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DATE: February 14, 2003

TO: Hank Cunningham, Redevelopment Agency Assistant Executive Director

FROM: City Attorney

SUBJECT: Use of Housing Set-Aside Funds in the Morena Vista Transit Oriented Project

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MEMORANDUM OF LAW

On January 14, 2003, the Redevelopment Agency of the City of San Diego considered certain actions related to the Morena/Linda Vista Trolley Station Project. Certain Board members had a number of questions regarding the use of Low and Moderate Income Housing Funds for the project. After the hearing, you asked our office to provide a written memorandum of these issues.

QUESTIONS PRESENTED

1. May the Redevelopment Agency of the City of San Diego [Agency] transfer excess funds into its Low/Moderate Income Housing Fund to be spent?

2. Can Low/Mod Funds be used for construction costs as well as certain pre-development costs, including soil compaction/preparation necessary for the creation of housing for moderate income persons?

3. Do the Low/Mod Funds need to be apportioned on a pro rata basis according to the percentage of affordable units?

SHORT ANSWERS

1. Yes. California Redevelopment Law § 33334.2 makes it clear that the 20 percent is the *minimum* that must be used for affordable housing, not a maximum. There is nothing in the California Redevelopment Law [CRL] (Health and Safety Code sections 33000-

34160) or in caselaw that precludes a redevelopment agency from using more than 20 percent for affordable housing.

2. Yes. So long as the costs incurred are directly related to the creation of the affordable units, the Low/Mod Funds can be used for these purposes.

3. No. So long as a nexus exists between the use of the Low/Mod Funds and the creation of the housing discussed above are met. There is no requirement that the amount expended be proportional to the percentage of affordable units in the development project.

BACKGROUND

The Morena/Linda Vista Trolley Station Project [Project] is a mixed use transit oriented development located within the North Bay Redevelopment Project Area. The Project is the subject of a Disposition and Development Agreement [DDA] between Citylink Investment Corporation and the Metropolitan Transit Development Board [MTDB] dated April 6, 2000, as well as a Cooperation Agreement, dated April 27, 2000. The Agency assisted the project by contributing funds for the undergrounding of 69KV power lines in and around the Morena/Linda Vista Trolley Station, located within the North Bay Redevelopment Project Area.

Earlier this month, the Cooperation Agreement was terminated, and the Agency approved several agreements designed to facilitate the completion of the Project. Included in these agreements was the Affordable Housing Assistance Agreement [Agreement] between the Agency and Citylink Investment Corporation, whereby the Agency, upon the satisfaction of certain conditions, is scheduled to provide funds, including Low and Moderate Income Housing Funds [Low/Mod Fund(s)] for the inclusion of sixteen residential units for low or moderate income persons. It is anticipated that at least a portion, and perhaps all of the funds provided under the Agreement will be Low/Mod Funds. At the time of the approval of the Agreement, Agency Board members requested that other Agency monies be used to replenish the Low/Mod Funds used for the Project. Certain Board members questioned both the legality of using Low/Mod Funds for other than hard construction costs as well as the legality of transferring other Agency monies into the Low/Mod Fund. This Office answered both of those questions at the hearing. After the hearing, I was asked by your office to look further into these issues, in addition to the issue of any pro rata requirement for the use of these funds. The answers to these questions are found in the provisions of the California Redevelopment Law (California Health and Safety Code sections 33000- 34009), and are discussed below.

DISCUSSION

1. The Agency legally can move non-Low/Mod monies into its Low/Mod Fund

The CRL mandates that at least 20 percent of the tax increment generated from a particular project area, “be used by the agency for the purposes of increasing, improving and preserving 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." CRL § 33334.2 The CRL makes it clear that the 20 percent set forth above is the *minimum* that must be used for the affordable housing, not a maximum. There is nothing in the CRL or in caselaw that precludes an agency from using more than 20 percent for affordable housing. To so find, in fact, would undermine the fundamental purpose of the CRL, which is to provide affordable housing to people or families of low or moderate income. CRL §§ 33334.6, 33071.

In the Project in question, it has been proposed that the Agency move non-Low/Mod monies into the Low/Mod Fund to replenish some or all of the Low/Mod Funds used to support the sixteen units of low or moderate income housing on the Project. Because the CRL expressly establishes the 20 percent as the *minimum* that must be placed into the Low/Mod Fund, the code recognizes that some agencies may choose to use more. Many jurisdictions, in fact, have adopted policies to require that on a regular basis that more than 20 percent be used. In our case, it is proposed that additional funds be moved to the Low/Mod Fund on a one time basis. There is nothing in the law that precludes this. Because the fundamental purpose of redevelopment itself is to provide affordable housing, it would make no sense to preclude the use of more than 20 percent for affordable housing, whether on a regular or a one time basis - and the CRL does not.

