

TWENTYNINE PALMS REDEVELOPMENT AGENCY

ASSET TRANSFER REVIEW

Review Report

January 1, 2011, through January 31, 2012



JOHN CHIANG
California State Controller

July 2014



JOHN CHIANG
California State Controller

July 30, 2014

Ron Peck, Acting City Manager
City of Twentynine Palms/Successor Agency
6136 Adobe Road
Twentynine Palms, CA 92277

Dear Mr. Peck:

Pursuant to Health and Safety Code section 34167.5, the State Controller's Office (SCO) reviewed all asset transfers made by the Twentynine Palms Redevelopment Agency (RDA) to the City of Twentynine Palms (City) or any other public agency after January 1, 2011. This statutory provision states, "The Legislature hereby finds that a transfer of assets by a redevelopment agency during the period covered in this section is deemed not to be in furtherance of the Community Redevelopment Law and is thereby unauthorized." Therefore, our review included an assessment of whether each asset transfer was allowable and whether the asset should be turned over to the Successor Agency.

Our review applied to all assets including, but not limited to, real and personal property, cash funds, accounts receivable, deeds of trust and mortgages, contract rights, and rights to payment of any kind. We also reviewed and determined whether any unallowable transfers to the City or any other public agency have been reversed.

Our review found that the RDA transferred \$16,992,454 in assets after January 1, 2011, including unallowable transfers totaling \$2,138,600 to the City of Twentynine Palms, or 12.59% of transferred assets. These assets must be turned over to the Successor Agency.

If you have any questions, please contact Elizabeth González, Bureau Chief, Local Government Compliance Bureau, by telephone at (916) 324-0622.

Sincerely,

Original signed by

JEFFREY V. BROWNFIELD, CPA
Chief, Division of Audits

JVB/mh

cc: Larry Walker, Auditor-Controller
San Bernardino County
John Cole, Oversight Board Chairperson
Twentynine Palms Redevelopment/Successor Agency
David Botelho, Program Budget Manager
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Asset Transfer Review Report

Summary

The State Controller's Office (SCO) reviewed the asset transfers made by the Twentynine Palms Redevelopment Agency (RDA) after January 1, 2011. Our review included, but was not limited to, real and personal property, cash funds, accounts receivable, deeds of trust and mortgages, contract rights, and rights to payments of any kind from any source.

Our review found that the RDA transferred \$16,992,454 in assets after January 1, 2011, including unallowable transfers totaling \$2,138,600 to the City of Twentynine Palms (City), or 12.59% of transferred assets. These assets must be turned over to the Successor Agency.

Background

In January of 2011, the Governor of the State of California proposed statewide elimination of redevelopment agencies (RDAs) beginning with the fiscal year (FY) 2011-12 State budget. The Governor's proposal was incorporated into Assembly Bill 26 (ABX1 26, Chapter 5, Statutes of 2011, First Extraordinary Session), which was passed by the Legislature, and signed into law by the Governor on June 28, 2011.

ABX1 26 prohibited RDAs from engaging in new business, established mechanisms and timelines for dissolution of the RDAs, and created RDA successor agencies and oversight boards to oversee dissolution of the RDAs and redistribution of RDA assets.

A California Supreme Court decision on December 28, 2011 (*California Redevelopment Association et al. v. Matosantos*), upheld ABX1 26 and the Legislature's constitutional authority to dissolve the RDAs.

ABX1 26 was codified in the Health and Safety (H&S) Code beginning with section 34161.

H&S Code section 34167.5 states in part, ". . . the Controller shall review the activities of redevelopment agencies in the state to determine whether an asset transfer has occurred after January 1, 2011, between the city or county, or city and county that created a redevelopment agency or any other public agency, and the redevelopment agency."

The SCO identified asset transfers that occurred after January 1, 2011, between the RDA, the City and/or any other public agency. By law, the SCO is required to order that such assets, except those that already had been committed to a third party prior to June 28, 2011, the effective date of ABX1 26, be turned over to the Successor Agency. In addition, the SCO may file a legal action to ensure compliance with this order.

Objective, Scope, and Methodology

Our review objective was to determine whether asset transfers that occurred after January 1, 2011, and the date upon which the RDA ceased to operate, or January 31, 2012, whichever was earlier, between the city or county, or city and county that created an RDA, or any other public agency, and the RDA, were appropriate.

We performed the following procedures:

- Interviewed Successor Agency personnel to gain an understanding of the Successor Agency’s operations and procedures.
- Reviewed meeting minutes, resolutions, and ordinances of the City, the RDA, the Successor Agency, and the Oversight Board.
- Reviewed accounting records relating to the recording of assets.
- Verified the accuracy of the Asset Transfer Assessment Form. This form was sent to all former RDAs to provide a list of all assets transferred between January 1, 2011, and January 31, 2012.
- Reviewed applicable financial reports to verify assets (capital, cash, property, etc.).

Conclusion

Our review found that the Twentynine Palms Redevelopment Agency transferred \$16,992,454 in assets after January 1, 2011, including unallowable transfers totaling \$2,138,600 to the City of Twentynine Palms, or 12.59% of transferred assets. These assets must be turned over to the Successor Agency.

Details of our finding are described in the Finding and Order of the Controller section of this report.

Views of Responsible Official

We issued a draft review report on May 29, 2014. Ron Peck, Acting City Manager, responded by letter dated June 13, 2014, disagreeing with the review results. The City’s response is included in this final review report as an attachment.

Restricted Use

This report is solely for the information and use of the City of Twentynine Palms, the Successor Agency, the Oversight Board, and the SCO; it is not intended to be and should not be used by anyone other than these specified parties. This restriction is not intended to limit distribution of this report, which is a matter of public record when issued final.

Original signed by

JEFFREY V. BROWNFIELD, CPA
 Chief, Division of Audits

July 30, 2014

Finding and Order of the Controller

**FINDING—
Unallowable asset
transfers to the
City of Twentynine
Palms**

The Twentynine Palms Redevelopment Agency (RDA) made unallowable asset transfers of \$2,138,600 to the City of Twentynine Palms (City). All of the asset transfers to the City occurred after January 1, 2011, and the assets were not contractually committed to a third party prior to June 28, 2011.

