

The Successor Agency may amend the EOPS in the future, if necessary, to address any ambiguity regarding the proper disposition of those proceeds. At this time, however, the development time frame has not expired and is not scheduled to expire imminently with respect to any of the properties initially acquired by the Former RDA with LMIHFs.

V. Other Uses of LMIHF

Home in the Heights – First Time Homebuyer Loans

Home in the Heights (HITH) was created by the Former RDA in the mid-1990s to encourage homeownership in the City Heights community. Increased homeowner occupancy had been identified as an important factor for improving neighborhood stability, encouraging private investment, and improving the local housing stock. Initially focused on helping low- and moderate-income families within the City Heights Redevelopment Project Area displaced by the development of new schools, the program grew to eventually include by 2008 all qualified homebuyers wishing to purchase a home in the City Heights Redevelopment Project Area or City Heights Community Planning Area. HITH program participants, whose household income must not exceed 100% of the area median income, received assistance in the form of a subordinate loan (i.e., silent second mortgage) evidenced by a promissory note and secured by a deed of trust recorded against the subject property. From 2002 through 2011, the program assisted 107 families purchase their first home in City Heights. The Former RDA invested $3,020,595 of City Heights low/moderate-income housing funds to issue the subordinate loans, and $326,391 to administer the program through Community HousingWorks.

Housing Enhancement Loan Program

The Housing Enhancement Loan Program (HELP) was created by the Former RDA to increase, improve, and preserve the supply of housing occupied by persons and families of low and moderate income. The HELP program provided forgivable loans to assist residents enhance the homes that they owned. In turn, these home improvements resulted in many benefits to the community, including: improving, promoting, and preserving positive neighborhood characteristics; promoting varied housing opportunities; improving and enhancing the housing stock; remediating health and safety issues; and supporting and promoting the growth and vitality of the business environment. Forgivable loan amounts ranged from $5,000 to $30,000, and loans were available to residential owner-occupants in or near the following redevelopment project areas: City Heights, College Grove, Crossroads, Grantville, Linda Vista, North Park, San Ysidro, and the Southeastern Economic Development Corporation's Area of Influence. HELP program participants must have incomes that do not exceed 100% of the area median income. As of December 31, 2011, a total of 324 homes had been rehabilitated with another 20

homes undergoing rehabilitation, representing an investment of $9,461,669 of LMIHFs in loans and $1,098,396 in administrative costs through the San Diego Housing Commission.

The predecessor to the HELP program was created by SEDC to offer forgivable rehabilitation loans to residents of the Mt. Hope and Southcrest redevelopment project areas. From 1991-2009, the Mt. Hope Rehab Program provided assistance to 134 households (81 VL, 42 low, 11 mod) totaling approximately $1.1 million for loans and program administration. From 1997-2009, the Southcrest Rehab Program provided assistance to 87 households (37 VL, 31 low, 19 mod) totaling approximately $598,000 for loans and program administration.

CCDC's Downtown – First Time Homebuyer Program

On behalf of the Former RDA, CCDC created the Downtown FTHB Program in 2002 to make home ownership more accessible and affordable in downtown San Diego. The program provided second trust deed loans, up to $75,000, to moderate income first-time homebuyers to purchase properties in downtown neighborhoods. The loans were structured as 30-year, zero-interest loans and no payments were required for the first five years. No resale price/income restrictions were placed on the properties. The Former RDA shared in appreciation upon sale for a period of 45 years. The program assisted 15 moderate-income homebuyers to purchase homes in downtown with loans totaling $1.1 million. The San Diego Housing Commission services the existing loans for the Former RDA under a Cooperation Agreement. The program was suspended in 2010 due to depletion of funds.

Non-Substantial Rehabilitation of Multifamily Developments

On behalf of the Former RDA, SEDC offered assistance for the rehabilitation of multifamily units. Although there was a long-term affordability covenant placed on these units, they did not count toward the affordable housing production requirements of the Former RDA because the completed rehabilitation was not considered "substantial" under California Community Redevelopment Law. An example of this type of project would be the Mayberry Townhomes, where all 69 of the units are restricted to low and moderate income households for a period of 55 years, but none of the units were counted toward the Former RDA's production obligations.

CONCLUSION

The Second Amended EOPS is a balanced and strategic approach to retaining as many community improvement projects as can be justified while at the same time minimizing risk to the City's general fund.

