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DATE: February 18, 2003

TO: Hank Cunningham, Assistant Executive Director
Redevelopment Agency of The City of San Diego

FROM: City Attorney

SUBJECT: Low and Moderate Income Housing Fund Moneys

MEMORANDUM OF LAW

QUESTION PRESENTED

1. Under the California Constitution, may the Redevelopment Agency use Low and Moderate Income Housing Fund Moneys outside of the project area from which they were generated?
2. May the Redevelopment Agency use bond proceeds generated from multiple project areas in selected project areas without amending the redevelopment plans for the involved project areas?

SHORT ANSWER

1. Yes. Low and Moderate Income Housing Moneys may be used outside of the project area that generated them upon a resolution of both the Redevelopment Agency and the City Council that the use of those funds will be of benefit to the generating project area.

Hank Cunningham, Assistant Executive Director
Redevelopment Agency of The City of San Diego
February 18, 2003
Page 2

2. Yes. The Agency may issue bonds on which the principal and interest are payable exclusively from the income and revenues of designated redevelopment project areas whether or not those project areas were financed in whole or in part with the proceeds of the bonds.

BACKGROUND

On August 6, 2002, the City Council and the Redevelopment Agency approved the recommendation of the City Manager/Executive Director of the Redevelopment Agency to leverage redevelopment Low and Moderate Income Housing Set-Aside Moneys to create up to \$55 million in financing to develop approximately 2,185 new affordable housing units in San Diego. At that meeting, Ms. Catherine A. Rodman spoke in opposition to the proposal and delivered the attached letter to the Mayor and Council members. In her letter, Ms. Rodman states her opinion that agencies should use tax increment revenues in the generating project area, that bonding housing funds results in fewer affordable housing dollars overall, and that taxable housing bonds should be issued to the extent housing funds are bonded. Ms. Rodman also argues two legal points that this memorandum will address: 1) that the use of Low and Moderate Income Housing Moneys outside of a redevelopment project is unconstitutional; and 2) that the use of bond proceeds generated from multiple project areas in selected project areas is tantamount to merging the project areas.

To support her position, Ms. Rodman states that article XVI, section 16 of the California State Constitution expressly limits the use of tax increment revenues to paying the principal of, and interest on, loans, advances, or indebtedness incurred by the redevelopment agency to finance or refinance the redevelopment project which produces the revenues. Ms. Rodman contends that the Legislature has no power to extend the authority of an agency's use of tax increment beyond the enabling Constitutional provision. She also contends that the Legislature did not consider or disregarded the lack of Constitutional authority for adding sections to the Community Redevelopment Law (Health and Safety Code sections 33000-34008), beginning in 1965 with California Health and Safety Code section 33445, which allows the redevelopment agency to spend tax increment moneys beyond the boundaries of the project if the legislative body can make certain findings.

ANALYSIS

A. Constitutionality of using Low and Moderate Income Housing Fund Moneys outside of the project area from which they were generated.

In 1974, article XVI, section 16 of the California Constitution was approved by the voters. Formerly, article XIII, section 19, section 16 authorized the use of tax increments for paying the indebtedness of redevelopment agencies. This authority permits redevelopment agencies to receive, as payment of debts, all of the property taxes levied on behalf of all of the taxing agencies that are generated in a project area on increases in assessed values of property over the assessed values that existed on the day the redevelopment plan was adopted. Article XVI, section 16 (b) provides,

[T]hat portion of the levied taxes each year in excess of that amount shall be allocated to and when collected shall be paid into a special fund of the redevelopment agency to pay the principal of

and interest on loans, moneys advanced to, or indebtedness (whether funded, refunded, assumed or otherwise) incurred by the redevelopment agency to finance or refinance, in whole or in part, the redevelopment project.

The Legislature implemented article XVI, section 16 in California Health and Safety Code¹ section 33670 et seq.

Section 33334.2 states that, unless a specified finding is made, at least 20 percent of all taxes that are allocated to a redevelopment agency pursuant to section 33670 shall 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, that is occupied by these persons and families. These moneys must be placed in a separate Low and Moderate Income Housing Fund until used. § 33334.3(a). The moneys in the Low and Moderate Income Housing Fund shall be used to increase, improve, and preserve the supply of low- and moderate-income housing within the territorial jurisdiction of the agency. § 33334.3(c).

