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ARTICLE

DIVERTING TAX INCREMENT REVENUE TO EDUCATIONAL FUNDS: IS IT CONSTITUTIONAL OR WISE?

By Ethan Friedman and Scott Hernandez*

Depending upon who you ask, California's move to reallocate redevelopment funds is either a raid on constitutionally protected tax increment revenue or another example of fat-cat developers stealing precious local property taxes from school children. Neutral observers will note that any legislation entails a certain amount of backroom dealing.[1] But as is often the case in political debates that create more heat than light, the constitutional issues involved are more nuanced and complicated. Such is the case in recent litigation involving California's redevelopment agencies and the Legislature, who in a frantic attempt to meet budgetary demands, created a statutory scheme which funnels tax increment revenue away from development projects to assist local schools. Perhaps this is understandable in light of the current financial crisis. Regardless, a second round of litigation between the State and California's redevelopment agencies is headed toward an outcome which is anything but certain.

WHAT IS TAX INCREMENT REVENUE?

To address problems such as unemployment, lack of low- and moderate-income housing, and the need for safe space spaces in which

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communities may socially and economically flourish, California has turned to redevelopment as the solution.[2] In California, redevelopment is initiated by the legislative body of a local government (*i.e.*, city council, county board of supervisors, etc.) which is empowered to establish a Redevelopment Agency ("RDA").[3] An RDA is then assigned the task of bringing redevelopment projects to blighted urban areas.[4] Because an RDA has no taxing powers, financing for redevelopment projects is primarily obtained by issuing bonds and receiving public and private, loans and grants.[5] Obviously, these financing options require an RDA to eventually repay the principal and interest to lenders and bondholders. This is where tax increment financing comes into play.

To help them pay back debt incurred to finance redevelopment projects, tax increment financing gives RDAs the difference in tax revenue from the increase in assessed real estate values within a designated redevelopment project area.[6] This method of financing prevents redevelopment projects from being a drain on local taxpayers and general government funds, allowing a project to essentially pay for itself.[7] This system of tax increment financing was passed by California voters by ballot proposition and is now a part of the state Constitution, in Article XXVI section 16.

Because section 16 is not mandatory, tax increment financing for redevelopment may only be initiated by the State Legislature and the local legislative body that formed the RDA. The Legislature is given the power to make tax increment financing available and to pass laws that are necessary to effectuate section 16.[8] The Legislature uses its section 16 power to regulate RDAs. For example, statutes have been passed that require RDAs to pay tax increment revenue to the local taxing agencies of communities burdened by redevelopment projects[9] and to increase low-income housing.[10] This is where the present conflict begins: how far may the Legislature go in allocating tax increment revenue away from RDAs before the allocation is unconstitutional?

CALIFORNIA REDEVELOPMENT ASSOCIATION V. GENEST I AND II: ERAFS, SERAFS, AND SRAFS

Beginning in 1992, each RDA is required by statute to transfer funds at times to the Educational Revenue Augmentation Fund ("ERAF") of the county in which it is located.[11] A county ERAF is used to fund local school districts.[12] In 2008, the Legislature, spurred on by the current financial crisis, passed Assembly Bill number 1389 ("AB1389") which

required RDAs to transfer the greater of five percent of statewide tax increment value or $350,000,000.[13] Under this new law, the State Director of Finance provides notice to each RDA of how much is due to the county ERAF based on statutory calculations.[14]

After Governor Schwarzenegger signed AB1389 into law, the California Redevelopment Association ("CRA"), a consortium of all state RDAs, filed suit against the State, challenging the constitutionality of AB1389 in Sacramento County Superior Court. The CRA prevailed, prompting the State to file an appeal. However, the State abandoned the appeal before the Third District Court of Appeal could sort out the constitutional issue.

