

Rent Stabilization Board

DATE: November 20, 2014

TO: Honorable Members of the Rent Stabilization Board

FROM: *JJK* Jay Kelekian, Executive Director

SUBJECT: Update on the Legality of the Board Entering Into a Joint Powers Agreement with the City of Richmond to Implement the Richmond CARES Program in Berkeley

BACKGROUND:

On November 4, 2013, Patrick Lynch, Richmond's Director of Housing and Community Development made a presentation to the Rent Board's Eviction/Section 8/Foreclosure Sub-Committee on their proposed CARES Program. At the December 3, 2013 Berkeley City Council meeting, the council unanimously voted to support Richmond's attempt to implement their CARES Program. Subsequently, the Board invited Richmond city officials to make a presentation to the full Board. To date, no city official from Richmond has responded to the Board's request. At its' July 21, 2014 meeting, the Board approved a motion requesting that staff analyze the legality, feasibility and risks of the Board entering into a Joint Powers Agreement (JPA) with the City of Richmond for the purpose of implementing a local version of the Richmond CARES program in Berkeley.

SUMMARY OF STAFF REVIEW AND ANALYSIS:

The City of Richmond has not yet voted to implement a CARES program so our analysis was based upon the program described to the Eviction/Section 8/Foreclosure Sub-Committee in November 2013. If the program ultimately adopted by Richmond changes significantly, it is possible that our conclusion may change.

The Board requested that staff analyze the legality, feasibility and the risks to the Board if it entered into a JPA with Richmond for the purposes of implementing a CARES program in Berkeley. Before analyzing feasibility, fully exploring the possible risks or writing a broad overview about the Board's authority to enter into any type of JPA, I requested and received a legal opinion (attached for your review) addressing the narrow issue of the Board's ability to partner with the City of Richmond to create a Joint Powers Agreement in order to implement

a CARES program. Staff has not yet analyzed the Board's ability to enter into other JPA's (for example, if the CARES program were amended to assist rental property owners or prevent unwarranted displacement of tenants) nor have we fully explored the potential costs or feasibility of being a party to such an agreement. We have identified several issues that would need to be researched if the Board wishes staff to spend additional time on this project.

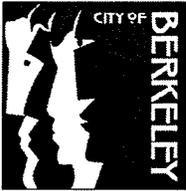
After doing independent research as well as checking with municipal attorneys in other rent control jurisdictions, legal staff has concluded that the Board would be legally precluded from creating a JPA with the City of Richmond for the purposes of implementing a CARES program as articulated to the Board in November 2013.

I have attached the legal opinion for your review and discussion. After discussion, the Board can provide staff guidance if any additional research is desired at this time and what the scope of that research should be.

Staff understands that while the Board asked a specific question, the Board may actually be looking for broader guidance related to other JPA scenarios. The memorandum from the Legal Department identifies, but does not analyze, three areas (Eminent Domain, Funding and Liability) that would need to be fully explored before the Board enters into any JPA. To do so, would require considerably more resources than thus far have been expended. Because of the legal opinion's conclusion, I deferred additional research pending Board review of the preliminary information. Before committing the necessary resources, I wanted to see if the Board still desired additional research on this topic and if so, the scope of that research given the current staffing constraints in the Legal Department.

Attachment:

- 1.) Legal opinion by Rent Board Legal Staff. Can the Berkeley Rent Board Enter Into a Joint Powers Agreement or Create a Joint Powers Authority ("JPA") with the City of Richmond to Implement the Richmond CARES Program?



Rent Stabilization Board
Legal Department

MEMORANDUM

DATE: November 17, 2014

TO: Jay Kelekian, Executive Director

FROM: Matthew Siegel, Staff Attorney *MS*

SUBJECT: Can the Berkeley Rent Board Enter Into a Joint Powers Agreement or Create a Joint Powers Authority ("JPA") with the City of Richmond to Implement the Richmond CARES Program?