By offering an inventory and summary of the affordable housing activities of the Former RDA from its inception on May 6, 1958 to its dissolution on February 1, 2012, this Attachment serves to address concerns recently raised by affordable housing advocates with respect to a variety of affordable housing items and their relation to the First Amended EOPS.

ATTACHMENT C TO CITY ATTORNEY MEMORANDUM

California Redevelopment Association Guidance Document

HOUSING SUCCESSOR AGENCIES UNDER ABx1 26

1. What is the difference between the Successor Agency and the Housing Successor?

Under Assembly Bill x1 26 ("Dissolution Act" or "AB x1 26"), the City or County that formed the RDA became the "Successor Agency", unless it opted not to by January 13, 2012. All assets properties, contracts, leases, books and records, buildings and equipment of the RDA (except for most affordable housing assets) transferred by operation of law to the Successor Agency on and as of February 1, 2012, the date all redevelopment agencies dissolved. The Successor Agency manages redevelopment projects that are the subject of Enforceable Obligations, makes payments on Enforceable Obligations identified on the EOPS and ROPS, unwinds and liquidates the non-affordable housing assets and properties under the supervision and control of and as directed by the seven-member "Oversight Board".

In contrast, Section 34176 of AB x1 26 provides that the City or County that authorized creation of the RDA may elect to retain the affordable housing assets and functions previously performed by the RDA; if not so elected, the host city or county may select a local housing authority to assume the housing assets and functions of the former RDA (or if there is no local housing authority the responsibility goes to State HCD). Housing assets that transfer to this "Housing Successor" include real property, personal property, contracts, leases, books and records, buildings, equipment and other revenues of the former RDA. However, the *unencumbered* balances in the former RDA's Low and Moderate Income Housing Fund ("Housing Fund") do not transfer to the Housing Successor.

The Housing Successor is not subject to the Oversight Board's control (with one exception described below). If the Housing Successor is the City or County, it is the City or County acting in its own capacity as a municipal corporation or county, it is not a separate "Successor Agency". If the Housing Successor is a local housing authority (established by a city or county under the California Housing Authorities Law, Health & Safety Code Section 34200, et seq.) it is acting in that capacity.

2. What happened to Affordable Housing Assets on February 1, 2012? And what happens to the Unencumbered Balance of the Housing Fund?

As of and on February 1, 2012, under Section 34176 all affordable housing assets of the former RDA (*excluding* unencumbered Housing Fund balances) are transferred by operation of law to the Housing Successor. Although Section 34181 clouds the presumption of this transfer as it states the Oversight Board directs the Successor Agency to "[t]ransfer housing responsibilities and all rights, powers, duties, and obligations along with any amounts on deposit in the Low and Moderate Income Housing Fund to the appropriate entity pursuant to Section 34176." Since the Successor Agency has existed since February 1 but the Oversight Board may be formed as late as May 1, there is not legal certainty that all housing assets have yet been transferred to the Housing Successor; however, most arguably the Housing Successor should now hold all housing assets of the former RDA. Some take the view that when the City or County that formed the redevelopment agency has not agreed to accept the housing assets, the transfer of these assets to the local housing authority or to HCD requires an Oversight Board directive pursuant to Section 34181. In addition, some title companies have indicated they will require a resolution of the Housing Successor agreeing to accept the housing assets.

Also unclear is the disposition of the existing Housing Fund balance since (i) Section 34177(d) requires Successor Agencies to remit unencumbered funds, both non-housing and housing, to the

County Auditor-Controller for distribution to the taxing entities; but, as noted, (ii) Section 34181(d) states that the Oversight Board directs this transfer; and, again, (iii) Section 34176 provides the entire Housing Fund balance (except unencumbered funds) is transferred to the Housing Successor.

In its February 17, 2012 "Report on Unwinding Redevelopment", the Legislative Analyst's Office (LAO) states that Successor Agencies and Oversight Boards together will distinguish between encumbered and unencumbered balances in the Housing Fund to determine what are the unencumbered funds to be remitted to the County Auditor-Controller for distribution to taxing entities. The LAO report also notes that "HCD and SCO have separate criteria for distinguishing between encumbered and unencumbered funds."

