Real Estate, Land Use & Environmental Law Blog
Up-to-date Information on Real Estate, Land Use & Environmental Law
Presented By SheppardMullin

UPDATE ON REDEVELOPMENT LAW: LITIGATION PROCEEDS - UNCERTAINTY CONTINUES

This is the fourth in a series of blog entries monitoring the proposed elimination of redevelopment agencies.

October 4, 2011 by Michael Kiely and Phillip Tate

True to their promise, the California Redevelopment Association, or CRA, and the California League of Cities, or CLC, petitioned the California Supreme Court on July 15, 2011 for a writ of mandate challenging the Legislature's adoption of ABX1 26, providing for elimination of California redevelopment agencies (RDAs), and ABX1 27, exempting from elimination any RDA that agrees to make its share of a $1.7 billion voluntary contribution of its revenues to other local government needs.[1] The CRA also asked the Court to implement a temporary stay of ABX1 26 and 27 pending the outcome of the litigation. Separately, 10 Southern California cities and their redevelopment agencies[2] filed a complaint for declaratory and injunctive relief and a petition for a writ of mandate with the Superior Court for Sacramento County on September 26, 2011.

The Court has indicated that it intends to rule in the case before the January 15, 2012 payment deadline for the first installment of the ABX1 27 voluntary payments. Until then, redevelopment activity is in suspense, other than speculation on the possible outcomes of the court case and advance planning for the period following the ruling.

SUMMARY OF LITIGATION

The Supreme Court Case

On August 11, 2011, the Court issued an order to show cause, which allowed the matter to proceed to hearing, and issued a stay on all aspects of ABX1 26 and 27 except for the provisions which prevent RDAs from entering into any new obligations. In essence, the Court preserved the status quo – the RDAs are not dissolved, but they are not permitted to spend their money or incur new obligations until the litigation is resolved.

The County of Santa Clara filed a motion to intervene on August 15, 2011 so that it could represent its own interests. None of the parties objected, and the Court granted that request on August 22, 2011. As such, Santa Clara County is now a non-title respondent in the lawsuit, meaning that the County has the right to file its own briefs in opposition to the CRA/CLC.

The CRA/CLC filed a motion that same day, August 22, asking the court to clarify or modify the stay it had issued so that RDAs in cities that had passed a continuation ordinance pursuant to ABX1 27 prior to the issuance of the stay could continue to operate. The CRA/CLC argued that those RDAs will continue to be in operation regardless of whether the Court upholds ABX1 26 and 27 or strikes them both down, so there is no reason to prevent those RDAs that implemented continuation ordinances from conducting business during the litigation. Foreshadowing the arguments it would ultimately make in its return brief, Santa Clara County filed a brief opposing the CRA/CLC's request to modify the stay, arguing that there is a strong likelihood that ABX1 26 will be upheld and ABX1 27 will be overturned. The Court denied the CRA/CLC's request to modify the stay on September 14, 2011 and so it will remain in place until the Court issues its decision on the writ petition.

The State and Santa Clara County both filed their return briefs on September 9, 2011. The State argued, in essence, that redevelopment was created by the

Legislature and, therefore, absent an express constitutional provision to the contrary, redevelopment legislation could be repealed by the Legislature. The State then argued that neither Proposition 1A nor Proposition 22 requires the preservation of redevelopment, concluding that these measures also do not limit the Legislature's power to repeal redevelopment legislation. The State's brief then points out that ABX1 26 and 27 were distinct legislative actions despite the CRA/CLC's attempts to conflate the two, and that, pursuant to the terms of the legislation, ABX1 26 would still survive even if ABX1 27 were found to be unconstitutional. Finally, the State argued that the Legislature has the authority to establish a voluntary replacement to redevelopment – which is what it did in ABX1 27. While ABX1 27 may force cities to make tough decisions, it does not mandate any payment and, according to the State, is not prohibited by Proposition 22.

Santa Clara County's arguments were similar to those made by the State – the Legislature has the authority to repeal redevelopment, ABX1 26 and 27 were distinct legislative acts, ABX1 26 survives even if ABX1 27 is struck down – but Santa Clara County had a different analysis of the constitutionality of ABX1 27. Santa Clara County argued that ABX1 27 violates the California Constitution because the constitution restricts the property tax increment that is diverted to RDAs to being used "to finance or refinance, in whole or in part, the redevelopment project."[3] However, ABX1 27 allows tax increment to be used to reimburse cities and counties for the voluntary payments made under ABX1 27. [4] Santa Clara County contended that such an arrangement violates the constitution because the ultimate expenditure of those funds would not be restricted to the redevelopment project. Santa Clara County also argued that ABX1 27 violated the constitution because it failed to return excess tax increment to the appropriate taxing agency[5] and because it changed the pro rata shares by which property taxes are allocated among local agencies.[6]

