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ARTICLE

UPDATE: Sifting Through the Ashes: The Demise of Redevelopment Agencies and the Scramble to Figure Out the Next Step

By Brian D. Shaffer*

I. INTRODUCTION[1]

Faced with a multi-billion dollar budget deficit, Governor Jerry Brown targeted the dissolution of redevelopment agencies ("RDAs") as a means to lower the deficit and redirect RDA assets to other areas of state and local government. In July 2011, the legislature passed Assembly Bill 1X 26 ("AB 1X 26"), which dissolved RDAs and directed successor agencies to sell the former RDAs' non-housing assets for the benefit of the taxing authorities and/or be used to satisfy the outstanding obligations of the former RDA.[2] In *California Redevelopment Association v. Matosantos*,[3] the California Supreme Court upheld the constitutionality of AB 1X 26, finding that if the legislature can create RDAs, it also has the power to dissolve them.[4]

The *Matosantos* decision sent developers, investors, cities, and counties scrambling to interpret AB 1X 26 in order to preserve development agreements and maintain their assets. However, as detailed in the first installment of this article, certain ambiguities in AB 1X 26 spawned differing opinions as to how certain RDA assets are treated and the procedures

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required to effectuate a transfer of those assets to successor agencies and third parties.[5] Apparently recognizing some of the issues with implementing AB 1X 26, on June 27, 2012, as part of the 2012-2013 state budget package, the Legislature passed and Governor Brown signed Assembly Bill 1484 ("AB 1484").[6] The primary purpose of AB 1484 was to make technical and substantive changes to AB 1X 26 to clarify issues under the prior statute and to make the dissolution of RDAs more orderly and understandable.[7] AB 1484 was a budget "trailer bill" and, therefore, took immediate effect upon signature by the Governor.

The first installment of this article identified four key issues with AB 1X 26, namely: (1) how transfers of properties between former RDAs and successor agencies and successor housing agencies should be documented in the chain of title; (2) whether oversight board approval is required for transfers of former RDA housing assets to successor housing agencies; (3) what types of properties are considered "housing" assets under the statute; and (4) whether there is a deadline to trigger the exception to the "claw back" provision for RDA assets transferred to a city, county, or other public agency and that are contractually committed to third parties. This second installment will analyze how AB 1484 addresses these issues and identify some further questions created by AB 1484.

II. KEY PROVISIONS OF AB 1484

A. More Guidance as to the Disposition and Use of Former RDA Properties

All assets and property of the RDAs were transferred to the successor agencies on February 1, 2012.[8] A threshold issue that has caused headaches for parties involved with transactions dealing with former RDA properties is how to address the chain of title for properties that were transferred from former RDAs to successor agencies. While a strong argument can be made that the transfer of assets from the former RDAs to successor agencies occurred by operation of law, AB 1X 26 did not provide any guidance as to what, if anything, needs be recorded in the county recorder's office to document this transfer.

AB 1484 does not provide any further guidance on this issue. However, AB 1484 provides an extensive new procedure relating to the disposition and use of the real properties of former RDAs.

Each successor agency is to employ a licensed accountant to conduct a due diligence review to determine the unobligated cash balances available for transfer to the taxing entities.[9] At the conclusion of the review, and after the oversight board approves the review and the

successor agency makes certain payments, the Department of Finance will issue a "Finding of Completion" to the successor agency.[10]

AB 1484 states that successor agencies are to prepare a long-range property management plan that addresses the disposition and use of the real properties of the former RDAs.[11] The plan is to be submitted to the oversight board and the Department of Finance for approval not later than 6 months after issuance of the Finding of Completion to the successor agency.[12] The property management plan must include an inventory about each property containing certain specified information.[13] Permissible uses for the properties are defined as: (1) retention of the property for governmental use; (2) retention of the property for future development; (3) sale of the property; or (4) use of the property to fulfill an enforceable obligation.[14] Upon approval of the long-range property management plan by the Department of Finance, the properties are to be placed in a Community Redevelopment Property Trust Fund to be administered by the successor agency in accordance with the long-range property management plan.[15]

Thus, while AB 1484 does not provide a clearer picture as to how to address the chain of the title for former RDA properties, it does provide a more extensive framework to determine how to dispose and use former RDA properties.

B. The Procedure to Effectuate the Transfer of Housing Assets is Clarified

The city or county that authorized the creation of an RDA may elect to retain the housing assets and functions previously performed by the former RDA.[16] AB 1X 26 required successor agencies to "effectuate" the transfer of the housing assets and functions to a successor housing agency.[17] Due to certain ambiguous provisions of the statute, there was considerable controversy over whether the transfer of housing assets to the successor housing agency was subject to review and approval by the oversight board (and, therefore, also subject to review and approval by the Department of Finance).

