

# It's the End of Redevelopment as We Know It

When Governor Brown took office earlier this year, he was faced with a massive budget deficit – to the tune of \$25 billion. While he considered a variety of measures to reduce California's glaring budget problem, Governor Brown – like many of his predecessors – ultimately turned to the pockets of redevelopment agencies to narrow the gap. In January, he proposed completely eliminating redevelopment agencies, but he could not garner enough legislative support. Months later, Governor Brown and the Legislature finally reached a compromise, enacting two bills, ABX1 26 and ABX1 27. The first eliminated redevelopment agencies, while the second provided for the agencies' reinstatement upon their transferring to local school districts money (\$1.7 billion this year and about \$400 million annually thereafter) that the State would have otherwise been obligated to pay.

Declaring the laws an illegal "ransom" scheme, the California Redevelopment Association and the League of Cities challenged them in a lawsuit filed directly in the California Supreme Court, *California Redevelopment Assn. v. Matosantos*. While many redevelopment agencies intended to make the required payments, they figured they'd take a shot: either (1) the Court would uphold the bills, in which case redevelopment would proceed subject to the annual payments, or (2) the Court would declare the bills unconstitutional, and redevelopment would proceed as normal. But there was a devastating potential third option: the Court could uphold ABX1 26 while striking down AB1X 27. As the case proceeded in the Supreme Court, this "worst case" scenario started to look more and more likely.

Yesterday, the Court issued its opinion, and the outcome was the nightmare redevelopment agencies feared most. The Court upheld ABX1 26, allowing the dissolution of California's redevelopment agencies to proceed, but struck down ABX1 27, the "voluntary" buy back program that would have allowed redevelopment to continue. In particular:

The Court had little difficulty upholding ABX1 26, the law eliminating California's redevelopment agencies. The Court reasoned that because redevelopment agencies were created by the Legislature, the Legislature could also eliminate them: "A corollary of the legislative power to make new laws is the power to abrogate existing ones. What the Legislature has enacted, it may repeal."

When it came to ABX1 27, the Court felt differently. All but Chief Justice

Cantil-Sakauye concluded that the "voluntary payment" portions of ABX1 27 run afoul of Proposition 22, adopted by voters in November 2010. The Court further concluded that the balance of ABX1 27 was not severable from the improper payment provisions, and the Court struck down ABX1 27 in its entirety.

**How We Got Here:** After announcing in January 2011 plans to eliminate California's redevelopment agencies as a means of helping to balance California's floundering budget, Governor Brown finally got his wish in July, with the adoption of ABX1 26 and ABX1 27. Unless agencies opted to participate in the "Alternative Voluntary Redevelopment Program" under ABX1 27, as of October 1, 2011, all redevelopment agencies were to be dissolved.

Within weeks, the California Redevelopment Association responded, filing a lawsuit challenging the laws directly in the California Supreme Court. Though the CRA raised several arguments, the one that garnered the most attention was the claim that the laws violated Proposition 22 by creating an illegal shift in property tax revenues away from redevelopment agencies. The CRA also argued that the two laws were inextricably intertwined, presumably knowing that the Proposition 22 argument was strongest as an attack on ABX1 27.

In August, the Supreme Court accepted jurisdiction over the case and granted a partial stay of the new laws. Shortly thereafter, the Court announced plans to hear oral argument in November, with a commitment to issue its decision prior to the January 15, 2012, cutoff date for agencies making their first reinstatement payments under ABX1 27.

At the oral argument in November, the Court seemed to focus on three issues:

- The fact that redevelopment agencies were created initially by the Legislature, which would, absent some constitutional prohibition, mean that the Legislature could also abolish them.

- The fact that the "voluntary" payments under ABX1 27 were not particularly voluntary, since failure to make them meant the redevelopment agency would be eliminated. And, if not voluntary, the payments seemed to run afoul of Proposition 22.

- The question of whether the two laws were so intertwined that striking down one (presumably, ABX1 27) would necessitate striking down both.

**The Decision:** Much as it telegraphed during oral argument, the Supreme Court started by concluding that ABX1 26 – the dissolution bill – passed constitutional muster. Rejecting the argument that Proposition 22 created a constitutional right for redevelopment agencies to exist, the Court explained:

The constitutionalization of a political subdivision – the alteration of a local

government entity from a statutory creation existing only at the pleasure of the sovereign state to a constitutional creation with life and powers of independent origin and standing – would represent a profound change in the structure of state government.

In reviewing Proposition 22, the Court found no discussion of redevelopment agencies taking on constitutional stature, and without some explicit mention of such a profound shift in the law, the Court would not imply any such intent. As the Court so eloquently summarized, the **drafters of legislation do "not, one might say, hide elephants in mouseholes."**

The Court then moved on to ABX1 27, focusing its attention on the "voluntary" payment program. The Court concluded that ABX1 27 was substantively indistinguishable from earlier efforts by the State to shift property tax increment from redevelopment agencies to the State's educational revenue augmentation funds ("ERAFs"). "Like all prior ERAF legislation, [Assembly Bill 1X 27] operates as a levy on the receipt of tax increment funds."