2. Low/Mod Funds can be used for construction costs as well as certain pre-development costs, including soil compaction/preparation necessary for the creation of housing for moderate income persons

As discussed above, the Agency is not precluded from transferring monies into the Low/Mod Fund, however, once transferred, these funds become Low/Mod Funds, with all of the restrictions and obligations of those funds. In determining how to use its Low/Mod Funds to improve, increase, or preserve a community's supply of affordable housing, the Agency may exercise "any or all of its powers to . . . [p]rovide subsidies to, or for the benefit of, very low income households . . . lower income households . . . or persons and families of low or moderate income . . . to the extent those households cannot obtain housing at affordable costs on the open market." CRL §§ 33334.2(a), 33334.2(e)(8).

Although an Agency may legitimately pursue innovative projects to increase or improve the supply of affordable housing, there must be a nexus between the proposed expense and the affordable housing. *Craig v. City of Poway*, 28 Cal. App. 4th 319, 338 (1994); *Lancaster Redevelopment Agency v. Dibley*, 20 Cal. App. 4th 1656, 1661-63 (1993). In the *Craig* case, a low-income resident of the City of Poway filed a lawsuit claiming that the expenditure of Low/Mod Funds for road improvement was not appropriate because the project did not improve or increase the housing supply. *Craig*, 28 Cal. App. 4th at 333. The court agreed with the plaintiff in this particular case, but stated that such an expenditure would not necessarily be inappropriate under every circumstance. Rather, the court found that the expenditure was inappropriate in that case because the agency failed to establish a nexus between the expenditure and the improvement of affordable housing. The court stated that there must be:

> [a] nexus between the LMI Housing Fund expenditures and the goal of improving the community's supply of affordable housing. A redevelopment agency must establish a direct link between the use of the LMI Housing Fund and the beneficial change in the *condition* of the affordable housing supply. Although construction projects such as a park or a pool could certainly be viewed as improving the quality of life of the neighborhood residents, an agency generally could not reasonably establish that a park or a pool directly and specifically improved affordable *housing.*

Id. at 338. (citations omitted)(emphasis in original).

Thus, in order to legally use Low/Mod Funds to subsidize a project, the Agency is required to show that the use of the funds is directly related to providing affordable housing for very low and low and moderate income households. *Id.* at 339.

In our Project, the Low/Mod Funds are proposed to be used for certain pre-development costs, including soil compaction, as well as hard construction costs. The CRL specifically provides that Low/Mod Funds can be used for construction, and pre-construction site improvements. (CRL § 33334.2(e)(5); (CRL § 33334.2(e)(2). As discussed above, despite the fact that the code specifically allows for the use of Low/Mod Funds for these purposes, their use must still be "directly related" to the creation of the affordable units. To ensure this, the Agency should review the developers cost projections to ensure that the pre-development costs are in fact directly related to the units. If it is established that the expenditure in these areas is attributable to the affordable units, or that the affordable units could not be built without incurring these costs, then the Low/Mod monies can be used for these purposes.

3. Low/Mod Funds need not be apportioned on a pro rata basis according to the percentage of affordable units

The only requirement in the CRL for proportionality in the use of Low/Mod Funds applies to internal agency expenses. The CRL allows Low/Mod Funds to be used for planning and administrative costs incurred by an agency if those costs are directly related to programs and activities necessary for increasing the supply of affordable housing. CRL § 33334.3(e)(1) The CRL provides that if an agency uses Low/Mod Funds for these activities, the amount of Low/Mod Funds used must not be disproportionate to the amount actually spent on the creation of affordable units. CRL § 33334.3(d). So long as the nexus between the use of the Low/Mod Funds and the creation of the housing discussed above are met, there is no requirement that the amount expended be proportional to the percentage of affordable units in the project.

CONCLUSION

The Agency has broad powers to increase or improve low income housing. The law provides that a minimum of 20 percent of the tax increment from every project area be used for affordable housing. The Agency may deposit tax increment in excess of the required 20 percent

into the Low/Mod Fund, at which point, those monies become restricted, and can only be used to improve, increase, or preserve a community's supply of affordable housing. The Low/Mod Funds can be used for site preparation and other activities related to the creation of the affordable units so long as there is a nexus, or connection, which makes it clear that the use of the funds is necessary for the creation of those units. Finally, there is no requirement that these funds be used on a pro rata basis according to the percentage of affordable units within a project.

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cc: Todd Hooks, Community and Economic Development, M.S. 904