AB 1484 now clarifies the procedures and necessary approvals relating to the transfer of housing assets to the successor housing agency. AB 1484 requires the successor housing agency to submit to the Department of Finance by August 1, 2012 a list of all assets that it contends qualify as a "housing asset," as that term is defined by the statute (see below).[18] The list must include all assets transferred to the successor

housing agency between February 1, 2012 and the date the list is created.[19] The Department of Finance has 30 days from receipt of the list to object to any assets or transfers of assets identified on the list.[20] If the Department of Finance objects to assets on the list, the successor housing agency may request a meet and confer process within 5 business days of receipt of the Department of Finance's objection.[21] If the transferred asset is deemed not to be a housing asset, it must be returned to the successor agency.[22] If the asset has been pledged to pay for bonded indebtedness, the successor agency must maintain control of the housing asset in order to pay for the bond debt.[23]

If a transfer of a housing asset occurs after the date the list is submitted to the Department of Finance, AB 1484 provides that the oversight board must approve the transfer at a public meeting after at least 10 days' notice to the public of the proposed transfer.[24] The oversight board action is subject to review by the Department of Finance for a period of up to 60 days.[25] If the Department of Finance does not object, and if no action is filed within 60 days of the oversight board's approval, the action taken by the oversight board is considered final and can be relied upon as conclusive.[26]

As detailed above, AB 1484 provides a clear procedure to effectuate the transfer of housing assets to successor housing agencies. This is a far cry from the lack of guidance provided by AB 1X 26. It is noteworthy that AB 1484 appears to give the Department of Finance considerable control over the determination of what qualifies as a "housing asset." Nevertheless, the establishment by AB 1484 of a defined procedure to follow should provide some solace to cities, counties, agencies, and practitioners handling transactions dealing with former RDA housing assets.

C. "Housing Assets" Are Now Defined

Since AB X1 26 allowed cities and counties to retain former RDAs' housing assets, rather than disposing of them as required for other assets, the definition of what qualified as a "housing" asset was a critical determination. However, AB 1X 26 did not define what qualified as a housing asset, which lead to conflicting interpretations by the Department of Finance and practitioners. Specifically, the Department of Finance appeared to take the position that only assets acquired in whole or in part with funds from the Low and Moderate Income Housing Fund are housing assets and, therefore, subject to retention by the successor housing agency.[27] This interpretation caused some concern among

those in the real estate industry, as most affordable housing projects are financed by many different sources, including funding by former RDAs that did not come from the Low and Moderate Income Fund.

AB 1484 addresses this issue by providing a lengthy definition of housing assets. As relevant to the issue described above, "housing asset" includes:

> Any real property, interest in, or restriction on the use of real property, whether improved or not, and any personal property provided in residences, including furniture and appliances, all housing-related files and loan documents, office supplies, software licenses, and mapping programs, *that were acquired for low-and moderate-income housing purposes, either by purchase or loan, in whole or in part with any source of funds*.[28]

(Emphasis added.) This definition is a significant expansion on the Department of Finance's interpretation of AB 1X 26, as described above. Based on AB 1484's definition of housing assets, any interest in, or restriction on the use of, real property is considered a housing asset if it was acquired for low and moderate income purposes and acquired in whole or in part with any source of funds. Since a housing asset can be acquired "with any source of funds," the Legislature expressly did not limit housing assets to only those acquired with funds from the Low and Moderate Income Housing Fund. Instead, housing assets financed with state or federal funding, or funding from a former RDA that did not come from the Low and Moderate Income Housing Fund, are still considered housing assets under AB 1484. This clarification in the statute will hopefully provide some guidance to those involved with transactions dealing with former RDA housing properties.

Another issue that cities, counties, successor agencies, and others struggled with was how mixed-use assets should be treated under AB 1X 26. The Department of Finance took the position that mixed-used projects should be treated as housing assets only to the extent of the proportional financing by the RDA.[29] While AX 1X 26 was silent on this point, AB 1484 explicitly addresses this issue. The relevant statute provides:

> If a development includes both low- and moderate-income housing that meets the definition of a housing asset under subdivision (e) and other types of property use, including,

> but not limited to, commercial use, governmental use, open space, and parks, the oversight board shall consider the overall value to the community as well as the benefit to taxing entities of keeping the entire development intact or dividing the title and control over the property between the housing successor and the successor agency or other public or private agencies. The disposition of those assets may be accomplished by a revenue-sharing arrangement as approved by the oversight board on behalf of the affecting taxing entities.[30]

Thus, AB 1484 acknowledges and attempts to address the significant issues with properties that include both housing and non-housing elements. AB 1484 provides the oversight board with the ability to keep mixed-used projects intact by, for instance, dividing the housing and non-housing revenues via a revenue sharing arrangement. AB 1484 also leaves open the possibility that a physical subdivision into housing and non-housing components can occur. While AB 1484 provides some guidance on these issues, considering the complexities provided by mixed-used projects, it is likely that successor agencies and practitioners will continue to encounter a myriad of novel and intricate issues in this area.