Unallowable asset transfers were as follows:

- On March 22, 2011, the RDA transferred \$2,011,750 in cash assets to the City. The transfer was for principle and interest payments on an inter-agency loan.
- On March 22, 2011, the RDA transferred \$126,850 in cash assets to the City. The transfer was payment on a land purchase made on April 29, 2009.

Pursuant to Health and Safety (H&S) Code section 34167.5, the RDA may not transfer assets to a city, county, city and county, or any other agency after January 1, 2011.

Order of the Controller

Pursuant to H&S Code section 34167.5, the City is ordered to reverse the transfers of \$2,138,600 and turn over to the Successor Agency. The Successor Agency is directed to properly dispose of those assets in accordance with H&S Code section 34177 (d) and (e).

City’s Response

The City disagreed with Draft Report finding.

The City stated that the RDA’s \$2,011,750 million loan payment to the City was a lawful and valid payment that cannot lawfully be reversed by the SCO’s Asset Transfer Review Audit. The City also stated that the RDA’s payment of \$126,850 to the City for the purchase of the Donnell Hill property is not subject to clawback under H&S Code section 34167.5.

See Attachment 1 for the City’s complete response.

SCO Comment

The SCO’s authority under H&S Code section 34167.5 extends to all assets transferred after January 1, 2011, by the RDA to the city or county, or city and county that created the RDA or any other public agency. This responsibility is not limited by the provisions cited by one City.

The Successor Agency received a Department of Finance Finding of Completion, so the Successor Agency may place loan agreements between the RDA and the City on the Recognized Obligation Payment Schedule, as an enforceable obligation, provided that the Oversight Board finds that the loan was for legitimate redevelopment purposes.

The Finding and Order of the Controller remain as stated.

**Schedule 1—
Unallowable Asset Transfers to
the City of Twentynine Palms
January 1, 2011, through January 31, 2012**

	Amount
Unallowable asset transfers to the City of Twentynine Palms:	
Cash- principle and interest on interagency loan (3/22/2011)	\$ 2,011,750
Cash- payment on land purchase (3/22/2011)	126,850
Total asset transfers subject to H&S Code section 34167.5	\$ 2,138,600

**Attachment—
City of Twentynine Palms' Response to
Draft Review Report**

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Cora Heiser
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Acting City Manager
Ron Peck

June 13, 2014

VIA OVERNIGHT DELIVERY
WITH COPY VIA US. CERTIFIED MAIL. RETURN RECEIPT REQUESTED
AND WITH COPY WITHOUT EXHIBITS VIA EMAIL

Elizabeth Gonzalez
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California State Controller

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RE: **City of Twentynine Palms and Twentynine Palms Successor Agency's Response to SCO's Draft Asset Transfer Review Audit Transmitted to Twentynine Palms by Letter Dated May 29, 2014 and Received on June 5, 2014**

Dear Ms. Gonzalez:

I serve as Interim Community Development Director for the City of Twentynine Palms ("City"). In that capacity, I also oversee the Successor Agency to the Twentynine Palms Redevelopment Agency ("Twentynine Palms Successor Agency"). I am in receipt of Jeffrey V. Brownfield's letter to the former City Manager, Joe Guzzetta, dated May 29, 2014, sent by certified mail. The City received his letter on June 5, 2014.

Enclosed with Mr. Brownfield's letter was a *draft* Asset Transfer Review Report (the "**Draft Report**") of the review the State Controller's Office ("SCO") conducted pursuant to Health and Safety Code Section 34167.5¹ of all "asset transfers"² made by the former Twentynine Palms Redevelopment Agency ("RDA") to the City or any other public agency after January 1, 2011."

¹ Unless otherwise specified, all further section references are to the Health and Safety Code.

² As discussed later in this response, Section 34167.5 does not define the phrase "asset transfer" or either the words "asset" or "transfer" and does not state what constitutes an "asset transfer."

The Draft Report identifies certain transactions made by the RDA between January 1, 2011 and January 31, 2012, which the SCO asserts includes certain unallowable transfers totaling \$2,138,600. The SCO asserts these assets must be turned over to the Successor Agency for disposition. As set forth in this response (“**Response**”),³ the City and Twentynine Palms Successor Agency (collectively “**Twentynine Palms**”) dispute the SCO’s conclusions. The Draft Report contains both factual and legal errors that undermine its conclusions and Twentynine Palms urges the SCO to correct these errors and findings before the SCO issues its final report (“**Final Report**”).

I. SCO FINDING 1 – UNALLOWABLE ASSET TRANSFERS TO THE CITY OF TWENTYNINE PALMS

The Draft Report, on page 4 (and as summarized in Mr. Brownfield’s letter and in the first few pages of the Draft Report), asserts the RDA transferred \$2,138,600 in cash to the City and none of those assets were contractually committed to a third party prior to June 28, 2011. The total of \$2,138,600 was identified as consisting of two (2) items:

- (1) “Cash-principle and interest on interagency loan (3/22/2011)” in the amount of \$2,011,750. (Draft Report, p. 4.)
- (2) “Cash-payment on land purchase (3/22/2011)” in the amount of \$126,850. (Draft Report, p. 4.)

Twentynine Palms responds as follows:

A. The RDA’s \$2,011,750 Million Loan Payment to the City Was a Lawful and Valid Payment and Cannot Lawfully Be Reversed by the SCO’s Asset Transfer Review Audit

On July 14, 2009, the City entered into a Loan Agreement with the RDA, whereby it agreed to advance \$2,000,000.00 to the RDA so that the RDA could proceed with funding several important projects, whose costs exceeded the tax increment the RDA had on hand at the time the projects were proposed (the “**Loan**” or “**Loan Agreement**”). The RDA, in return, agreed to repay the funds loaned by the City with interest. A true and correct copy of the Loan Agreement and the City Council and RDA Resolutions approving the Loan Agreement are attached hereto as **Exhibit A**.⁴

This Loan Agreement is a valid agreement and arrangement between separate public agencies,⁵ entered into pursuant to California law, and supported by consideration after an offer and acceptance had been negotiated by the City and RDA for the advance of money by the City to the RDA and terms of repayment by the RDA to the City. No coercion or duress was involved with the negotiations or decisions, and none of the terms were unconscionable. The Loan by the City to the RDA did not violate the debt limit of the City.