Undeterred but instructed by the ruling in the first case, the Legislature passed Assembly Bill number X4-26 ("ABX4-26.") in 2009, which again required transfer of revenue to ERAFs.[15] However, ABX4-26 and companion statutes created two new types of funds which require funding from the RDAs. The first new fund, the Supplemental Educational Revenue Augmentation ("SERAF"), was created to assist school districts through the State financial crisis. The SERAFs serve students who live within the project area or in redevelopment-funded housing by providing revenue to schools located within redevelopment project areas.[16] The second new fund, the Supplemental Revenue Augmentation Fund ("SRAF"), is used to reimburse the State for the expense of providing health care, trial court, correctional and other state services.[17] Any unused SRAF funds are transferred to the county's ERAF.[18] Thankfully, SRAFs do not receive tax increment funds, so for the balance of this article only two confusing acronyms must be kept in mind—ERAF and SERAF—not three.

Not surprisingly, the CRA has once again filed a constitutional challenge to ABX4-26. With this background in mind, the various constitutional and policy arguments for and against the use of redevelopment funds to pay for educational expenses may be addressed.

THE CONSTITUTIONALITY OF DIVERTING TAX INCREMENT FUNDS TO ERAFS AND SERAFS

A variety of constitutional arguments have been levied against AB1389 and now ABX4-26. In their memorandum of points and authorities for both legal challenges, the CRA and the State assert a host of typical constitutional arguments. For example, the CRA argues that the payment of funds into SERAFs creates a disparity in school fund-

ing between those who live within a redevelopment project area and those who do not. Therefore, under both the Federal and California Constitutions, ABX4-26 violates equal protection.[19] The State has asserted constitutional standing and justiciability issues, stating, for example, that the dispute is not ripe because no parties have been able to show "any *present, specific and substantial*" injury.[20]

These typical types of arguments obfuscate the real issue. Like so many other constitutional matters, the technical constitutional arguments are driven by conflicting public policy objectives. In this case, the CRA is concerned with the future of redevelopment bonds, while the State is attempting to cope with a seemingly insurmountable financial crunch. With this conflict in mind, the relevant constitutional issues emerge. The first question is whether legislation allocating tax increment revenue to ERAFs and SERAFs violates Article XVI, section 16 of the California Constitution, which is the basis for all California tax increment financing for redevelopment. The second is whether this legislation is an unconstitutional impairment of contracts under the California and Federal Constitutions. The third is whether diverting money to ERAFs and SERAFs constitutes a prohibited taking of private property without compensation, also under both constitutions. At rock bottom, arguments regarding the impairment of contracts and takings are pendent to the primary issues, which are the practical impacts of ERAF and SERAF obligations and their impact on the system established by section 16.

This Article will look at several of the salient issues at play when evaluating legislation promulgated under section 16.[21]

THE NEXUS BETWEEN TAX INCREMENT REVENUE AND REDEVELOPMENT

The dispositive issue in the first constitutional challenge was whether the transfer of RDA funds to ERAFs resulted in an unconstitutional use of tax increment funds for schools unrelated to redevelopment projects.[22] The State argued that redevelopment is intended to benefit the entire community, not only the parts of the community within a redevelopment area. The Health and Safety Code defines the term "community" as a "city" or "county."[23] Therefore, redevelopment funds are intended to benefit the local government of the "community" ("city" or "county") served by the RDA and not merely the specific redevelopment area. Indeed, other ERAF funds, which are provided by the taxing

authority and derived from property taxes, are distributed throughout the community.[24]

The Superior Court disagreed with this contention. The Court asserted that Legislative action under section 16 must be consistent with the intent of the voters who added the section to the constitution.[25] Section 16 was intended to provide tax increment revenue to fund redevelopment projects only. This is a contrast to the Legislature's broad authority to reasonably allocate local property taxes to schools and local governments under Proposition 98.[26] Therefore, there must be a clear nexus between the use of any tax increment funds and redevelopment.[27]

However, the Legislature attempted to create a nexus between redevelopment and education funding. The Health and Safety Code provides several definitions for the term "redevelopment," one of which is "payments to school and community college districts."[28] The reasoning behind this definition is simple: redevelopment in blighted area is pointless unless there is a skilled work force that is educated by a functioning public school system.[29] The Legislature emphasizes that RDAs must serve the goals of redevelopment, which include attracting private investments and improving the socio-economic conditions of residential neighborhoods.[30] Providing financial assistance to schools is one of the RDAs' responsibilities.[31]

