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Memorandum

To: California Housing Advocates

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Re: Redevelopment Agency Housing Indebtedness Is an “Enforceable Obligation”;
Agencies Should List It on their Obligation Schedules

I. Introduction

The California Supreme Court approved the dissolution of redevelopment agencies, as contained in AB1X 26, effective February 1, 2012. Through the dissolution process, redevelopment agencies must ensure that all existing debt is transferred to a successor agency and repaid until fully satisfied. It is our position that the total projected amount of the Low and Moderate Income Housing Fund (LMIHF) which will be accumulated through the life of each redevelopment project area, is in the words of AB1X 26, an “enforceable obligation” of the redevelopment agency. We refer to this obligation as the “total LMIHF debt”.

The total LMIHF debt is a crucial financial piece to maintaining the affordable housing stock in California. Accordingly, it is essential that the total LMIHF debt be included on each Enforceable and Recognized Obligation Payment Schedule (EOPS) and Recognized Obligation Payment Schedule (ROPS) and paid down quarterly from tax increment by the successor agency. This memo discusses the legal obligation to include the total LMIHF debt on the EOPS and the subsequent ROPS.

In addition, it is our position that all outstanding debts and loans currently owed to the LMIHF, as well as the affordable housing obligations set forth in the current redevelopment agency Five-Year Implementation Plan, are also “enforceable obligations” of the redevelopment agency and therefore must be listed on the EOPS and ROPS.

For information about the Supreme Court decision and the extended timeframes for the dissolution process, see Goldfarb and Lipman, [California Supreme Court Decision in California Redevelopment Association v. Matosantos and Related Implementation Actions](#) (Updated January 4, 2012).

II. Background: Pre-ABX1 26 legislation to dissolve redevelopment agencies

Before ABX1 26 was enacted, Health & Safety Code §33675 described how tax increment must be distributed. On or before October 1 of each year, each redevelopment agency was required to “request” disbursement of the tax increment via the agency’s Statement of Indebtedness (SOI). To ensure adequate accounting by the County auditor and the subsequent disbursement of tax increment, the agency was required to include all the following information for “each loan, advance or indebtedness incurred or entered into . . .” on its SOI:

- (i) The date the loan, advance, or indebtedness was incurred or entered into.
- (ii) The principal amount, term, purpose, interest rate, and total interest of each loan, advance, or indebtedness.
- (iii) The principal amount and interest due in the *fiscal year* in which the statement of indebtedness is filed for each loan, advance, or indebtedness.
- (iv) The total amount of principal and interest *remaining to be paid for each loan, advance, or indebtedness*.

§33675(c)(1)(A), emphasis added.

The SOI establishes prima facie evidence of the agency’s indebtedness. Coomes, et al., *Redevelopment in California* (2009, Fourth Edition), p. 245. The agency’s indebtedness expands beyond bonds, loans and other traditional agreements. Thus, for the purposes of the SOI, the amounts to be deposited into the LMIHF “shall constitute an indebtedness of the agency”, §33675(f) *citing* §33334.3; see also Coomes, *Redevelopment in California*, p. 247: “Under AB 1290, an agency’s 20 percent set-aside requirement is a debt of the agency that can be claimed on a statement of indebtedness.”

Moreover, the agency is entitled to claim its total sum indebtedness until paid. The SOI “encompasses ‘obligations which are yet to become due as [well as] those which are already matured.’” *Marek v. Napa Community Redevelopment Agency*, 46 Cal.3d 1070, 1081 (1988). Since the LMIHF is indebtedness, the current annual amount owed to the LMIHF, as well as the projected outstanding debt

that would eventually be paid in total to the LMIHF over the life of the project area, was a required component to the SOI.¹

As noted above, §33675(c)(1)(A)(iv) required the agency to list the total amount of its *remaining* indebtedness on the SOI. This included the LMIHF through the life of the project. §33675(f). The State Controller in its SOI guidance confirmed that obligations to the LMIHF are defined by state law as “indebtedness” for the SOI and further explained:

The Statement of Indebtedness is perhaps the least understood aspect of redevelopment finance. It itemizes all future tax increment requirements for the purpose of repaying indebtedness. In preparing the Statement of Indebtedness, an agency must take into consideration all obligations, contracts to perform, and legal agreements such as pass-through payments to other local taxing agencies. The exact amounts of pass-through payments are not always known until the year in which they must be paid. For example, pass-through payments may or may not be directly related to the amount of tax increment received. Estimates must be made annually to determine what future obligations would be required for pass-through payments for the life of the project area . . .

The California State Controller’s Office noted, in preparing the data for this publication, that some Statements of Indebtedness are prepared in ways that indicate that some redevelopment agencies fail to realize the importance of the document. All future demands for tax increment revenues should be itemized in the document, yet some agencies omit their required funding of the Low and Moderate Income Housing Fund, future administrative cost requirements, and other costs that would be funded from future tax increment revenues. Assembly Bill 1290, Chapter 942, Statutes of 1993, added requirements that redevelopment agencies adopt certain time limits regarding the establishment of new indebtedness, the effectiveness of the redevelopment plan, and the final date for the repayment, from tax increment revenues, of all indebtedness. These requirements make it essential that an agency include the above-mentioned indebtedness in order to receive sufficient tax increment revenues to meet all of its obligations within those time limits.