³ This Response is timely submitted within 10 calendar days of my receipt on June 5, 2014, of Mr. Brownfield’s letter.

⁴ True and correct copies of all of the exhibits cited in this letter are attached hereto and incorporated herein by reference.

⁵ The City and RDA are separate legal entities. (See, *Pacific States Enterprises v. City of Coachella* (1993) 3 Cal. App. 4th 1414, 1424 [“Well-established and well-recognized case law holds that the mere fact that the same body of officers acts as the legislative body of two different governmental entities does *not* mean that the two different governmental entities are, in actuality, one and the same.”].)

1. **An SCO Order to Return the Loan Payment to the Successor Agency Violates the California Constitution as Amended by Proposition 22**

The SCO may not order the City to return the Loan Payment to the Successor Agency as an "unpermitted transfer" because the Legislature lacked the constitutional authority to enact a law that would result in the SCO's proposed order.

Proposition 22, adopted by the California voters in 2010, amended the State's Constitution to provide in pertinent part:

The Legislature shall not...[r]equire a community redevelopment agency to pay, remit, loan, or otherwise transfer, directly or indirectly, taxes on ad valorem real property and tangible personal property allocated to [a redevelopment] agency pursuant to Section 16 of Article XVI to or for the benefit of the State, any agency of the State, or any jurisdiction.

(Cal. Const., art. XIII, s. 25.5(a)(7).)

The purpose of Proposition 22 was to prohibit the State from requiring redevelopment agencies to shift their funds to schools or other agencies, and to eliminate the Legislature's authority to redirect a redevelopment agency's property taxes to any other local government.

The California Supreme Court's decision in *California Redevelopment Association v. Matosantos* (2011) 53 Cal.4th 231, concluded:

Proposition 22's limit on state restrictions of redevelopment agencies' use of their funds is best read as limiting the Legislature's powers during the operation, rather than the dissolution, of redevelopment agencies. Thus...those taxes so allocated to an operating redevelopment agency may not be restricted to the benefit the state by any further legislation.

(*Id.*, at p. 263.)

The text of Proposition 22 and *CRA v. Matosantos* case establish that the Legislature cannot, directly or indirectly, reallocate tax increment paid or otherwise transferred by the RDA to the City or any other entity prior to the RDA's dissolution. By ordering a return of tax increment, which had been allocated to the RDA to pay an indebtedness owed to the City prior to the enactment (indeed, consideration) of Assembly Bill 26 from the 2011-12 First Extraordinary Session of the Legislature ("ABx1 26"), the SCO is unconstitutionally ordering a reallocation of RDA tax increment for the benefit of the State.

2. **No Legislative Intent to Appropriate the City's General Funds.**

Section 1 of ABx1 26 sets forth the Legislature's findings and declarations in enacting ABx1 26. The findings describe the increasing shift of property taxes away from the various taxing agencies that has resulted from the growth and expansion of redevelopment agencies (See, ABx1 26, Section 1(e), (f), & (g).) In passing ABx1 26, the Legislature, in Section 1(j), expressly stated that its intent was to:

(1) Bar existing redevelopment agencies from incurring new obligations, prior to their dissolution.

(2) Allocate property tax revenues to successor agencies for making payments on indebtedness incurred by the redevelopment agency prior to its dissolution and allocate remaining balances in accordance with applicable constitutional and statutory provisions.

(3) Beginning [February 1, 2012], allocate these funds according to the existing property tax allocation within each county to make the funds available for cities, counties, special districts, and school and community college districts.

Based on the expressly-stated intent of the Legislature, as set forth above, it was *not* the Legislature's intent to appropriate general fund monies from cities and counties, which would be the effect of disallowing the repayment of loans made by a host city or county to its redevelopment agency.

As a corollary (or even alternative) to the constitutional protection established by Proposition 22 (discussed above), if the money ordered to be returned by the SCO were *not* deemed tax increment—an assumption that the Successor Agency does not advocate based on the timing of the repayment of the Loan—then the City still has constitutional protection that prohibits the SCO from ordering the \$2,011,750 (or at least the \$2,000,000 principal) to be distributed to other taxing entities by returning that amount to the Successor Agency.

The City loaned *general fund* monies to the RDA. It was *City* money. Neither the fact of the City Loan nor the RDA's receipt and expenditure of those funds transformed those funds into tax increment. The source for general fund monies is general taxes imposed on all residents of the City, while tax increment is *not* a general levy on the City's residents. Because the outstanding loan amounts owed by the RDA were general funds, disallowing the payment of those funds to the City, and requiring the funds to instead be transferred to the county auditor-controller for distribution to the taxing entities, is a *direct appropriation* of City general fund monies. Such an appropriation violates Article XIII of the California Constitution, Sections 24(b) and 25.5(a)(1), (2) & (3).

Because the Legislature in passing ABx1 26 did not intend to appropriate general fund monies from cities and counties but rather intended to shift the allocation of *unobligated* tax increment, the Loan Payment to the City is legally valid under ABx1 26 and AB 1484, and is not subject to an order of reversal by the SCO.

3. Use of the City's Property Tax and Sales and Use Tax Revenues Are Constitutionally Protected.

Similarly, because the Loan Payment is considered City general funds, constitutional provisions prohibit the distribution of the funds used to pay the Loan Payment to other taxing entities for the benefit of the State.