The CRA/CLC filed their reply memorandum on September 23, 2011. In that memorandum, the CRA/CLC argued that ABX1 26 and 27 are fundamentally

designed to redirect RDA monies to the State and other taxing agencies and that redirection of funds violates the intent of Proposition 22. The CRA/CLC analogized the Legislature's actions to street crime, stating that the State believed "that Proposition 22 is like a hypothetical robbery statute that prohibits the theft of someone's money unless the victim is killed first."[7] The CRA/CLC stated that it is a well established rule that the "Legislature cannot use a constitutional power to achieve an unconstitutional goal"[8] and that there was ample evidence showing that the Legislature's purpose in passing ABX1 26 and 27 had been to divert the RDAs' funds to the State and other agencies. As a result, concluded the CRA/CLC, the elimination of RDAs through ABX1 26 was unconstitutional. Additionally, the CRA/CLC argued that ABX1 26 and 27 could not be severed because the Legislature's purpose in passing those bills had not been to eliminate RDAs, as evidenced by remarks by the Senate Pro Tem that the legislation would not eliminate redevelopment. Consequently, severing the two bills would yield a result contrary to the legislative intent.

The Superior Court Case

As noted above, a group of 10 Southern California cities and their redevelopment agencies sued the State on September 26, 2011 in an effort to have ABX1 26 and 27 struck down. While the Superior Court action includes the arguments raised in the CRA/CLC suit, it goes beyond those arguments. The arguments are essentially that 1) ABX1 26 and 27 fail because they unconstitutionally cause a reallocation of tax revenue amongst taxing authorities; 2) ABX1 26 and 27 fail on procedural grounds because the bills, while passed as budget trailer bills, are actually policy bills and not budget bills; 3) ABX1 26 and 27 violate the constitutional requirement that bills only address a single subject because they both make an appropriation and alter the State's policy on redevelopment; and 4) ABX1 26 and 27 violate both the US and California constitutions because they impair legally enforceable commitments between RDAs and private third parties. According to recent press accounts, the Petitioners and Plaintiffs in the Superior

Court action plan to file and amicus brief in the CRA litigation and present these arguments.

The State responded the next day by filing a Notice of Related Case with the Superior Court. In essence, the State said that the same issue is already being considered by the California Supreme Court in the CRA/CLC suit and whatever ruling the Court issues in the CRA/CLC suit will be binding on the Superior Court and could potentially make the Superior Court action moot. As such, it would be a waste of judicial resources to proceed with the Superior Court action prior to the resolution of the CRA/CLC suit.

POTENTIAL OUTCOMES

Santa Clara County has raised the stakes for the CRA/CLC by suggesting that the Court should uphold ABX1 26 and strike down ABX1 27. There are now three parties engaged in the litigation, each arguing for a different outcome. The CRA/CLC is asking the Court to strike down both pieces of legislation; the State is asking the Court to uphold both pieces of legislation; and Santa Clara County is asking for the Court to uphold ABX1 26 and strike down ABX1 27.

RDAs and parties hoping to do business with RDAs should consider what might happen under each scenario:

The Supreme Court Strikes Down Both Bills

If the Court agrees with the CRA/CLC and strikes down both bills, then redevelopment will effectively go back to the way it was before the budget process began. However, the Legislature enacted and the Governor signed the two-bill approach in order to fill a $1.7 billion hole in the budget and an anticipated ongoing budget deficit problem. It is likely that they will react to an adverse decision of the Supreme Court by trying again.

Whether the Legislature has the power to draft around the errors found by the Court will depend in large part on whether the Court holds that Proposition 22

implicitly prevents the legislative dissolution of RDAs. If the Court holds that the Legislature is constitutionally prohibited from legislatively dissolving RDAs, then it is likely that either the Legislature or an interest group will place a ballot measure before the voters amending the California Constitution to dissolve RDAs.

If the Court does not hold that the Legislature is constitutionally prohibited from dissolving RDAs, but strikes down the legislation on other grounds, then it seems likely that the Legislature will act quickly to pass new legislation that responds to whatever concerns the Court has in order to recapture that money. This is what happened following the CRA's judicial challenge to the State's attempt to shift RDA revenues in 2009 to local education. The court in that case upheld the CRA's challenge by finding that the shift of property tax increment to education purposes violated the constitutional prohibition on the use of such funds in a redevelopment project area other than the one from which they were generated. Taking guidance from that court's opinion, the following year, the State acted again, but this time shifted the funds for use at education facilities within the redevelopment project areas from which they were generated. The CRA filed suit again, but this time the same judge allowed the shift.

Because either a ballot measure or new legislation will take some time, there may be a window of opportunity in which developers and redevelopment agencies can complete deals. Because doing redevelopment deals takes time, this opportunity may only be available to deals that are already in the pipeline. Many developers and RDAs are proceeding with negotiation of OPAs and other documentation, despite the stay, in anticipation of calendaring and acting on such transactions immediately following such a determination.