One counter-argument to this proposition is that it gives the Legislature an unconstitutional amount of power if it can force any kind of spending program within the term "redevelopment." If such power is permitted, then there is nothing to prevent the State from compelling the RDAs to fund other types of government services with tax increment funds. The court of appeal has already held that the construction of an overpass that would ostensibly serve a redevelopment area was not sufficiently connected to the definition of redevelopment and was therefore an unconstitutional use of tax increment funds.[32] Additionally, by expanding statutory definitions of the term "redevelopment," the Legislature is attempting to rewrite the constitution without utilizing proper amendment or revision standards as laid out in the constitution (i.e., two-thirds vote of the Legislature, etc.).[33]

In any event, the court in the first case based its ruling on the premise that ERAF funds are distributed without necessary procedures to make certain that schools receiving RDA funds, which may have been derived from tax increment financing, serve students living within project areas

or in redevelopment-funded housing.[34] However, the Legislature may have averted this hazard by creating the SERAF fund provided in ABX4-26. Under the new law, RDA funds go into the county SERAF and not the ERAF. As stated before, SERAF funds can only go to serve students who reside in redevelopment areas or in redevelopment housing.[35] Because of this statutory change and the fact that the court explicitly did not base its holding on any other ground, the court's ruling in the first case no longer provides any guidance in this analysis.

"INDEBTEDNESS"

Throughout section 16 there are six occurrences of the term "indebtedness." The meaning of "indebtedness" presents another major point of disagreement between the RDAs and the State. Additionally, section 16 also states that the tax increment revenue "shall be paid into a special fund of the redevelopment agency."

On the one hand, ERAFs and SERAFs may not constitute "indebtedness" under section 16, which states that the special fund is used to pay debts "incurred by the redevelopment agency."[36] This phrase suggests that section 16 makes control of tax increment funds a local matter.[37] Thus, use of tax increment revenue to fund ERAFs and SERAFs may just as easily be unconstitutional.

On the other hand, the Legislature has declared that ERAF and SERAF obligations imposed by statute constitute indebtedness.[38] Therefore, section 16 is not violated by using tax increment funds to contribute money to ERAFs and SERAFs to fund local schools. Generally, courts should defer to the Legislature's statutory declarations and presume such declarations are valid.[39] Additionally, the Legislature should be given a particularly large amount of deference when enacting budget legislation.[40] Because the Legislature has declared that the obligation to contribute funds to ERAFs and SERAFs constitute "indebtedness" under section 16, tax increment revenue may be paid into these funds.

THE SPECIAL FUND DOCTRINE

The terms of section 16 create a "special fund," which is intended to pay this an RDA's indebtedness.[41] As to whether or not section 16 creates this "special fund," the RDAs argue that the section does create a fund that is financed by tax increment revenue and is to be used exclusively to pay principal and interest on indebtedness incurred for development by the RDAs. Under the Special Fund Doctrine, when a state or local agency sells bonds to finance a project or expense, the

bondholders may seek repayment of the bond from funds specifically pledged for such purpose. If the special fund does not have sufficient revenue to repay the bondholders, the bondholders may not turn to an alternative source of public funds.[42]

The California Supreme Court has held that section 16 creates a special fund that provides revenue for all indebtedness that the RDA has incurred.[43] The Special Fund Doctrine gives rise to two other major constitutional issues: the impairment of contracts and the taking of property without just compensation.

Legislative action is unconstitutional, under both the Federal and California Constitutions,[44] if it destroys or impairs contractual rights or obligations.[45] Specifically, the CRA argues that, because RDAs receive tax increment revue only to the amount of the indebtedness they accrue,[46] RDAs almost exclusively finance redevelopment projects by tax allocation bonds secured by future tax increment revenue.[47] Redevelopment bonds are contracts between the RDA and their bondholders—the bondholders will lend the RDA money and the RDA will return the money plus interest to the bondholders at a later date. The CRA argues that "a change in laws made after the issuance of assessment bonds which adversely impacts either bondholders or the owners of property secured by the bonds is an impermissible impairment of contract under the Federal and California Constitutions."[48] From the perspective of the RDAs, AB1389 and ABX4-26 adversely affect the contract rights and obligations between RDAs and their bondholders.

