



**Berkeley
Redevelopment
Successor Agency**

OVERSIGHT BOARD MEETING AGENDA

Tuesday, October 9, 2012
4:00 P.M.

Location

Douglas Fir Room
2120 Milvia Street, 1st Floor
Berkeley, CA

All agenda items are for Discussion and Possible Action.

Public Comment Policy: *Members of the public may speak on any items on the Agenda and items not on the Agenda during the initial Public Comment period. Members of the public may also comment on any item listed on the agenda as the item is taken up. Members of the public may not speak more than once on any given item. The Chair may limit public comments to 3 minutes or less.*

1. Roll Call
2. Public Comment
3. Agenda Approval
4. Approval of Minutes of October 1, 2012 [Attachment A]
5. Approve Results of Review of Unobligated Balances of the Low and Moderate Income Housing Fund of the Berkeley Redevelopment Successor Agency [Attachment B]

6. Information Items

- Memorandum from Meyers Nave regarding *Review of Items 2 and 3 on ROPS III* [Attachment C]
- E-mail Correspondence from Goldfarb & Lipman, counsel for Successor Agency, re: City Bonds – Enforceable Obligations [Attachment D]

7. Administrative Items

- New Oversight Board Legal Counsel

8. Announcements

- Next meeting: Monday, November 26, 2012, 4:00 p.m.

9. Future Agenda Items

- November 26, 2012 (tentative): Public Comment Session to receive comments on the Review of the unobligated balances of the Successor Agency's non-LMIHF
- December 3, 2012 (tentative): Oversight Board approval of results of the Review of the unobligated balances of the Successor Agency's non-LMIHF

10. Adjourn

ATTACHMENTS:

- A. Draft Minutes of October, 2012 Oversight Board Meeting
- B. Staff Report, Approve Results of the Review of the Unobligated LMIHF
- C. Memorandum from Meyers Nave regarding Review of Items No. 2 & 3 on ROPS III
- D. E-mail Correspondence from Goldfarb & Lipman (dated 09/25/12), counsel for Successor Agency, re: City Bonds – Enforceable Obligations



Time: 4:02 p.m.

Douglas Fir Room
 Permit Service Center
 2120 Milvia Street – Berkeley, CA
 Secretary – Lourdes Chang, (510) 981-5419

Draft Minutes of the October 1, 2012 Oversight Board Meeting

All agenda items are for Discussion and Possible Action.

1. Roll Call

Present: Arreguin, Decredico, Harper, Hoover and Riddle. Alternate: Brooks (for Keith Carson, Arrived late). Absent: Gerhard. Staff Present: Chang, Hardaway and Xie.
Presenter: Chris Lynch, Jones-Hall. Public: None.

2. Public Comments

There were none.

3. Approval of Agenda

The agenda was approved unanimously. (M/S/C: Hoover/Riddle. Unanimous)

4. Approval of Minutes of July 23, 2012

A motion to approve the July 23, 2012, minutes was made with the following correction to Item No. 5, sentence 3: strike "1987" and replace with "1978" in reference to the 1978 Closeout Agreement between the City of Berkeley and the Berkeley Redevelopment Agency. The motion to approve the minutes as corrected was unanimously approved. (Hoover/Decredico. Unanimous)

5. Approval of Minutes of August 27, 2012

A motion to approve the minutes of the August 27, 2012, meeting was approved unanimously. Board Members Decredico and Harper voted on the minutes although they were not at the August 27, 2012, meeting. Mr. Harper questioned whether members who were absent from the meeting could actually vote on the minutes. Chair Arreguin noted they could vote in order to meet quorum and they also could abstain if they wish. (Hoover/Riddle. Unanimous)

6. Approval of the Amended and Restated Joint Exercise of Powers Agreement for the Berkeley Joint Powers Financing Authority

Chris Lynch of Jones Hall, the City's bond counsel, was present to answer questions regarding the proposal to replace the Successor Agency with a new member of the Joint Powers Financing Authority (JPFA), the California Municipal Finance Authority. The action would allow the JPFA to continue to operate after the dissolution of the Successor Agency, and would result in the withdrawal of the Successor Agency as a member of the JPFA.