With the adoption by the voters of Proposition 1A in 2004, certain provision in Article XIII, Section 25.5 of the California Constitution were added to ensure that the percentage allocation of sales and use taxes and ad valorem property taxes to local taxing agencies were not decreased from the percentages that were established in November 2004. Specifically, the constitutional requirements are, in pertinent part:

(a) On or after November 3, 2004, the Legislature shall not enact a statute to do any of the following:

(1) . . . modify the manner in which ad valorem property tax revenues are allocated in accordance with subdivision (a) of Section 1 of Article XIII A so as to reduce for any fiscal year the percentage of the total amount of ad valorem property tax revenues in a county that is allocated among all of the local agencies in that county below the percentage of the total amount of those revenues that would be allocated among those agencies for the same fiscal year under the statutes in effect on November 3, 2004. . . .

(2)(A) . . . restrict the authority of a city, county, or city and county to impose a tax rate under, or change the method of distributing revenues derived under, the Bradley-Burns Uniform Local Sales and Use Tax Law set forth in Part 1.5 (commencing with Section 7200) of Division 2 of the Revenue and Taxation Code, as that law read on November 3, 2004.

...

(3) . . . change for any fiscal year the pro rata shares in which ad valorem property tax revenues are allocated among local agencies in a county other than pursuant to a bill passed in each house of the Legislature by roll call vote entered in the journal, two-thirds of the membership concurring. . . .

(Cal. Const., art. XIII, § 25.5.)

Additionally, in 2010, the voters approved Proposition 22, which among other provisions amended Article XIII, Section 24 of the California Constitution to add subdivision (b), which reads:

The Legislature may not reallocate, transfer, borrow, appropriate, restrict the use of, or otherwise use the proceeds of any tax imposed or levied by a local government solely for the local government's purpose.

Relevant to the Loan Agreement and the Loan Payment at issue here, the City's general fund is comprised of sales and use tax revenue and ad valorem property tax revenue (*not* tax increment), portions of which are specifically dedicated for the City. Thus, on both the "front" and "back" ends of the Loan transaction—the "front" end being the City's loaning of funds from the general fund, and the "back" end being the Loan Payment to the City and the retention of those funds by the City—the Legislature may not change the City's percentage allocation of these tax revenues: No authority exists under Article XIII, Sections 24(b) and 25.5(a)(2) to reallocate sales and use tax revenue allocations of the City here, and no ability exists under Article XIII, Section 25.5(a)(1) & (3) because neither AB126 nor AB 1484 passed with a 2/3 majority.

If a State agency were to require the City to turn over amounts equal to the Loan Payment, the State essentially would be ordering a reallocation of the City's sale and use/property taxes to other taxing entities. Such an order violates Article XIII, Sections 24(b) and 25.5(a)(1), (2) & (3).

4. **The RDA's Loan Payment Was a Fully Performed Act That Was Not Timely Challenged Within The Statutory Limitations Period**

The RDA, on or about March 22, 2011, made a \$2,011,750 payment on the principal and interest owed under the terms of the Loan Agreement (the "Loan Payment"). That Loan Payment was made *more than three months before* AB1x26 was adopted. The Loan Payment was a fully performed and executed act pursuant to the Loan which is a prior contractual obligation. The Loan is an evidence

of indebtedness under applicable State law, including Government Code section 53511. No party or any other person filed any validation action challenging either the Loan within 60 (or 90) days after the City and the RDA entered into the Loan and thus the Loan and all of its terms, including the RDA's right to make the Payment, is lawful, final, and binding and cannot be reversed by Section 34167.5.

5. The RDA's Loan Payment Was Not an "Asset Transfer" Under §34167.5

Section 34167.5 provides, in pertinent part:

. . . the Controller shall review the activities of redevelopment agencies in the state to determine whether an asset transfer has occurred after January 1, 2011, between the city . . . that created a redevelopment agency or any other public agency, and the redevelopment agency. If such an asset transfer did occur during that period and the government agency that received the assets is not contractually committed to a third party for the expenditure or encumbrance of those assets, to the extent not prohibited by state and federal law, the Controller shall order the available assets to be returned to the redevelopment agency or, on or after [February 1, 2012], to the successor agency. . .

The SCO asset transfer review process is intended to determine assets transferred by the former redevelopment agency for no consideration, such as where an asset was transferred to the host city or county, or other public agency, for the sole purpose of transferring title, with the intent to insulate the asset from the requirements of ABx1 26.

The Loan Payment to the City was not a "transfer" for purposes of Section 34167.5. In making the Loan Payment under the Loan, the RDA did not transfer funds to the City without any consideration (as defined under black-letter contract law).

The Loan Payment similarly is not a "transfer" under any other provision of law. Section 1039 of the Civil Code defines "transfer" as "an act of the parties, or of the law, by which the title to property is conveyed from one living person to another." The funds that constituted the principal when loaned by the City to the RDA, and the funds, when repaid with interest by the RDA to the City, constitute the *City's* funds. Because the funds loaned by the City to the RDA pursuant to the Loan Agreement were never *owned* by the RDA, those funds were not an asset of the RDA. As such, the RDA could not convey title to those funds. When the City loaned the funds to the RDA, title to the funds remained with the City. (See, *In re Marriage of Lotz* (1981) 120 Cal. App. 3d 379, 386-387 [funds borrowed by husband from the husband and wife's closely held corporation was an asset of the corporation, and not a sum owed the community estate].)

In making the Loan Payment, the RDA repaid principal and interest on a debt it owed to the City with funds that, under Article XVI, Section 16 of the California Constitution and the CRL (at §33670(b)), were encumbered to repay an indebtedness of the RDA. A redevelopment agency's financial obligations to other public agencies constitute "indebtedness" of the redevelopment agency, which entitles the other public agencies – in this case the City – to repayment from the redevelopment agency's available tax increment revenues. (See, Cal. Const., art. XVI, § 16; §§ 33670, 33675 [tax increment provisions]; *Marek v. Napa Community Redevelopment Agency* (1988) 46 Cal.3d 1070, 1087.)

Moreover, the SCO's purported definition of the terms "Asset" and "Transfer of Assets" set forth in the SCO's letter to County Auditor-Controllers dated May 29, 2014, has no force of law. The SCO has not adopted any regulations or rulemaking through required processes, including under the

Administrative Procedure Act and implementing regulations (1 C.C.R. §1 *et seq.*) (“APA”). The exception to the application of APA under Government Code §11340.9(e) [exception for “A regulation that establishes criteria or guidelines to be used by the staff of an agency in performing an audit, investigation, examination, or inspection,”] does not apply in this case because none of the criteria set forth in paragraph (1) through (3) of subdivision (e) apply.