The Court then put the nail in the ABX1 27 coffin: "A condition that must be satisfied in order for any redevelopment agency to operate is not an option but a requirement. Such absolute requirements Proposition 22 forbids."

With respect to AB1X 27, Chief Justice Cantil-Sakauye disagreed with the majority, concluding that Proposition 22 forbids only payments required of the redevelopment agencies themselves, and since ABX1 27 contemplates payments by the agencies' community sponsors, it survived a facial constitutional challenge. Unfortunately for redevelopment agencies, the other Justices concluded that this technicality missed the mark because the same argument could be made of virtually every recent ERAF shift. This means (in the Majority's view) that the Chief Justice's interpretation would render Proposition 22 essentially meaningless. The Court struck down ABX1 27.

Finally, the Court turned to the severability question, needing to decide whether ABX1 26 could stand alone, or whether it must fall given ABX1 27's fate. The Court had no trouble with grammatical and mechanical severability – i.e., it readily found that the two laws could be separated from one another. Volitional severability was the key question: would the Legislature have intended ABX1 26 to stand if it knew that ABX1 27 would be invalidated? The Court responded to claims that a number of legislators had reportedly opined that the Legislature would NOT have wanted such an outcome by looking at the statute's specific severability clause stating the opposite, concluding that

whatever individual legislators may have said at one point or another, what the Legislature actually did establishes it would have passed [ABX1 26] irrespective

of the passage of [ABX1 27], and that [ABX1 26] is volitionally separable. Consequently, it is severable.

Thus, the Court's final conclusion: ABX1 26 stands, while ABX1 27 falls.

**What Happens Next: the Mechanics?** The Court examined some of the mechanics of ABX1 26's implementation in light of the partial stay and the passage of time that has rendered some of the law's time frames impossible. The Court concluded that it has the power to reform the law, and it chose a superficially simple solution: all initial dates in ABX1 26 are shifted four months, representing the time period during which the Supreme Court's partial stay was in place. Thus:

Generally speaking, the provisions in part 1.85 (the portion of the law that dissolves redevelopment agencies) become operative on February 1, 2012, rather than October 1, 2011;

The draft obligation payment schedules due on November 1, 2011, under Health & Safety Code section 34177, subdivision (l)(2)(A), are now due March 1, 2012; and

Successorship agency board membership, required to be determined by January 1, 2012 under section 34179, subd. (a), must be complete by May 1, 2012.

But there is a twist. For any obligations that span multiple fiscal years, the Court did not reform the deadlines. Instead, only those trigger dates which fall before May 1, 2012, get shifted. This means, for example, that for the distributions required to be made on January 16 and June 1 every year pursuant to section 34185, the January 16, 2012, distribution is now due May 16, 2012, but the June 1, 2012, distribution (and all future distributions) remain due as set forth in ABX1 26.

**What Happens Next: Implementation?** Moving beyond the technical issues, the real question is what happens to redevelopment obligations and assets. This will be the subject of considerable discussion in upcoming weeks, but there are a few, bright-line rules people should know:

**For obligations incurred prior to January 1, 2011, the obligations remain valid and binding.** The successor agencies, once established, will be charged with managing those obligations and making all required bond payments until the bonds are satisfied.

**For deals under negotiation when the Supreme Court stay was issued, the redevelopment agencies have no power to consummate the deals.** Redevelopment agencies cannot issue or sell bonds, incur new indebtedness, acquire or dispose of real property, enter into new

contracts, etc. between now and their February 1, 2012, dissolution.

**Remaining redevelopment assets will be sold.** Initially, money raised from the sale of assets will be used to satisfy existing obligations. After meeting existing obligations, additional monies raised by the disposition of assets will be treated like other property tax proceeds for disbursement to other agencies.

**If the agency transferred any assets to its city/county or another public agency after January 1, 2011, the transfer is potentially subject to ABX1 26's "claw back" provisions.** ABX1 26 contains a provision that allows the State Controller to seek to rescind any 2011 deal between a redevelopment agency and another public agency, recapturing the assets involved in any transfer.

This last provision is likely to generate considerable debate. When Governor Brown first proposed eliminating redevelopment agencies in January 2011, many agencies quickly took steps to insulate their assets from any adverse legislation. In the six months between the January announcement and the July 1 adoption of ABX1 26, untold millions of dollars in property and other assets were transferred back to the underlying cities/counties. In response, the Legislature included ABX1 26's "claw-back" provisions.

**What Happens Next: a Legislative Compromise?** Finally, entering into the realm of pure speculation, there is already some murmuring about a possible legislative compromise designed to reinstate some form of redevelopment. Whether any such compromise sees the light of day remains to be seen. And even if it does, considerable obstacles may exist.

In particular, any legislative effort to reinstate some form of redevelopment must overcome the very problem that led to the demise of ABX1 27: how to fund "Redevelopment 2.0" without running afoul of Proposition 22. Moreover, a legislative compromise only works if the Governor approves it, and Governor Brown's early comments do not suggest he is dissatisfied with the Court's holding.

For more information on the opinion and its aftermath, please [join us](#) for a webinar, *Supreme Court Upholds Elimination of Redevelopment in California - Now What?* It will take place on January 4, 2012, at 2:00 p.m.