A motion was made to approve the Amended and Restated Joint Exercise of Powers Agreement relating to the Berkeley Joint Powers Financing Authority. (M/S/C: Harper/Hoover. Unanimous).

7. Receive Public Comment on Review of Unencumbered Low-Moderate Income Housing Fund (LMIHF)

No one from the public was present for comments. Lucy Xie from the City's Finance Department was present to answer questions regarding the review. The results of the review show there is \$127,978 in unencumbered LMIHF funds that could potentially be transferred to the taxing entities.

8. Administrative Items

- a) Communication with Board Members and Staff outside of the regularly scheduled meetings. It was agreed that all questions from individual board members must go through the Secretary of the Board either via e-mail or phone call. The Secretary will provide a response via e-mail and blind-copy all members of the Oversight Board. This will allow all Board members to receive the same information at the same time, without violating the Brown Act.
- b) Recording of Minutes. It was agreed the Secretary will continue to take action minutes for the official record of the Oversight Board meetings. If any member of the Board wishes to include his/her comments on a specific item or issue, he/she can request that the comments be noted in the minutes. The request can be made during the meeting or at the next meeting when the minutes are reviewed and approved. Board Member Harper noted he would request that his comments be noted in instances where he is in the minority vote to reflect the reasoning behind his vote.

9. Announcements

The next meeting of the Oversight Board is scheduled for Tuesday, October 9, 2012 @ 4 p.m. The purpose of the meeting is to obtain Oversight Board approval of the results of the

Review.

10. Future Items

- a) October 9, 2012: Oversight Board approval of results of the Review of the unobligated balances of the Successor Agency's LMIHF.
- b) November 26, 2012 (tentative): Public Comment Session to receive comments on the Review of the unobligated balances of the Successor Agency's non-LMIHF
- c) December 3, 2012 (tentative): Oversight Board approval of results of the Review of the unobligated balances of the Successor Agency's non-LMIHF

11. Adjourn

The meeting was adjourned at 4:38 p.m. (M/S/C: Hoover/Riddle. Unanimous).

Approved on _____

_____, Lourdes Chang, Secretary



**Berkeley
Redevelopment
Successor Agency**

Date: October 9, 2012
To: Berkeley Redevelopment Successor Agency Oversight Board
From: Lourdes Chang, Oversight Board Secretary
Subject: Approve Review of Unobligated Balances of the Low and Moderate Income Housing Fund

RECOMMENDATION

Adopt a resolution approving the review of the unobligated balances of the Low-Moderate Income Housing Fund (the "Review").

FISCAL IMPACTS OF RECOMMENDATION

Approval of the Review by the Oversight Board is required under AB 1484. The results of the Review show approximately \$127,978 of unencumbered Low-Moderate Income Housing Funds could potentially be transferred to the taxing entities of the Successor Agency.

CURRENT SITUATION AND ITS EFFECTS

Per Assembly Bill (AB) 1484, Section 34179.5, the Successor Agency to the Former Redevelopment Agency is required to conduct a review of the unobligated balances of the Low and Moderate Income Housing Fund (the "Review") and submit the results to the Department of Finance, State Controller's Office, County Auditor-Controller and the Oversight Board by October 1, 2012. Upon receipt of the Review, the Oversight Board is required to hold a public comment session at least five days prior to Oversight Board approval. The Oversight Board held a public comment session on October 1, 2012. No one from the public was present for comment. The purpose of the meeting on October 9, 2012, is to obtain Oversight Board approval of the Review. The Review must be submitted to the Department of Finance, State Controller's Office and County Auditor-Controller by October 15, 2012.