The SCO, therefore, cannot rely on the definitions it created without following the required regulatory or rulemaking process, and then base an “unallowable transfer” finding on those self-created definitions.

6. The Independent Auditor Performing the “Other Funds & Account Due Diligence Review Did Not Identify The \$2,011,750 Million Loan Payment as an Asset Transfer

AB 1484, effective June 27, 2012, established a due diligence review (“DDR”) process (§§34179.5, 34179.6) in furtherance of Section 34177, subdivision (d), which provides in pertinent part that successor agencies are required to: “Remit *unencumbered* balances of [RDA] funds to the county auditor-controller for distribution to the taxing entities, including, but not limited to, the unencumbered balance of the Low and Moderate Income Housing Fund of a former redevelopment agency.” (Emphasis added.)

The DDR process required successor agencies to hire independent licensed accountants approved by county auditor-controllers to review the assets of the dissolved RDAs in order to identify *unobligated and unencumbered* balances of “cash or cash equivalents” previously held by the RDA in either the Low and Moderate Income Housing Fund or any “Other Funds and Accounts” (“OFA”), which, upon the dissolution of redevelopment agencies, would be available for distribution to the taxing entities. (§34179.5(a).)

Pertinent to the discussion here is the fact that as part of the DDR process, the independent accountant retained was required to review the dollar value of all assets and cash or cash equivalents “transferred” from the former RDA to the city that formed the RDA, or any other public entity or private party, between January 1, 2011 and June 30, 2012. (§34179.5(c).)⁶ In other words, the independent auditor was required to review the same so-called “transfers” the SCO is reviewing pursuant to Section 34167.5 and which is at issue in the Draft Report.

Critical to the analysis is that nowhere in Section 34167.5—the provision of ABx1 26 on which the SCO is relying—did the Legislature define the term “asset transfer” or either of those words individually. The Legislature, however, did define terms as part of AB 1484 and a court would turn—as your office should turn—to those definitions.

AB 1484 imposes a specific definition of “transferred” to be applied when an accountant or auditor performing the DDR determines whether any specific assets, cash, or cash equivalents should be included in the calculation of funds available for remittance to the taxing entities. (*See*, §§ 34179.5(c)(1)-(6), 34179.6(c).) Specifically, Section 34179.5(b)(3) defines “transferred” for purposes of the DDR as:

⁶ For any assets or cash or cash equivalents that were transferred by the RDA to the city that formed it, the DDR “shall provide documentation of any enforceable obligation that required the transfer.” (§34179.6(c)(2), (c)(3).)

[t]he transmission of money to another party that is not in payment for goods or services or an investment or where the payment is de minimus. Transfer also means where the payments are ultimately merely a restriction on the use of the money.

AB 1484 also imposes a specific definition of the term “enforceable obligation” for purposes of the DDR, as including three categories, *any one of which* may apply:

- (1) *any of the items listed in Section 34171(d);*⁷
- (2) contracts detailing specific work to be performed that were entered into by the former redevelopment agency prior to June 28, 2011, with a third party that is other than the city, county, or city and county that created the former redevelopment agency; and
- (3) indebtedness obligations as defined in Section 34171(e).

The Twentynine Palms Successor Agency hired the independent accounting firm of Rogers, Andersen, Malody & Scott (“RAMS”) to prepare the OFA DDR. RAMS was a firm that was approved by the San Bernardino County Auditor-Controller. A copy of the OFA DDR is attached hereto as **Exhibit B**.

RAMS, over a period of several weeks, conducted an exhaustive review of the RDA’s and Twentynine Palms’ Successor Agency’s assets, cash, and cash equivalents. The results of MGO’s review of these assets, cash, and cash equivalents were detailed in text and in numerous spreadsheets in the OFA DDR. (See, generally, **Exhibit B**.)

RAMS did not include the Loan Payment as an “asset transfer” in the OFA DDR because it did not constitute an “asset transfer” comprised of “cash or cash equivalents” available for remittance to the Auditor-Controller. Rather, the Loan Payment was made pursuant to an enforceable obligation between the RDA and the City.

The Oversight Board to the Twentynine Palms Successor Agency (“Oversight Board”)—comprised in part by some of the taxing agencies that would receive funds available for disbursement from the Loan Payment at issue here—held a public meeting and discussed the conclusions of the OFA DDR. At the public meeting, the Oversight Board voted unanimously to approve the OFA DDR as presented and made no adjustment to the conclusions. (§34179.6(c).) A copy of Oversight Board Resolution No. 13-06 is attached hereto as **Exhibit C**.

The OFA DDR was timely submitted to the Department of Finance (“DOF”) and after an initial determination and a meet and confer session, DOF issued its final determination. A copy of DOF’s initial and final determination letters on the OFA DDR, dated May 29, 2013, and July 3, 2013, respectively, are attached hereto as **Exhibit D**.

⁷ Two clauses of Section 34171(d)(1) apply to define the Loan, and thus the Payment pursuant to the Loan, as an enforceable obligation. Section 34171(d)(1)(B) defines “enforceable obligation” as including “Loans of moneys borrowed by the redevelopment agency for a lawful purpose, to the extent they are legally required to be repaid pursuant to a required repayment schedule or other mandatory loan terms.” Section 34171(d)(1)(E) defines “enforceable obligation” as including “Any legally binding and enforceable agreement or contract that is not otherwise void as violating the debt limit or public policy.”