If such accounting has not already been completed, it is suggested that the Successor Agency transfer the encumbered Housing Funds to the Housing Successor to use for housing obligations and retain possession of the unencumbered Housing Fund (i.e. not send theses funds to the County Auditor-Controller) until further clarification is made (perhaps by the passage of SB 654 or AB1585).

3. What happens to remaining tax-exempt and taxable Housing bond proceeds?

Bond proceeds are to be spent for the purposes for which they were issued unless those purposes can no longer be achieved, and then they are used to defease bonds. The Dissolution Act is not clear as to who makes this determination. There appears to be a strong argument for transferring housing bond proceeds to the Housing Successor to be used for their intended purpose, but check with your bond/legal counsel. The LAO report indicates that the assets to be transferred to the Housing Successor include "property, rental payments, **bond proceeds**, lines of credit, certain loan repayments, and other small revenue sources." (Emphasis added).

4. How is debt service on outstanding Housing bonds paid?

Housing bonds that were secured by a pledge of tax increment should be listed as an Enforceable Obligation on the EOPS/ROPS and be paid from the Redevelopment Property Tax Trust Fund payments made by the County Auditor Controller to the Successor Agency.

5. What responsibilities will the Housing Successor have?

They have all "rights, powers, duties and obligations" of the former RDA. They <u>may</u> enforce affordability covenants and perform related activities pursuant to the CRL (SB 654 & AB1585 would change "may" to "shall"). As written, ABx1 26 is not clear if the Housing Successor must meet any existing or future Replacement Housing or Inclusionary Housing obligations; nor is it clear whether the Housing Successor exercises powers and performs activities pursuant to the CRL statutes that have been repealed or otherwise declared inoperative. However, the DOF responded to a question posed by a Successor Agency stating: "there may be specific housing-related enforceable obligations that would have been satisfied out of the low-moderate income housing fund. These could include construction contracts, and **purchase of replacement housing** for housing that has been demolished as part of an ongoing project" (emphasis added). This implies that DOF believes that existing replacement housing obligations must be met. It appears that Replacement Housing and Inclusionary Housing obligations will continue to be the subject of discussion, differing opinions, and disagreement that will need to be resolved by the legislature and courts.

6. Does the Oversight Board oversee the Housing Successor?

No -- based on AB x1 26 provisions at this date (except with regard to the muddy provisions of Section 34181 as excerpted above in question 2). Again, housing projects/obligations that must be paid from future property taxes (former tax increment) should be listed on the Recognized Obligations Payment Schedule (ROPS) that is subject to review and approval of the Oversight Board.

7. ABx1 26 says that amounts borrowed from the Housing Fund must be repaid. Where do these funds go? To the Successor Agency or to the Housing Successor?

Loan repayments, lease payments, and repayments of Housing Fund deferrals and ERAF/SERAF loans are all affordable housing-related accounts receivable, and are therefore considered affordable housing assets of the former redevelopment agency which will pass to the Housing Successor entity. Payments on these accounts receivable will therefore go to the Housing Successor. A question has been raised as to whether these funds could later be considered "unencumbered" fund balance when they are repaid; there is no clear answer to this question.

8. What should staff do to prepare for transfer of assets and functions to the Housing Successor?

As discussed above, since assets and obligations transferred to the Successor Agency and Housing Successor by operation of law on February 1, 2012, without deeds or assignment agreements, it was recommended that RDAs prepare "exit memos" (one to the Successor Agency and one to the Housing Successor) delineating which assets and obligations would transfer to the Successor Agency and which would transfer to the Housing Successor to establish an internal record of these transfers. If this has not yet been done, this inventory and accounting can, and is encouraged to, be prepared.

As presented and recommended by the CRA accounting panel for the training sessions, as part of the Successor Agency's and Housing Successor's setting up of new accounts, the housing assets should be separately accounted for. Separate "affordable housing accounts" should be established for the existing unencumbered and encumbered balances in the RDA's Housing Fund, pending the County audit and outcome of SB 654/AB 1585. Also, the Housing Successor should create a new "affordable housing fund" in its accounts to account for encumbered affordable housing assets that were transferred from the Successor Agency, as well as funds received in the future by the Housing Successor from third parties through loan repayments, ground lease payments or sales proceeds. These funds are to be expended for affordable housing. If the Housing Successor is a housing authority, then the provisions of the Housing Authorities Law, Health & Safety Code Section 34200, *et seq*. also apply.