BACKGROUND AND DISCUSSION

AB 1484 requires each Successor Agency to hire a licensed accountant to conduct a review of the unobligated balances available for transfer to the taxing entities (the "Review". The Berkeley Redevelopment Successor Agency hired Badawi & Associates who completed the Review on September 25, 2012. The Successor Agency delivered

the Review to the Oversight Board, DOF, State Controller's Office and the County Auditor-Controller's office on September 27, 2012.

The Oversight Board held a public comment session at their meeting on October 1, 2012. No one from the public was present for comments. A discussion was held by the members of the Oversight Board on the results of the Review. The results show that approximately \$127,978 of unencumbered LMIHF could potentially be transferred to the taxing entities of the Successor Agency. The purpose of the meeting on October 9th is to obtain approval of the Review by the Oversight Board. Upon approval by the Oversight Board, the Review must be submitted to the DOF, SCO and CAC by October 15, 2012.

ALTERNATIVE ACTIONS CONSIDERED

None.

RATIONALE FOR RECOMMENDATION

In order to comply with Section 34179.5 of AB 1484, the Successor Agency must conduct a review of the unobligated balances of the LMIHF; submit the report to the DOF, State Auditor-Controller's Office, the County Auditor-Controller's office and the Oversight Board for review by October 1, 2012; hold a public comment session at least 5 business days prior to approval of the Review by the Oversight Board; and transmit the Review as approved by the Oversight Board to the DOF, State Auditor-Controller's Office, the County Auditor-Controller's office by October 15, 2012. The Oversight Board must approve the Review to meet AB 1484 requirements.

CONTACT PERSON

Lourdes Chang, (510) 981-5419

Attachments:

1. Resolution approving the Results of the Review of the Unobligated Balances of the Berkeley Redevelopment Successor Agency's Low-Moderate Income Housing Fund.

OVERSIGHT BOARD RESOLUTION NO. _____

Approving the results of the review of the unobligated balances of the Low and Moderate Income Housing Fund as required by Assembly Bill 1484

WHEREAS, Section 34179.5 of Assembly Bill 1484 (AB 1484) requires the Successor Agency to conduct a review ("Review") to determine the unobligated balances of the Low and Moderate Income Housing Fund (LMIHF) available for transfer to taxing entities; and

WHEREAS, the Review was completed by a licensed accountant approved by the County Auditor-Controller (CAC); and

WHEREAS, under Section 34179.6 of AB 1484 the Successor Agency provided to the oversight board, the county auditor-controller, the State Controller and the Department of Finance the results of the Review on September 27, 2012; and

WHEREAS, upon receipt of the Review, the Oversight Board convened a public comment session on October 1, 2012, at least five days before the oversight board approves the Review pursuant to Section 34179.6 (b) of AB 1484; and

WHEREAS, by October 15, 2012, the Oversight Board is required to review, approve and transmit to the County auditor-controller, the State Controller and the Department of Finance the results of the Review as approved by the Oversight Board.

NOW THEREFORE, BE IT RESOLVED by the Berkeley Redevelopment Successor Agency Oversight Board, that it hereby approves the results of the Review of the unobligated balances of the Low and Moderate Income Housing Fund of the Successor Agency available for transfer to taxing entities.

PASSED AND ADOPTED at a meeting of the Oversight Board of the Successor Agency to the dissolved Redevelopment Agency of the City of Berkeley held on the 9th day of October, 2012 by the following vote:

AYES:

NOES:

ABSTAINED:

ABSENT:

Jesse Arreguin, Oversight Board Chairperson

ATTEST:

Lourdes Chang, Oversight Board Secretary

MEMORANDUM

Via Electronic Mail Only

DATE: October 3, 2012
TO: Laura McKinney, Deputy City Attorney
City of Berkeley
FROM: John Bakker
RE: **Review of Items 2 and 3 on ROPS III**

As you know, we had previously been engaged to serve as counsel to the Berkeley Oversight Board. Due to conflicts of interests under the Rules of Professional Responsibility arising from our representation of certain of the taxing agencies that could benefit from dissolution of the Berkeley Redevelopment Agency, we are not in a position to represent the Oversight Board. Nonetheless, we are prepared to offer the City our independent analysis of the matters discussed below, which the City may transmit to the Oversight Board. If the Oversight Board desires additional advice and counsel, we would not be in a position to provide it for the reasons noted above.