ISSUE:

The Rent Board has asked for a legal opinion as to whether the Board may enter into a JPA with the City of Richmond to implement its CARES Program. The CARES Program (Community Action to Restore Equity and Stability) is one wherein the City of Richmond would hire Mortgage Resolution Partners (MRP), a private, San Francisco-based venture fund, to raise funds from private investors and then front those funds to the City of Richmond for the purpose of compensating mortgage holders of loans that Richmond would take over via the use of eminent domain. The City would only acquire loans that have been condemned, and those loans would then be restructured to ensure that the homeowner maintains home ownership. The program, as understood by Board staff, would provide relief for homeowners only. The initial question is whether the Berkeley Rent Board may enter into a JPA with the City of Richmond for this purpose. If permitted, additional issues related to scope, feasibility and potential liability would need to be addressed.

CONCLUSION:

No. The Board would be prohibited from entering into a JPA with the City of Richmond for the purpose of allowing a homeowner to maintain home ownership. Government Code Section 6500 et. seq. and case law bars the Board from entering into a JPA of this nature since the Board and Richmond do not share a "common power." The Board does not have the power to do unilaterally what the City of Richmond, via the CARES Program, envisions.

BACKGROUND:

On November 4, 2013, Patrick Lynch, Richmond's Director of Housing and Community Development made a presentation to the Rent Board's Eviction/Section 8/Foreclosure Sub-Committee on the CARES Program. At its' July 21, 2014 meeting, the Board approved a motion for staff to analyze the legality, feasibility and risks of the Board entering into a Joint Powers Agreement with the City of Richmond to implement the Richmond CARES program in Berkeley. To date, the City of Richmond has yet to approve the CARES program, thus this analysis is based upon the program described to the Eviction/Section 8/Foreclosure Committee in November 2013.

ANALYSIS:

What is a JPA?

A Joint Powers Agreement ("JPA") is a formal, legal agreement between two or more public agencies that share a common power and wish to jointly implement programs, build facilities or deliver services. Each JPA is unique, and there is no set formula for how the agencies are to use their powers. JPAs can be short-term or long-term; one agency can take responsibility for staffing and one agency can be empowered with the administration of the contemplated program ("*Governments Working Together: A Citizen's Guide to Joint Powers Agreements*," Ca. State Legislature Senate Local Government Committee 2007). Statutory authority for the existence and operation of JPAs is derived from the Joint Exercise of Powers Act (Government Code Section 6500 et seq.).

JPAs are generally funded via one of two mechanisms; raising capital through the issuance of bonds or the creation of a revenue stream. While the CARES Program seeks mortgage acquisition via the use of MRP and private funds/capital, it is unclear what level of funding would be required for the actual administration of the CARES Program and from where such funding would originate. Further discussion regarding funding issues will be addressed below.

The Board May Not Enter Into a JPA With The City of Richmond To Implement The CARES Program As Currently Envisioned

If authorized by their legislative bodies, two or more public agencies, by agreement, may jointly exercise any power common to the contracting parties. It is not necessary that any power common to the contracting parties be exercisable by each contracting party with respect to the geographical area in which such power is to be jointly exercised. (Gv't Code Section 6502, *Beckwith v. Stanislaus County* (1959) 175 CA 2d 40).

For the Board to partner with Richmond in implementing the CARES Program, the Board must have the power to unilaterally perform what the JPA intends to do jointly. A Public agency may not acquire new functions or powers through a joint powers agreement (*City of Oakland v. Williams* 15 C2d 542 (1940)). In other words, the Board must have the power to enact its own

CARES Program to obtain condemned mortgages of homeowners via eminent domain and restructure them in order to preserve the home ownership of the property owner. Currently, the CARES Program has no component for obtaining or rescuing condemned mortgages held by owners of rental properties.

The purpose of the Rent Stabilization Board is to provide for the proper administration of programs to regulate residential rents; to protect tenants from unwarranted rent increases and arbitrary, discriminatory or retaliatory evictions, to help maintain the diversity of the Berkeley community and to ensure compliance with legal obligations related to renting. (Chapter XVII, City of Berkeley Charter, Elected Rent Stabilization Board Sec. 120).