Notices should be sent to parties of all affordable housing contracts, informing them of the name and address of the Housing Successor for communications and payments. If the Housing Successor inherits a subordinate mortgage lien from the former RDA, a new request for notice of default under prior liens should be recorded against the property, including the successor agency's name and address.

9. Is there a cost allowance for the administration of the Housing Successor?

While ABx1 26 provides an administrative cost allowance for the Successor Agency, subject to the approval by the Oversight Board, it does not address costs related to the administration of the Housing Successor. Therefore, the Housing Successor will be responsible for administration costs.

Generally, Successor Agencies are listing all affordable housing obligations as enforceable obligations on the EOPS and ROPS and including any related project costs (legal, consulting, staffing, etc.) as obligations, either in the same line item or a separate line item. Administrative costs of the Housing Successor can also be paid with program income, or the Successor Agency, with Oversight Board approval, may chose to share its administrative cost allowance with the Housing Successor.

10. What opportunities exist for Housing Successor to promote and achieve new affordable housing projects and programs?

Cities are authorized to implement affordable housing projects and programs. Housing authorities have extensive powers as set forth in the Housing Authorities Law. Local jurisdictions can continue to assist in the entitlement process for affordable housing projects, and can continue to charge in-lieu fees and enforce local inclusionary ordinances. However, funding to carry out new projects or programs will depend upon the amount of assets transferred to the Housing Successor, estimated repayments to the Housing Successor, and whether other federal, state, or local funding sources are available.

11. If SB 654 (Steinberg) and/or AB 1585 (Perez) is signed into law, what will be different?

If either SB 654 or AB 1585 is adopted, assets transferred to the Housing Successor will include the existing, *unencumbered* Housing Fund balance(s). Also, the local housing authority can reject becoming the Housing Successor, in which case the responsibility will go to HCD. Also, the Housing Successor "shall" (as opposed to "may") enforce affordability covenants and perform related activities pursuant to CRL.

12. What other legislation is currently under consideration that would affect affordable housing?

SB 1151 would require Successor Agencies to prepare a long range asset management plan that outlines a strategy for maximizing the long-term value of the real property and assets of the former redevelopment agency for ongoing economic development and housing functions. The bill requires Successor Agencies to submit the plan to the DOF and the Oversight Board by December 1, 2012, and would require the approval of the plan by DOF and Oversight Board by December 31, 2012.

SB 1156 would enable cities and counties to establish a "community development and housing joint powers authority." The joint powers authority (JPA) would assume the successor agency responsibilities. It also permits the JPA to establish an additional sales tax to fund sustainable economic development and affordable housing.

SB 1220, the Housing Opportunity Trust Fund Act of 2012, would establish a permanent source of funding for affordable housing. SB 1220 would impose a $75 fee on the recordation of each real-estate document. These funds will be deposited into a state-administered Housing Opportunity and Market Stabilization (HOMeS) Trust Fund to support the development, acquisition, rehabilitation, and preservation of affordable housing. The funds could be used for emergency shelters, transitional and permanent rental housing, and foreclosure mitigation as well as homeownership opportunities.

13. Should our Agency follow the recommendations outlined in the Western Center's memorandum of January 17, 2012?

Western Center on Law & Poverty has taken the position that the total projected amount of required 20% set-aside deposits to the Housing Fund that would be accumulated through the remaining life of the Redevelopment Plan is indebtedness of the Agency and thus an "Enforceable Obligation" that should be listed on the EOPS and ROPS. Western Center on Law & Poverty also states in their memorandum that every Agency has a "legal obligation" to include the total Housing Fund debt on the EOPS and the subsequent ROPS. Many redevelopment lawyers and practitioners have reviewed this memorandum and do not find its arguments compelling; thus, they do not concur with or conclude there is a "legal obligation." Some Successor Agencies have included the annual deposit of low and moderate housing funds as a debt on the EOPS/ROPS. However, in response to questions posed by Successor Agencies to the DOF, Mark Hill of DOF stated: "ABx1 26 dissolves redevelopment agencies, thus there is no longer any entity that is required to make a low-moderate income housing set-aside. No such set-aside amount should appear on a ROPS. Activities associate with the set-aside are no longer are required, such as annual reporting."

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