ISSUES: A member of the Oversight Board has requested an analysis of whether Items 2 and 3 on the Recognized Obligation Payment Schedule for January 1, 2013 through June 30, 2013 (“ROPS III”) are enforceable obligations. Item 2 is listed as “Savo Island Loan Payable,” and the Payee is listed as “City Retiree Medical Trust.” The ROPS III shows an outstanding obligation of \$759,600. Item 3 is listed a “\$1Million Bond – City Loan.” ROPS III lists the payee as the City of Berkeley and shows an outstanding balance of \$1,563,553.

CONCLUSION: We have reviewed both items and concluded that, in both cases, the Oversight Board could find that both items are enforceable obligations that were properly included on the Recognized Obligation Payment Schedule. Our analysis follows.

To: Memo to Members of the Berkeley Oversight Board
From: John Bakker, Board Counsel
Re: Review of Items 3 and 4 on ROPS III
Date: October 3, 2012
Page: 2

DISCUSSION:

I. Statutory Background.

During each specified period, a successor agency may pay only those obligations that are set forth on the Recognized Obligation Payment Schedule or ROPS for the specified period. The ROPS may contain only “enforceable obligations.” The term “enforceable obligations” is defined in Health and Safety section 34171(d). The ROPS must be approved by the Oversight Board. (See Health & Saf. Code, § 34180, subd. (g).)

Although redevelopment agency debt is generally an enforceable obligation, a loan from a city to a redevelopment agency is only an enforceable obligation under certain specified circumstances. An enforceable obligation includes “Bonds” (see Health & Saf. Code, § 34171, (d)(1)(A)) and “Loans of money borrowed by a redevelopment agency for a lawful purpose,” provided that the agency is “legally required” to repay the loan. (See Health & Saf. Code, § 34171, subd. (d)(1)(B).) However, the definition of enforceable obligation specifically excludes “any agreements, contracts, or arrangements between the city, county, or city and county that created the redevelopment agency and the former redevelopment agency.” (See *id.*, § 34171, subd. (d)(2).)

There are two specific exceptions to obligations-owed-to-the-agency’s-creator-are-invalid rule. The first is not relevant here. The second relates to “indebtedness obligations.” It provides that “written agreements entered into (A) at the time of issuance, but in no event later than December 31, 2010, of indebtedness obligations, and (B) solely for the purpose of securing or repaying those indebtedness obligations may be deemed enforceable obligations for purposes of this part.” (*Ibid.*) Separately, “indebtedness obligation” is defined to mean “bonds, notes, certificates of participation, or other evidence of indebtedness, issued or delivered by the redevelopment agency . . . to *third-party investors or bondholders* to finance or refinance redevelopment projects undertaken by the redevelopment agency in compliance with the Community Redevelopment Law (Part 1 (commencing with Section 33000)).”

In addition, another provision allows a successor agency with oversight board approval to reenter into agreements with the creator agency. It specifies that: “a successor entity wishing to enter or reenter into agreements with the city, county, or city and county that formed the redevelopment agency that it is succeeding may do so upon obtaining the approval of its oversight board.” (*Id.*, § 34178, subd. (a).) Thus, even if a loan from the creator to the agency was invalidated, a successor can seek oversight board approval to revive the loan.