In response, the State stresses that the RDA obligation to contribute to ERAFs and SERAFs does not impair contracts, because an RDA's obligations under ERAF and SERAF are subordinate to its bond payment obligations.[49] Moreover, an RDA may seek a 12-month deferment of its ERAF and SERAF obligations if parting with those revenues creates hardship.[50] Finally, an RDA with insufficient funds can go to its local governing legislative body to make up the difference.[51]

In this financial crunch, the idea that that RDAs can turn to their governing city council or board of supervisors is patently absurd; the RDAs cannot get blood from a turnip. Additionally, while in the past state and municipal bonds were protected from default by the Local Agency Indebtedness Fund, that fund no longer exists.[52]

In its papers filed in the first case, the State argued that the contract impairment claims are too speculative and fail for lack of ripeness,

because the CRA has not shown any present, specific, and substantial impairment of contract.[53] In response, the CRA admits that it is very difficult to quantify the harm done to development funds and their bond ratings to any level of exactitude. However, diverting tax increment revenue to ERAFs and SERAFs will result in inevitable losses to the RDAs and their bondholders. The amount of diminution in bond value need not be determined to make a valid impairment of contract claim.[54] Therefore, diverting tax increment funds in violation of the Special Fund Doctrine may be an unconstitutional impairment of contract.

The final major constitutional issue regarding the Special Fund Doctrine is the question of whether the ERAF and SERAF legislation is an unconstitutional taking of property without just compensation under the Federal and California Constitutions.[55] The CRA argues that contract rights are property which can be taken by the government just like any other form of property, and require just compensation to be paid. This is because taking monies from a special fund destroys the contract expectations between the RDAs and their bondholders. [56] However it is important to look at the contract property rights at play. The RDAs' property rights cannot be taken by the government; the RDAs are the government. Only the owners of private property must be justly compensated. The RDAs have no property interest or vested right to just compensation.[57] While the RDAs could argue that the private property rights of bondholders may be taken by these new statutes, none of the parties to the litigation thus far are creditors or bondholders of the RDAs and thus far, no party to the litigation has suffered an injury. Therefore, the CRA has no standing to argue that the allocation of tax increment revenue funds is a taking of private property without just compensation.

THE PUBLIC POLICY RATIONALE: CALIFORNIA BOND RATINGS IN SHAMBLES

At its heart, this entire dispute comes down to the State's attempt to close the budget gap and the RDAs' concern regarding possible damage that they and their bondholders will suffer if the tax increment can be diverted to other public costs. Unfortunately, the concern about bonding reaches far beyond just RDAs, redevelopment, and school children. The bonding issue affects all Californians.

A major problem in the current State budget crisis is that Califor-

nia's credit is in miserable shape. As recently as July of 2009, California had the worst credit rating of all 50 states.[58] However, in spite of this fact, California's Economic Recovery Bonds were recently upgraded two ratings from "Baa1" to "A1."[59] The Economic Recovery Bonds were created by the Legislature to cope with budget shortfalls by providing a mechanism with which to pay for public education and health programs.[60] These bonds are secured by a special fund backed by sales taxes which are "irrevocably pledged to the payment of principal and interest on the bonds issued" and are kept separate from the General Fund.[61] Because these bonds are secured by a special fund with a pledged source of revenue, the bond rating agencies are comfortable with assigning the Economic Recovery Bonds a higher rating.[62]

Putting this in context, if the State finds a way to divert tax increment revenue away from the special fund mentioned in section 16, the ratings of California redevelopment bonds will be negatively impacted. In turn, this will reduce the RDAs' abilities to sell their bonds, rendering the entire California redevelopment scheme unworkable. Without bonds to pay for new redevelopment, tax increment funds will dry up. RDAs will no longer be able to fund ERAFs and SERAFs. The State will be right back where it started, except with vastly reduced redevelopment which will make crawling out of the financial crises all the more difficult. If the State demonstrates that it can use funds which have been pledged to secure bonds, the bond ratings of all California state and municipal bonds may be negatively impacted. Marketing California government bonds may prove difficult or near impossible.