A redevelopment agency may use the moneys in the Low and Moderate Income Housing Fund inside or outside the project area. § 33334.2(g)(1). To use the funds outside the project area, the agency and the legislative body must find that the use will benefit the generating project area. The determination by the agency and the legislative body shall be final as to the issue of benefit to the project area. *Id.*

The California State Supreme Court has observed that constitutional restrictions on the power of the Legislature must be strictly construed against the limitation. *Delaney v. Lowery*, 25 Cal. 2d 561, 568-569 (1994). If there is any doubt as to the Legislature's power to act in any given case, the doubt should be resolved in favor of the Legislature's action. *Collins v. Riley*, 24 Cal. 2d 912, 916 (1944). In addition, there is a strong presumption in favor of the Legislature's interpretation of a provision of the Constitution. *Bell Community Redevelopment Agency v. Woosley* 169 Cal. App. 3d 24, 33 (1985). In the Bell case, the court examined the issue of whether section 33678, which exempts tax increment financing from the appropriation limitations of California Constitution, article XIII B, is a valid legislative interpretation and reconciliation of the constitutional limitation. The Bell court held that the Legislative interpretation was valid and said:

Where a constitutional provision may well have either of two meanings, it is a fundamental rule of constitutional construction that, if the Legislature has by statute adopted one, its action in this respect is well nigh, if not completely, controlling. When the Legislature has once construed the constitution, for the courts then

¹ All statutory references are to the California Health and Safety Code unless specified otherwise.

to place a different construction upon it means they must declare void the action of the Legislature. *Id.* at 34.

Article XVI, section 16 limits the power of the Legislature to use of tax increment (and, therefore, the Low and Moderate Income Housing Fund Moneys) exclusively for the redevelopment project. The Legislature has defined "the redevelopment project" as any undertaking of an agency pursuant to the Community Redevelopment Law. § 33010. This interpretation by the Legislature is presumptively controlling. Clearly, this definition and the statutes passed by the Legislature that allow tax increment and the Low and Moderate Income Housing Fund Moneys to be spent outside the project area that generated them is a valid legislative interpretation of the requirements of article XVI, section 16 of the California Constitution. Therefore the courts have in the past and will continue in the future to give these statutes that meaning, rather than another in conflict with the Constitution.

B. Ability of the Agency to issue bonds on which the principal and interest are payable exclusively from the income and revenues of certain designated redevelopment project areas whether or not those project areas were financed in whole or in part with the proceeds of the bonds.

Ms. Rodman also argues in her August 6, 2002 letter that the use of bond proceeds generated from multiple project areas in selected project areas is tantamount to merging the project areas and that merger of project areas requires formal amendment of each of the redevelopment plans involved.

Pursuant to section 33640, the Agency can issue bonds for any of its corporate purposes, subject to the approval of the City Council. The Agency may issue bonds on which the principal and interest are payable exclusively from the income and revenues of the redevelopment projects financed with the proceeds of the bonds, or with bond proceeds together with financial assistance from the state or federal government in aid of the projects. § 33641(a). In addition, the Agency may issue bonds on which the principal and interest are payable from the income and revenues of certain designated redevelopment project areas whether or not those project areas were financed in whole or in part with the proceeds of the bonds. § 33641(b). In other words, the Agency may issue bonds on which the principal and interest are payable from the project area financed with the proceeds of the bonds or from other project areas.

Using bond proceeds in a project area that is not contributing to the principal and interest payment on the bonds is not the same as merging two project areas. Merger of project areas is covered in sections 33485 through 33489. Redevelopment project areas under the jurisdiction of a redevelopment agency may be merged by the amendment of each affected redevelopment plan. Merged project areas are subject to the requirement that 20 percent of the annual tax increment be placed in the Low and Moderate Income Housing Fund, regardless of when the project areas were originally adopted. § 33486. If, prior to the merger, one project area has incurred debt to be repaid from tax increment, the agency may deposit less than the 20 percent in the Housing Fund if all or a portion of these funds is needed to pay down the debt. In this situation, a deficit in the Housing Fund is created and the agency is required to eliminate the deficit as soon as possible

before incurring new debt for anything other than low- and moderate-income housing. Section 33487 defines the following uses for which the moneys in the Housing Fund may be expended: acquisition of land, improvements to land, the acquisition, rehabilitation, or construction of structures, and the provision of subsidies. While this gives the agency broad authority, it is not as complete as the authority granted to the agency if the project areas are not merged. However, section 33334.14(b) states that, notwithstanding the definition of "construction and rehabilitation" in subdivision (a) of section 33487, an agency with merged project areas may use any of the funds for the purposes and in the manner permitted by sections 33334.2 and 33334.3. Therefore, the use of bond proceeds generated from multiple project areas in selected projects is lawful and is not tantamount to merging of the project areas.

CONCLUSION

Low and Moderate Income Housing Moneys may be used outside of the project area that generated them upon a resolution of both the Redevelopment Agency and the City Council that the use of those funds will be of benefit to the generating project area. The Agency may issue bonds on which the principal and interest are payable exclusively from the income and revenues of certain designated redevelopment project areas whether or not those project areas were financed in whole or in part with the proceeds of the bonds. The use of bond proceeds generated from multiple project areas in selected project areas does not require amendment of the redevelopment plans involved.

CASEY GWINN, City Attorney

By _____
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Deputy City Attorney