However, newly enacted legislation (AB 1484) limits the oversight board’s ability to approve the revival of loan agreements entered into between redevelopment agencies and their

To: Memo to Members of the Berkeley Oversight Board
From: John Bakker, Board Counsel
Re: Review of Items 3 and 4 on ROPS III
Date: October 3, 2012
Page: 3

creators. AB 1484 added a new provision that deems, after a successor has been issued a finding of completion by the Department of Finance, “loan agreements entered into between the redevelopment agency and [its creator]” to be enforceable obligations “provided that the oversight board makes a finding that the loan was for legitimate redevelopment purposes.” (*Id.*, § 34191.4, subd. (b)(1).) Loans revived under this section are subject to very significant restrictions. (See *id.*, § 34191.4, subd. (b)(2).) AB 1484 also added a provision stating that oversight boards “shall not have the authority to reestablish loan agreements between the successor agency and the city, county, or city and county that formed the redevelopment agency except as provided in Chapter 9 (commencing with Section 34191.1).” (*Id.*, § 34180, subd. (a).) The apparent purpose of this provision was to prevent oversight boards from exercising their authority under 34178 to approve a successor agency’s reentering into loan agreements the creator. Thus, it now appears that the only way that creator-to-agency loan agreement can be “revived” is pursuant to Section 34191.4.

II. Analysis

The pertinent law can be summarized as follows:

- State law invalidated agreements between creator agencies to redevelopment agencies unless:
 - They were entered into at the time of an indebtedness obligation to a “third party investor or bondholder” and “for the purpose of securing or repaying those indebtedness obligations” or
- Previous to AB 1484’s operative date, the oversight board had the power to revive creator-agency agreements without restrictions.
- Presently, invalidated loan agreements can be revived, if the oversight board finds that the loan was for a legitimate purpose. The revived agreements must be amended to conform with certain statutory requirements limiting total payments, interest, and duration.

A. Item No. 2 — Savo Island Loan Payable.

We have been provided with a copy of the loan agreement that created this obligation. The Agreement is dated December 1, 2001, the parties are the Berkeley Redevelopment Agency and “the City of Berkeley Retiree Medical Trust Fund” (“the Trust”). The loan agreement was executed by the City of Berkeley, through its Mayor.

In it, the Fund agreed to loan the Agency \$600,000 at the simple interest rate of 8% per year, which the Agency could use only “for redevelopment purposes consistent with the Redevelopment Plan.” We understand that the interest rate was consistent with the market

To: Memo to Members of the Berkeley Oversight Board
From: John Bakker, Board Counsel
Re: Review of Items 3 and 4 on ROPS III
Date: October 3, 2012
Page: 4

rate that the Agency could have obtained at that time in the capital markets. The loan matures on September 1, 2025. Payments are due on March 1 and September 1 of each year.

The agreement is a loan of money borrowed by the Agency, and it would be considered an enforceable obligation unless it is an agreement between the City and the former redevelopment agency. Although the Agreement was executed by the City of Berkeley, it apparently did so in its capacity as the trustee of the Trust, which is listed as the actual party to the agreement, and not in its own capacity.

We have not reviewed the underlying documents that created the Trust, but, based on the documents we have seen, the Oversight Board can conclude that the agreement is *not between* the City and the Agency. Rather, the loan agreement is between a third party (the Trust) and the Agency. Such loans are enforceable obligations under Health and Safety Code section 34171(d)(1)(B).

B. Item No. 3 — “\$1Million Bond – City Loan”

We have been provided with an Indenture of Trust, dated December 1, 1997, between the Agency and the City, that led to the Agency obligations for this item. In the Agreement, the Agency agreed to issue \$1,000,000 in term bonds, maturing December 15, 2012. Under the debt structure, the bonds were initially to be held by the City, and the City could request that the Agency remarket the bonds to third-party purchasers. During the period that the City held the bonds, the interest rate was to be fixed at the average of the Local Agency Investment Fund rate for the preceding six-month period plus 1%. It is our understanding that the Agency created the bonds and that the City’s Capital Improvement Fund currently holds these bonds.

This circumstance presents a unique set of facts that is not squarely addressed in the law governing the dissolution of redevelopment agencies. The Agency’s obligation to repay the City arise not from the Indenture of Trust, but rather from the bond or bonds that were created pursuant to that agreement; bonds that are now held by the City. Section 34171(d)(2) specifies that “agreements, contracts, and arrangements” between the City and the Agency are not enforceable obligations. Unless the bonds are “agreements, contracts, or arrangements” between the City and the Agency, the obligations arising under the bonds would be enforceable obligations.