The Board's powers are to determine, arbitrate and set rent levels and to administer any Berkeley program which regulates rents and evictions. In addition to these duties the Board is also empowered to do the following:

- **conduct studies, survey and investigations as necessary to carry out its duties;
- ** issue orders, rules and regulations, conduct hearings and charge fees;
- **seek injunctive relief pursuant to B.M.C. 13.76.150;
- ** pursue civil remedies in court;
- ** hold public hearings;
- ** other powers necessary to carry out the purposes of this chapter which are not inconsistent with the terms of this chapter (B.M.C. 13.76.060F).

In conjunction with the Board's powers, there are limits regarding the use of revenue generated by registration fees which are the basis for its funding. The amount of the fee is valid under the California Constitution as long as it does not exceed the reasonable cost of providing services necessary to the activity for which the fee is charged (*Pennell v. City of San Jose* (1986) 42 C.3d 365, 375). The reasonable cost of the regulatory program includes all costs incident to accomplishing the regulatory purpose, including such things as administration, investigation, supervision and enforcement (*City of Oakland v. Superior Court* (1996) 45 CA4th 740, 762). Thus, the fee must not exceed the reasonable cost of the program nor be used for unrelated revenue purposes (*Sinclair Paint Co. v. State Bd. of Equalization* (1997) 15 C.4th 866, 879, 881).

As currently proposed by Richmond, The CARES Program is designed to rescue homeowners whose homes are in financial distress. While the Berkeley Rent Board may agree with the policy concerns set forth by the program, no nexus exists between the purpose and powers of the Rent Board with that of the CARES Program. On its own, the Board would not have the authority to enter into a partnership with an entity such as MRP to salvage mortgages of homeowners. The reach of the Board extends to matters related to rental housing. While this may, by its nature, encompass a broad variety of policy concerns such as zoning issues, general rental housing laws, habitability, and other matters pertaining to the regulation and maintenance of residential rental units, that reach does not extend to maintaining homeowners' residences.

Under the Joint Exercise of Powers Act, the Board is prohibited from entering into a JPA with the City of Richmond to partner with MRP as the program is currently envisioned.

OTHER ISSUES

Because, under the proposed CARES Program, the Board and City of Richmond do not share a “Common Power” as required under the Government Code, this opinion only addresses that narrow threshold issue. If the Board were able to establish a Common Power, Board legal staff would need to do additional, more complex, research. Three additional issues that would need to be analyzed in any proposal, at a minimum, include:

- 1) Eminent Domain: According to MRP and the City of Richmond, eminent domain is the vehicle that would propel the taking of the distressed homeowner mortgages. Further review is necessary to determine if the Board has jurisdiction to take properties via eminent domain. While the City of Berkeley may have such police powers, it is unclear whether the Board also has those powers.
- 2) Funding: As discussed above, the JPA is funded either through the issuance of bonds or the creation of revenue. While the CARES Program, as envisioned by the City of Richmond, speaks to mortgage acquisition being realized via the use of MRP and private funds/capital, it is unclear what level of funding would be required for the actual administration of the CARES Program and where the Board would generate such funding. As noted below, there is risk should the Rent Board dedicate registration fees for the administration of a JPA as described by Richmond and MRP. A further review of this risk and whether the Board registration fee in effect becomes a tax, thus requiring a 2/3rd vote of the electorate, would need to be evaluated in any other proposal considered by the Board.
- 3) Liability: Assuming that the Board can enter into a JPA with Richmond should the scope of the JPA be altered, an analysis of potential liability must be considered. While many JPAs obtain insurance via insurance-pooling, it is unclear what those costs would be and whether such insurance would be obtainable for the CARES Program.

The CARES Program requires the use of eminent domain to obtain condemned mortgages. Eminent Domain challenges can result in jury trials, and the Board may be vulnerable to damages and attorney fees. While the purpose of the JPA is to provide insulation to such damages, it is not yet clear whether the Rent Board would have full immunity.