CONCLUSION

The essential function of tax increment financing is furnish sufficient security to redevelopment bond investors that political convenience will not harm their investment.[63] Regardless of whether the constitution says that the State *could* divert tax increment funds, the greater question is whether the State *should* do so. If anything, the current financial crisis has taught us that short-term gain can bring long-term hardship. Legislative action like AB1389 and ABX4-26 amounts to putting a tourniquet on a leg wound; the bleeding may stop but the leg could be lost.

NOTES

1. Sacramento insiders disclosed that lobbyists representing the City of Industry maneuvered the statute in question through the legislature in order to finance a new professional

football stadium, and not to support California schools. See Walters, *Redevelopment Bond Scheme Floats Again*, Sac. Bee (Jan. 9, 2009) p. 3A.

2. Health & Saf. Code, §33071. See, generally, Miller & Starr, *California Real Estate 3d.*, ch. 30B, Community Redevelopment.
3. Health & Saf. Code, §§33100 *et seq.*
4. Health & Saf. Code, §§33030 *et seq.*
5. Health & Saf. Code, §§33600 to 33603.
6. See Cal. Const., art. XVI, §16.
7. *Redevelopment Agency v. County of San Bernardino*, 21 Cal. 3d 255, 265 n.5, 145 Cal. Rptr. 886, 578 P.2d 133 (1978) [citation omitted].
8. Cal. Const., art. XVI, §16.
9. Health & Saf. Code, §33607.5.
10. Health & Saf. Code, §33334.2.
11. Transfers to ERAFs were required in the tax years 1992-1993, 1993-1994, 1994-1995, 2002-2003, 2003-2004, 2004-2005, and 2005-2006. See Health & Saf. Code, §§33681 [repealed], 33681.5 [repealed], 33681.7, 33681.9, 33681.12.
12. See Health & Saf. Code, §§33680 *et seq.*
13. Health & Saf. Code, §33685, subd. (a)(2).
14. *Ibid.*
15. See Health & Saf. Code, §§33680 *et seq.*
16. Health & Saf. Code, §§33690, subd. (j)(1), (5); Assem. Bill No. XA-26 (2008-2009 Reg. Sess.) §1, subd. (a)(3).
17. Rev. & Tax. Code, §100.06, subd. (c)(1).
18. Rev. & Tax. Code, §100.06, subd. (c)(3).
19. U.S. Const. amend XIV, §1; Cal. Const., art. I, §7(a).
20. See *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization*, 22 Cal. 3d 208, 241, 149 Cal. Rptr. 239, 583 P.2d 1281 (1978).
21. At over 800 words, section 16 is too sprawling to analyze completely.
22. *CRA v. Genest* (Super. Ct. Sac. County, 2009, No. 34-2008-00028334), at p. 13-14.
23. Health & Saf. Code, §33002.
24. See Rev. & Tax. Code, §97.3, subd. (d)(1)-(3).
25. *CRA v. Genest* (Super. Ct. Sac. County, 2009, No. 34-2008-00028334), at p. 8.
26. See Cal. Const., art. XVI, §§8, 8.5.
27. See *Lancaster Redevelopment Agency v. Dibley*, 20 Cal. App. 4th 1656, 1663-67, 25 Cal. Rptr. 2d 593 (2d Dist. 1993).
28. Health & Saf. Code, §33020.
29. See Health & Saf. Code, §33680, subd. (a).
30. *Ibid.*
31. Health & Saf. Code, §33680, subd. (d).
32. *Lancaster Redevelopment Agency v. Dibley*, 20 Cal. App. 4th 1656, 1663-67, 25 Cal. Rptr. 2d 593 (2d Dist. 1993).
33. See Cal. Const., art. XVIII.
34. *CRA v. Genest* (Super. Ct. Sac. County, 2009, No. 34-2008-00028334), at p. 13-14.
35. Health & Saf. Code, §33690, subd. (j)(1), (5).
36. Cal. Const., art. XVI, §16(b).
37. *Marek v. Napa Community Redevelopment Agency*, 46 Cal. 3d 1070, 1083, 251 Cal. Rptr. 778, 761 P.2d 701 (1988).
38. Health & Saf. Code, §§33685, 33690.
39. See *In re Brian J.*, 150 Cal. App. 4th 97, 124, 58 Cal. Rptr. 3d 246 (4th Dist. 2007), review denied, (Aug. 8, 2007).