D. Some Clarification on the "Claw Back"

AB 1X 26 allows the state controller to reverse transfers made by a RDA to a city, county, or public agency that occurred after January 1, 2011. These provisions are commonly referred to as the "claw back" provisions. However, AB 1X 26 exempted certain transfers from the claw back. Specifically, RDA assets transferred to a city, county, or other public agency that are "contractually committed to a third party" are not subject to the claw back provisions. State Controller John Chiang took a rather controversial view of the statute in late April 2012 when he sent a letter to county controllers, auditors, and the successor agencies stating that any contract entered into *after June 28, 2011* is still subject to the terms of the claw back provision.[31] Those disputing this interpretation argued that the June 28, 2011 deadline was not specified in AB 1X 26 and, therefore, contracts entered into after this date should still be exempt from the claw back.

AB 1484 clarifies this ambiguity by stating that "[a]ny actions taken by redevelopment agencies to create new obligations after June 27, 2011, are ultra vires and do not create enforceable obligations."[32] It further states that "[s]uccessor agencies shall lack the authority to, and

shall not, create new enforceable obligations under the authority of the Community Redevelopment Law … or begin new redevelopment work, except in compliance with an enforceable obligation that existed prior to June 28, 2011."[33] Thus, AB 1484 appears to amend existing law to conform to the State Controller's directive described above. The apparent rationale behind the deadline is that, since Governor Brown signed AB 1X 26 in late June 2011, anyone contracting with a RDA after that date should have known of the law and, therefore, subsequent contracts with the RDAs should not be enforceable.

III. CONCLUSION

AB 1484 provides substantial and significant additions and amendments to the prior statute. AB 1484 will require successor agencies, cities, counties, local agencies, title insurers, and practitioners to learn these new and complex rules just as they were adapting to the procedures set forth in AB 1X 26. The process of unwinding RDAs is an extremely daunting and complicated task. While AB 1484 provides some further guidance on this process, it is likely that issues will surface as parties attempt to interpret and conform to new procedures and requirements under the new statute.

NOTES

1. The author would like to thank JoAnne Dunec, shareholder of Miller Starr Regalia, for her invaluable input in researching this article.
2. *California Redevelopment Assn. v. Matosantos*, 53 Cal. 4th 231, 250, 135 Cal. Rptr. 3d 683, 267 P.3d 580 (2011) ("Matosantos").
3. *Id.* at 231.
4. *Id.* at 255.
5. B. Shaffer, Sifting Through the Ashes: The Demise of Redevelopment Agencies and the Scramble to Figure Out The Next Step, 22 Miller & Starr Newsalert, No. 6, at 707 et seq. (Thompson Reuters 2012).
6. Legis. Counsel's Dig., Assem. Bill No. 1484 (2011-2012 Reg. Sess.).
7. Legis. Counsel's Dig., Assem. Bill No. 1484 (2011-2012 Reg. Sess.)
8. Health & Saf. Code, § 34175, subd. (b).
9. Health & Saf. Code, § 34179.5, subd. (a).
10. Health & Saf. Code, § 34179.7.
11. Health & Saf. Code, § 34191.5, subd. (b).
12. *Ibid*.
13. Health & Saf. Code, § 34191.5, subd. (c).
14. Health & Saf. Code, § 34191.5, subd. (c)(2).
15. Health & Saf. Code, §§ 34191.4, subd. (a), 34191.5, subd. (a).
16. Health & Saf. Code, § 34176, subd. (a)(1).
17. Health & Saf. Code, § 34177, subd. (g).
18. Health & Saf. Code, § 34176, subd. (a)(2).
19. *Ibid*.

20. *Ibid*.
21. *Ibid*.
22. *Ibid*.
23. *Ibid*.
24. Health & Saf. Code, § 34181, subds. (c), (f).
25. Health & Saf. Code, § 34181, subd. (f).
26. *Ibid*.
27. Department of Finance, "Housing Frequently Asked Questions," http://www.dof.ca.gov/assembly_bills_26-27/ (last visited May 27, 2012).
28. Health & Saf. Code, § 34176, subd. (e).
29. Department of Finance, "Housing Frequently Asked Questions," http://www.dof.ca.gov/assembly_bills_26-27/ (last visited May 27, 2012).
30. Health & Saf. Code, § 34176, subd. (f).
31. Seipel, California Controller Seeks Return of Redevelopment Agency Property, Assets, San Jose Mercury News, May 7, 2012.
32. Health & Saf. Code, § 34177.3, subd. (d).
33. Health & Saf. Code, § 34177.3, subd. (a).

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