7. **SCO, Through an Audit Process Under ABx1 26 or Otherwise, Cannot Invalidate or Reverse the Loan Payment Made Pursuant to the Loan Which, As a Matter of Law, Is Deemed Valid For All Time.**

At the time the Loan was approved in 2009, applicable law provided (and still provides) that any challenge to the validity of the warrants, contracts, obligations, or other evidence of indebtedness of the RDA to the City had to be brought within 60 days of the date of the action approving such indebtedness. (Gov. Code §§ 53510, 53511; Code Civ. Proc. §§860-870.5; *City of Ontario v. Superior Court of San Bernardino County* (1970) 2 Cal.3d 335, 341-344.) The Loan, as a City/RDA contract, obligation, and evidence of indebtedness—which committed RDA tax increment and other funds for repayment—falls squarely within this ambit of local agency “financial obligations” that are subject to the validation/reverse validation action statutes. (See, e.g., *City of Ontario, supra*, 2 Cal.3d at 344; *City of Cerritos v. Cerritos Taxpayers Assn.* (2010) 183 Cal.App.4th 1417, 1423, 1427-1428 & fn.3; *McLeod, supra*, 158 Cal.App.4th at 1160, 1169-1170; see also, Code Civ., Proc. §864.) As such, challenges to the City’s loan to the RDA pursuant to the Loan and the RDA’s repayment obligation under the Loan—including the Loan Payment at issue here—could only be brought within the 60-day limitations period and none were timely brought. As such, any attempt to invalidate the Loan and the Loan Payment, including by the SCO, is forever barred.

In *City of Ontario*, the California Supreme Court explained that, when public agency actions are subject to the validation provisions in Code of Civil Procedure Section 860 *et seq.*, “an agency may indirectly but effectively ‘validate’ its action *by doing nothing to validate it*; unless an ‘interested person’ brings an action of his own under *section 863* within the 60-day period, the agency’s action will become immune from attack whether it is legally valid or not.” (2 Cal.3d at 341-342; see also *McLeod, supra*, 158 Cal.App.4th at 1169.) On the flip side, if a “validation action” is timely brought by a public agency, or a “reverse validation action” is timely brought by any other interested person, the final adjudication of that action is “forever binding and conclusive” as to all matters adjudicated *or that could have been adjudicated*, and on all parties *and all other interested persons*. (Code Civ. Proc. §§869, 870; see also, *Cerritos, supra*, 183 Cal.App.4th at 1428-1429.)

The purpose behind the short limitations period is “to further the important policy of speedy determination of the public agency’s action.” (*McLeod, supra*, 158 Cal.App.4th at 1166.) If either the RDA were continuously subject to challenge for borrowing the City’s funds, or the City were continuously susceptible to challenge (as it is now by the SCO) for not being repaid, then both agencies would be impeded in their ability to operate based on the reliance of those funds being available under the agreed upon terms. (*Id.* at 1169.)

The SCO like all other “interested persons” under the validation statutes, are bound by the longstanding validity of the Loan. (Code Civ. Proc. §§869, 870; see also, *Moorpark Unified Sch. Dist. v. Superior Court of Ventura County* (1990) 223 Cal.App.3d 954, 956, 959 [county and school district all “interested parties” under validation statute].) Indeed, the CRL expressly provided (and still provides) that, “[f]or the purpose of protecting the interests of the state, the Attorney General and [DOF] are interested persons pursuant to Section 863 of the Code of Civil Procedure” (§ 33501(d); see also, 41A West’s Ann. HSC (1999 ed.) former § 33501(b) [DOF is an “interested person” to protect the interests of the State].) SCO cannot now, through the “asset transfer review audit” under the Dissolution Act or otherwise, invalidate loan repayments made under the terms provided in Loan which, as a matter of law, is deemed valid for all time. (*City of Ontario, supra*, 2 Cal.3d at 341-342; *McLeod, supra*, 158 Cal.App.4th at 1169.)

8. **The Loan, and thus the Payment, Are Enforceable Obligations Under Applicable CRL Provisions Prior to ABx1 26 and Are Enforceable Obligations under Applicable Provisions in ABx1 26 and AB 1484**

a. **The Loan and Payment Are Enforceable Obligations Under The Pre-ABx1 26 CRL Which Was In Force When the Payment Was Made**

At the time the RDA made the Loan Payment in accordance with the Loan Agreement, the payment was pursuant to an enforceable contract committing repayment of dedicated tax increment funds pursuant to controlling constitutional, statutory, and case authority. (See, Cal. Const., art. XVI, § 16; §§ 33670, 33675; *CRA*, 53 Cal.4th at 245-248; *City of Dinuba v. County of Tulare* (2007), 41 Cal.4th 859, 866; *Marek*, 46 Cal.3d at 1087; and *Pacific States Enterprises*, 13 Cal.App.4th at 1424.)

It cannot be emphasized enough: *at the time of the Loan Payment, ABx1 26 had not been enacted*. In fact, at the time of the Loan Payment, the operative language eventually adopted in ABx1 26 had not even been introduced or considered by the Legislature. Rather, ABx1 26 first appeared on June 14, 2011⁸ and then was signed into law by the Governor the evening of June 28, 2011.

b. **The Loan Agreement and Loan Payment Are Enforceable Obligations Under ABx1 26**

The provisions of ABx1 26 that took effect immediately were in Part 1.8 of Division 24 of the Health and Safety Code (“**Part 1.8**”). Section 34167.5—*the section under which the Controller conducted the asset transfer audit and issued the Draft Report*—is contained within Part 1.8.

Part 1.8 is commonly referred to as the “suspension” provisions. As the name implies, Part 1.8 suspended the powers and authorities of all redevelopment agencies, including the ability to adopt new redevelopment plans or plan amendments, issue new bonded indebtedness, and enter into new contracts or incur new obligations. (§§ 34162(a), 34163(a) & (b), 34164(a).) In contrast to those provisions, however, Part 1.8 clearly provides that, “[n]othing in this part shall be construed to interfere with a redevelopment agency’s authority, pursuant to enforceable obligations *as defined in this chapter*, to (1) make payments due, (2) enforce existing covenants and obligations, or (3) perform its obligations.” (§ 34167(f), emphasis added.) Part 1.8 defined “enforceable obligations” in Section 34167(d) as follows:

For purposes of this part, “enforceable obligation” means any of the following:

- ...
- (2) Loans of moneys borrowed by the redevelopment agency for a lawful purpose, including, but not limited to, moneys borrowed from the Low and Moderate Income Housing Fund, to the extent they are legally required to be repaid pursuant to a required repayment schedule or other mandatory loan terms.
- ...
- (5) Any legally binding and enforceable agreement or contract that is not otherwise void as violating the debt limit or public policy.