40. *Schabarum v. California Legislature*, 60 Cal. App. 4th 1205, 1221, 70 Cal. Rptr. 2d 745 (3d Dist. 1998).
41. Cal. Const., art. XVI, §16(b).
42. *Marek v. Napa Community Redevelopment Agency*, 46 Cal. 3d 1070, 1083, 251 Cal. Rptr. 778, 761 P.2d 701 (1988).
43. Ibid.
44. U.S. Const., art. 1, §10; Cal. Const., art. I, §9.
45. *Pardee Construction Co. v. California Coastal Com.*, 95 Cal. App. 3d 471, 479, 157 Cal. Rptr. 184 (4th Dist. 1979).
46. Health & Saf. Code, §§33670, subd. (b), 33675.
47. Health & Saf. Code, §§33640, 33641. See also *Fontana Redevelopment Agency v. Torres*, 153 Cal. App. 4th 902, 905, 62 Cal. Rptr. 3d 875 (4th Dist. 2007), as modified on denial of reh'g, (Aug. 24, 2007) and review denied, (Oct. 24, 2007).
48. *Community Facilities Dist. No. 88-8 v. Harvill*, 74 Cal. App. 4th 876, 880, 88 Cal. Rptr. 2d 405 (4th Dist. 1999), as modified on denial of reh'g, (Sept. 2, 1999).
49. Health & Saf. Code, §33685, subd. (a)(3).
50. Health & Saf. Code, §33684, subd. (i)(3).
51. Health & Saf. Code, §33685, subd. (a)(3).
52. Gov. Code, §16496 [repealed by 1996 Stats. Ch. 833 §9.].
53. See *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization*, 22 Cal. 3d 208, 240-241, 149 Cal. Rptr. 239, 583 P.2d 1281 (1978).
54. *U.S. Trust Co. of New York v. New Jersey*, 431 U.S. 1, 19-20, 97 S. Ct. 1505, 52 L. Ed. 2d 92 (1977).
55. U.S. Const. amend V; Cal. Const., art. I, §§7, 19.
56. *U.S. Trust Co. of New York v. New Jersey*, 431 U.S. 1, 19 n.16, 97 S. Ct. 1505, 52 L. Ed. 2d 92 (1977).
57. *San Miguel Consolidated Fire Protection Dist. v. Davis*, 25 Cal. App. 4th 134, 143, 30 Cal. Rptr. 2d 343, 90 Ed. Law Rep. 1116 (3d Dist. 1994).
58. Marois & Selway, *California's Bond Rating Slashed by Moody's* (July 14, 2009) <http://www.bloomberg.com/apps/news?pid=20601087&sid=az4zN3Kv02vo> [as of Nov. 13, 2009] (hereafter cited as Marois & Selway).
59. Reuters, *California Recovery Bond Ratings Get Two Upgrades* (Nov. 5, 2009) <http://www.reuters.com/article/companyNewsAndPR/idUSN05150877200911O6> [as of Nov. 13, 2009].
60. Gov. Code, §§99050 *et seq.*
61. Gov. Code, §99072, subd. (c).
62. Marois & Selway (*supra*) note 58.
63. See *Marek v. Napa Community Redevelopment Agency*, 46 Cal. 3d 1070, 1082-83, 251 Cal. Rptr. 778, 761 P.2d 701 (1988).

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