Although there is some ambiguity in the law, we do think the stronger argument is that bonds are not “agreements, contracts, and arrangements” that the dissolution law invalidated. Under this view, bonds are enforceable obligations, whether or not they are owned by the creator. The basis for this conclusion is two-fold. First, the dissolution law

To: Memo to Members of the Berkeley Oversight Board
From: John Bakker, Board Counsel
Re: Review of Items 3 and 4 on ROPS III
Date: October 3, 2012
Page: 5

calls out bonds separately (see Health & Saf. Code, § 34171, subd. (d)(1)(A)) and distinguishes them from other types of loans. (See *ibid.*, § 34171, subd. (d)(1)(B), § 34171, subd. (d)(2).) This is consistent with the fact that bonds are *legally distinct* from loans; they are securities that can be traded in the capital markets. Thus, the form of bond attached the Indenture of Trust specifies that the *registered owner*, not the City specifically, is entitled to payment of principal and interest. Bond holders buy the right to receive those payments. Second, the dissolution law's invalidation of "agreements, contracts, and arrangements" between cities and former agencies seems aimed at less formal agreements and arrangements between creators and agencies and not at formal arms-lengths transactions like this one that anticipate third party (other potential bondholders) involvement. Finally, we also think that it would be unreasonable to interpret the statutes in a way that would validate the bonds had the City sold them to third parties but invalidates them simply because the City retained the bonds in its investment portfolio. For all these reasons, we do not think that the bonds are "agreements, contracts, and arrangements" between the City and the Agency. Therefore, we believe that the bonds are enforceable obligations.

Please let me know if you have any questions.

JB:jb

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From: Karen M. Tiedemann [<mailto:KTiedemann@goldfarblipman.com>]
Sent: Tuesday, September 25, 2012 9:12 AM
To: McKinney, Laura N.; Cosin, Wendy
Subject: City Bonds - Enforceable Obligation

Wendy and Laura,

You have asked for information on why the \$1,000,000 bonds that were issued by the Redevelopment Agency to the City of Berkeley qualify as an enforceable obligation. The bonds were issued by the Redevelopment Agency in 1997 pursuant to an indenture of Trust agreement between the Redevelopment Agency and the City. The City of Berkeley purchased the Agency bonds. The Agency has been repaying the bonds in accordance with the indenture since the issuance of the bonds.

Under ABx1 26, the Redevelopment Dissolution Act, as amended by AB 1484, agreements between the former Redevelopment Agency and the sponsoring city are generally null and void as of February 1, 2012 with limited exceptions. The 1997 Agency bonds falls within one of the exceptions. Health and Safety Code Section 34171(d) generally defines enforceable obligations. Subsection (d)(2) provides that enforceable obligations do not include any agreements, contracts or arrangements between the City and the former redevelopment agency except written agreements that (A) were entered into at the time of issuance but in no event later than December 31, 2010 of indebtedness obligations and (B) solely for the purpose of securing or repaying the indebtedness obligation. Indebtedness obligations is defined in Section 34171(e) to mean bonds, notes, certificate of participation or other evidence of indebtedness, issued or delivered by the redevelopment agency to third party investors or bondholders to finance or refinance redevelopment projects.

In this instance, the contract with the City was entered into at the time of issuance of the bonds and was entered into before December 31, 2010. The purpose of the indenture is specifically and solely for the purpose of repaying the bondholders. The bonds satisfy the definition of indebtedness obligation in that they are bonds that were issued by the Redevelopment Agency to bondholders and the funds were used to finance redevelopment projects undertaken by the redevelopment agency. The indenture thus meets the exception set forth in Section 34171(d) (2) and qualifies as an enforceable obligations.

Please let me know if you have any additional questions.

Karen

Karen Tiedemann
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