⁸ A blank “spot bill” denominated as ABx1 26 was introduced on May 19, 2011 but contained no substantive provisions. All of what we know as ABx1 26 appeared by amendment in the Senate on June 14, 2011.

Because the Loan fits within the definition of “enforceable obligation” under the suspension provisions (e.g., Part 1.8) of ABx1 26, the RDA was fully authorized to make a payment until such date as the RDA no longer existed and no longer could perform existing enforceable obligations; *i.e.*, until February 1, 2012, the dissolution date set by the California Supreme Court in the *CRA v. Matosantos* case.

Under well-settled principles of statutory construction, the plain meaning of the two different definitions of “enforceable obligation” controls. (*Miklosy v. Regents of University of Cal.* (2008) 44 Cal.4th 876, 888 [“If the statutory language is unambiguous, we presume the Legislature meant what it said, and the plain meaning of the statute controls. [Citation.] We consider extrinsic aids, such as legislative history, only if the statutory language is reasonably subject to multiple interpretations.”]; *Halbert’s Lumber v. Lucky Stores* (1992) 6 Cal.App.4th 1233, 1238-1239 [“If the meaning is without ambiguity, doubt, or uncertainty, then the language controls. . . . There is nothing to ‘interpret’ or ‘construe.’”].) The Loan Agreement is an enforceable obligation under the plain meaning of the applicable sections of Part 1.8 and the RDA was fully authorized to make the Loan Payment.

Even if there were some ambiguity, general principles of statutory construction still would lead to the same conclusion. “It is a settled rule of statutory construction that where a statute, with reference to one subject contains a given provision, the omission of such provision from a similar statute concerning a related subject is significant to show that a different legislative intent existed with reference to the different statutes.” (*Los Angeles County Metropolitan Trans. Auth. v. Alameda Produce Market, LLC* (2011) 52 Cal.4th 1100, 1108-1109; *In re Jennings* (2004) 34 Cal.4th 254, 273.) A similar “cardinal rule” of statutory construction is that courts may not add provisions to a statute that do not exist. (*Los Angeles County* 52 Cal.4th at 1108-1109.) Had the Legislature intended city/agency agreements to be unenforceable during the “suspension” period of redevelopment agencies, or prior thereto, the Legislature would have expressly said so.

Moreover, any reliance by the SCO on the definition of “enforceable obligation” under Part 1.85 of Division 24 of the Health and Safety Code (“**Part 1.85**”), commonly known as the “dissolution” provisions, to reject the loan repayment would be unavailing.⁹ In Part 1.85, the definition of enforceable obligation includes: “Loans of moneys borrowed by the redevelopment agency for a lawful purpose to the extent they are legally required to be repaid pursuant to a required repayment schedule or other mandatory loan terms.” (§ 34171(d)(1)(B).)

We note that Part 1.85 also contains the following “two-year carve-out” language:

For purposes of this part, “enforceable obligation” does not include any agreements, contracts, or arrangements between the city, county, or city and county that created the redevelopment agency and the former redevelopment agency. . . . Notwithstanding this paragraph, loan agreements entered into between the redevelopment agency and the city, county, or city and county that created it, within two years of the date of creation of the redevelopment agency, may be deemed to be enforceable obligations. (§ 34171(d)(2).)

As it happens the Loan also fits the definition of “enforceable obligation” under Part 1.85, whether the definition is analyzed by its plain meaning or for legislative intent. Under a “plain

⁹ Neither the definition of “enforceable obligation” in Part 1.8 nor in Part 1.85 was amended by AB 1484.

meaning” analysis, the Loan is an enforceable obligations under two independent paragraphs of Section 34171(d)(1):

- Section 34171(d)(1)(B), which defines “enforceable obligation” as including “Loans of moneys borrowed by the redevelopment agency for a lawful purpose, to the extent they are legally required to be repaid pursuant to a required repayment schedule or other mandatory loan terms,” and
- Section 34171(d)(1)(E), which defines “enforceable obligation” as including “Any legally binding and enforceable agreement or contract that is not otherwise void as violating the debt limit or public policy.

Under a legislative intent analysis, the Loan Agreement and Loan Payment are “enforceable obligations” under Part 1.85, *even if they do not satisfy the so-called two year carve-out language in Section 34171(d)(2)*. This conclusion is compelled because the Loan Agreement satisfies the criteria for an enforceable obligation in Section 34171(d)(1)(B) and in Section 34171(d)(1)(E), and these provisions stand on their own and are not subsumed, or modified, by the carve-out language in Section 34171(d)(2).

As noted by the Sacramento County Superior Court in issuing a preliminary injunction against the Department of Finance in *City of Pasadena Successor v. Matosantos*, it is impossible for an agreement to be an enforceable obligation under Section 34171(d)(1)(E) and *not* be an enforceable obligation under Section 34171(d)(2). (Sacramento County Superior Court Case No. 34-2012-00134585-CU-MC-GDS.) The court there held that the former is to be construed broadly and the latter narrowly and that the Legislature did not intend for agreements like the loan provisions of the Loan Agreement at issue here to be invalidated. The court concluded: “But for the happenstance that the City itself is a party to the [loan agreement] at issue here, there would be no dispute that §34171(d)(2) is inapplicable . . . [the Department of Finance’s] reliance on HSC section 34171(d)(2) is misplaced . . .” The same reasoning applies to the RDA’s Loan Payment to the City at issue here.

In issuing its decision, the court considered, among various other factors, the background and history surrounding the inclusion of Section 34171(d)(2) in ABx1 26. (See, *City of Pasadena Successor v. Matosantos*, Sacramento County Superior Court Case No. 34-2012-00134585-CU-MC-GDS, at p. 5.). After the Governor’s redevelopment dissolution proposal was first proposed in January 2011 and prior to June 28, 2011 when ABx1 26 was signed into law and became effective, some redevelopment agencies apparently made transfers of real property to their cities, or entered into other transactions with their cities to transfer funds, for no consideration. The Legislature obviously responded to these “no consideration” transfers of real property and other so-called “last minute” transactions by some redevelopment agencies by including Section 34171(d)(2) in the subsequently enacted ABx1 26. (*Ibid.*).