¹ In addition, the Agency was required to include any other deficit or debt owed to the LMIHF on its SOI. §33675(f). However, any loan, advance or indebtedness that the Agency intends to pay *from* the LMIHF cannot be listed on the SOI. *Id.*

For example, for the 2009-10 fiscal year, 53 agencies reported indebtedness that did not include the required funding of the Low and Moderate Income Housing Fund. These agencies reported a total of \$3.34 billion in indebtedness. As redevelopment agencies are required to set aside 20% of all tax increment revenues for deposit in the Low and Moderate Income Housing Fund, these agencies will not be able to repay their indebtedness and satisfy the 20% set-aside requirement to the Low and Moderate Income Housing Fund if they receive only \$4.17 billion in tax increment revenues. To meet all obligations, these agencies should increase amounts reported on their Statement of Indebtedness by 25%; an additional \$834.02 million. The resulting total indebtedness of \$4.17 billion will provide these agencies with sufficient tax increment revenues to satisfy all obligations, including the 20% set-aside requirement (20% of \$4.17 billion = \$834.02 million). . .

State of California, *Community Redevelopment Agencies Annual Report*, (FY ended June 30, 2010), pp. xvii – xix (emphasis added).

While it is clear from the State Controller report that most agencies included the total LMIHF debt on their SOI's in 2009-10, it does not appear that all of these agencies included the total LMIHF debt on their EOPS. The next section explains why the total LMIHF debt listed on the SOI should be transferred to the EOPS and subsequent ROPS.

III. Post AB1X 26 Obligations to list total LMIHF debt

Under AB1X 26, an “enforceable obligation” is, among other things, “preexisting obligations to the state or *obligations imposed by state law . . .*” §§34167(d)(3), 34171. The Agency must create its Enforceable Obligation Payment Schedule (EOPS) before dissolution on February 1, 2012. After the Successor Agency is identified, the EOPS may be subsequently amended by the Successor Agency. §34177(a)(1). The Agency must prepare an initial Recognized Obligation Payment Schedule (ROPS) for the Successor Agency by January 31, 2012, the date the agency must dissolve.

After the agency dissolves, the Successor Agency is designated as the successor entity to the redevelopment agency. §34173(a). Except for those provisions of the Community Redevelopment Law that are “repealed, restricted, or revised pursuant to [Part 1.85], all authority, rights powers, duties and obligations previously vested with the former redevelopment agencies under the [CRL]” are vested in

the Successor Agency. §34173(b). In vesting the rights of the Successor Agency, the Legislature expressed its intent that “pledges of revenues associated with enforceable obligations of the former redevelopment agencies be honored.” §34175(a). The Legislature further expressed its intent that the cessation of any redevelopment agency shall not affect the pledge, the legal existence of that pledge, or the stream of revenues available to meet the requirements of the pledge. *Id.*

Against this backdrop, the Successor Agency will begin making payments for the obligations listed on the EOPS. By March 1, 2012, the Successor Agency must prepare its own initial draft ROPS and proceed through the process of having it certified and approved. §34177(l)(2). The ROPS may only include those obligations listed on the EOPS, and the Successor Agency may not pay any original debt of the Agency unless it is identified on the ROPS. On May 1, 2012, the ROPS supersedes the Statement of Indebtedness, which shall no longer be prepared or have any effect as of that date. §34177(a)(3).

The intent of AB1X 26 is to preserve as much of the redevelopment agencies’ revenues and assets for local governments, unless that money is necessary to pay enforceable obligations. §34167(a). Thus, the last SOI prepared for each agency, *i.e.* 2010-2011, provides prima facie evidence of the financial “enforceable obligations” of the agency that existed when ABx1 26 was enacted.² *See Coomes, infra.* If an agency previously listed its LMIHF on its SOI and then transferred that debt to its EOPS, the Successor Agency should transfer that debt to the ROPS and continue to make the payments on that enforceable obligation.

This interpretation is consistent with the language in AB1X 26. The budget bill provides for the creation of a successor housing entity to retain the housing assets and functions of the redevelopment agency. It further transfers all “rights, powers, duties, and obligations, excluding any amounts on deposit in the [LMIHF]” to the successor housing entity. §34176(a). However, this section speaks only to those amounts “on deposit”; it does not limit the payment of future payments based on an enforceable obligation to the successor housing entity to perform these functions. Indeed, AB1X 26 defines as an enforceable obligation for Successor Agencies in Part 1.85 as “amounts borrowed from or payments owing to the [LMIHF] . . .”, provided that the ROPS payment is permitted by the Oversight Board.³ §34171(d)(1)(G).

² To the extent an indebtedness was created after December 31, 2010, such indebtedness may not be an enforceable obligation even if listed on the SOI. *See* §34171((d)(2).

³ The Oversight Board is comprised of seven members of the community, including one member each of the board of supervisors, city, largest special district, county superintendent, community college district, public at large and former redevelopment employee’s union. §34179.

IV. Actions needed

It is critical that agencies list the total LMIHF debt on their EOPS's and ROPS's, in order to preserve housing funding required under state law.

Agencies may be reluctant to list the LMIHF debt, as the templates provided by the California Redevelopment Association presume that enforceable obligations fall due on discreet dates. No such requirement exists under AB1X 26. Many agencies simply note that the payment dates for this and similar obligations will be determined later. Another approach would be to simply divide the total LMIHF debt by the number of years that were remaining on the life of the project area, and assign that as the amount due each year. Quarterly payments could then be calculated.

Advocates should also remind agencies that there is no penalty for being conservative and simply transferring essentially all SOI debts to the EOPS and ROPS, including the total LMIHF debt. Only debts to the parent city or county are closely regulated by AB1X 26.