The Supreme Court Upholds Both Bills

If the Court agrees with the State and upholds both bills, then we expect to see things unfold similarly to how we discussed in our previous blog post – the RDAs that can, will make the voluntary payment and continue operating, but with less money available, and a few RDAs will be dissolved either because they cannot,

or do not want to, make the voluntary payment. Although shrunken, RDAs and the bond markets could proceed with at least some certainty and redevelopment activity, albeit shrunken, could resume.

The debates leading up to ABX1 26 and 27 kindled some very public criticism of redevelopment. Outrage over an unfavorable Supreme Court determination may lead an anti-redevelopment interest group to attempt place a ballot measure before the voters amending the California Constitution to dissolve RDAs. However, given the difficulty and expense of collecting signatures, and possibly lack of legislative support for such a measure, the odds of such efforts resulting in the elimination of RDAs seem low.

There is also a possibility that the Superior Court could subsequently strike down one or both bills on the basis of an argument that was not raised in the CRA Supreme Court suit. However, the coalition of Southern California Cities made the same arguments in an amicus brief, meaning that there is less of a chance that the Supreme Court will not have considered and ruled on all of the arguments raised in the Superior Court case. Nonetheless, should the Superior Court find one of the coalition's arguments compelling and strike down ABX1 26 and 27, the uncertainty concerning redevelopment would continue.

The Supreme Court Upholds ABX1 26 And Strikes Down ABX1 27

If the Court agrees with Santa Clara County, then RDAs will be out of business. However, ABX1 26 was only able to garner the votes it needed to pass the Legislature because it was paired with ABX1 27. Therefore, it is possible that there may be a legislative attempt to revive ABX1 27, or something similar to it, with changes to address the Court's concerns. It is not clear though whether there will be the votes necessary to resuscitate ABX1 27 or whether the Governor would sign such a bill.

SCHEDULE FOR LITIGATION

A total of thirteen amicus briefs were filed with the Court on September 30, 2011. [9] The parties to the case have until October 7, 2011 to file and serve a reply to any amicus briefs. The Court expects to hold oral arguments in 2011, shortly after the replies to amicus briefs are filed, and issue a decision before January 15, 2012.

LEGISLATIVE UPDATES

The 2011 state legislative session ended in the early morning of September 10, 2011. The Governor has until October 9, 2011 to act on the legislation that was passed by the Legislature. Only one of the proposed ABX1 26 and 27 "clean up" bills, SBX1 8, passed the Legislature. SBX1 8 contains some minor and some significant changes to ABX1 26 and 27. Generally, these changes grant additional flexibility to RDAs, cities and counties to make the voluntary annual payments, but also maintain the anticipated $1.7 billion of revenue. This bill also adds protection for low and moderate income housing (low-mod) funds by specifying that existing balances belonging to an eliminated RDA are retained for low-mod purposes and affordability covenants are retained. This bill also makes other technical changes. The Governor vetoed SBX1 8 on October 3, 2011.

Authored By:

Michael Kiely
(213) 617-5587
MKiely@sheppardmullin.com

Phillip M. Tate
(213) 617-5575
PTate@sheppardmullin.com

---

[1] The two bills were described in more detail in California Redevelopment Update: Governor Signs Trailer Bills To End Redevelopment Agencies Unless They Make Payments - Uncertainty Continues, July 1, 2011, California Redevelopment Update: Legislative Two Step To Cut Redevelopment Agency Funding Goes Down With Governor's Budget Veto, June 16, 2011, and California Redevelopment Update: No News is …No News, April 26, 2011.

[2] The complete list of Plaintiffs and Petitioners includes: City of Cerritos; Cerritos Redevelopment Agency; City of Carson; Carson Redevelopment Agency; City of Commerce; Commerce Community Development Commission; City of Cypress; Cypress Redevelopment Agency; City of Downey; Community Development Commission of the City of Downey; City of Lakewood; Lakewood Redevelopment Agency; City of Paramount; Paramount Redevelopment Agency; City of Placentia; Redevelopment Agency of the City of Placentia; City of Santa Fe Springs; Community Development Commission of the City of Santa Fe Springs; City of Signal Hill; Signal Hill Redevelopment Agency; Cuesta Villas Housing Corporation; and Bruce W. Barrows.

[3] California Constitution, article XVI, section 16.

[4] ABX1 27 §34194.2.

[5] California Constitution, article XVI, section 16(b).

[6] California Constitution, article XIII, section 25.5(a)(3).

[7] Reply Memorandum of Petitioner at 1, *California Redevelopment Association, et. al. v. Matosantos, et. al.*, No. S194861 (CA Sup. Ct. Sept. 23, 2011).

[8] *Id.* at 2.

[9] The complete list of parties of interest filing amicus briefs includes: The Community Redevelopment Agency of the City of Los Angeles; The County of

San Bernardino; California Professional Firefighters; California Teachers Association; Association of Bay Area Governments; Affordable Housing Advocates; County of Riverside; City of Irvine; Public Interest Law Project; Long Beach Central, West and North Project Areas; Santa Clara Unified School District; Association of California Cities; and the coalition of ten Southern California cities referenced above.