Similarly, the California Attorney General’s office itself has stated on the record that it is “far from clear” that ABx1 26 invalidates all city-redevelopment loans and that the apparent intent of those provisions of ABx1 26 was to invalidate only the “last minute” loan agreements and other arrangements between cities and their redevelopment agencies that took place after January 1, 2011. (Hearing for preliminary injunction, *City of Cerritos et al. v. State of California, et al.*, Sacramento County Superior Court Case No. 34-2011-80000952, January 27, 2012.)

Furthermore, additional recent court rulings support the position that repaid loan agreement amounts are not subject to remittance to other taxing entities as part of the analogous due diligence review process. The same legal issues involved in the RDA's Loan Payment were resolved in favor of the city in *City of Murrieta v. California Department of Finance*, Sacramento Superior Court Case No. 34-2012-80001346. On April 30, 2013, in the *City of Murrieta* case, Judge Michael P. Kenny of the Sacramento County Superior Court issued a Preliminary Injunction against the State Defendants, including the Department of Finance, blocking the Department of Finance's "clawback" of Murrieta's general fund dollars. In order to issue the Preliminary Injunction, Judge Kenny had to find a "substantial likelihood" that the City of Murrieta *will prevail on the merits of its lawsuit*. The facts underlying the RDA's Loan Payment pursuant to the Loan are almost identical to the Murrieta situation.¹⁰

9. There Is No Clear Legislative Intent to Retroactively Apply ABx1 26 to Invalidate a Performed Act Such as the Loan Payment

Apart from the constitutional issues discussed above, the doctrine of "completed acts" dictates that the Loan Payment at issue here cannot be reversed. The United States Supreme Court has either held or stated expressly that courts must not apply a statute that changes the legal consequence of completed acts without evidence of clear legislative intent to do so. (See, e.g., *Bowen v. Georgetown Univ. Hosp.* (1988) 488 U.S. 204, 208-209; see also, Kahn, Hilde E., *Completed Acts, Pending Cases, and Conflicting Presumptions: The Retroactive Application of Legislation After Bradley* (1990) 13 Geo. Mason U. L. Rev. 231, 234.)

California law follows the same principle. "It is a widely recognized legal principle . . . that in the absence of a clear legislative intent to the contrary statutory enactments apply prospectively." (*Strauss v. Horton* (2009) 46 Cal.4th 364, 470, quoting *Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1193-1194.) "California continues to adhere to the time-honored principle . . . that *in the absence of an express retroactivity provision, a statute will not be applied retroactively unless it is very clear from extrinsic sources that the Legislature or the voters must have intended a retroactive application.*" (*Strauss*, 46 Cal.4th at 470 [italics in original].)

When assessing whether a law acts retrospectively, California cases have a uniform approach:

[A] . . . retrospective law "is one which affects rights, obligations, acts, transactions and conditions which are performed or exist prior to the adoption of the statute." [Citations.] . . . "[E]very statute, which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must be deemed retrospective."

¹⁰ This analysis is consistent with the conclusion reached by the SCO in connection with at least one Asset Transfer Review completed under Section 34167.5. In its Review Report of the Milpitas Redevelopment Agency ("Milpitas Report"), covering a review of asset transfers from January 1, 2011, through January 31, 2012, the SCO does not include as an "unallowable transfer" a \$3.6 million repayment by the Milpitas Redevelopment Agency to the City of Milpitas made in January 2012 pursuant to the terms and conditions of a 2004 city/redevelopment agency loan agreement. On page 2 of the Milpitas Report, the SCO identifies a total \$175,613,510 in asset transfers, of which the SCO claims \$147,108,600 as "unallowable" transfers. Attachment 1 in the Milpitas Report does not identify, as an "unallowable" transfer, the \$3.6 million repayment. (The Milpitas Report can be accessed at the SCO's Website at <http://www.sco.ca.gov/aud_rda_asset_transfer_reviews.html>.

(*Strauss*, 46 Cal.4th at 471-472, quoting *Myers v. Philip Morris Co., Inc.* (2002) 28 Cal.4th 828, 839.)

Synthesizing these legal principles, it is beyond question that, if the \$2,011,750 payment made on March 22, 2011 were to be “undone” either by ABx1 26 or AB 1484, then the legislation would be “retroactive.” In order to be retroactive, the Legislature had to clearly *intend* for it to be retroactive. (*Strauss*, 46 Cal.4th at 470-472.)

There is no such clear and direct Legislative intent. In fact, the separate definitions of “enforceable obligations” in Parts 1.8 and 1.85, along with the lack of any specific definition of “asset transfer” applicable to Section 34167.5 (and thus “asset transfer” must be interpreted under other provisions of California law as discussed above), support the statutory construction that ABx1 26’s and AB 1484’s provisions concerning loan repayments and, as here, an associated interest payment, would *not* be retroactively applied. Indeed, Part 1.8 (where Section 34167.5 appears)—which took effect on June 28, 2011—provides that the “freeze” of redevelopment activities was intended only to preserve the *unencumbered* revenues and assets of the a redevelopment agency that are *not needed to pay for enforceable obligations*. (§ 34167(a) [emphasis added].)

If the Legislature intended to have ABx1 26 to apply retroactively—before June 28, 2011—to the *already repaid* City/RDA loan, it had to expressly say so (*Strauss*, 46 Cal.4th at 470-472) and it did not.

10. Conclusion: the Draft Report Must Be Revised to Eliminate Reference to the \$2,011,750 Million Loan Payment or Must Find The Loan Payment to Be an Allowable Transfer

For each and all of the reason set forth above, Twentynine Palms respectfully submits that the Loan Payment made by the RDA to the City was and is a lawful and valid payment that is not subject to reversal or “clawback” by the SCO under Section 34167.5.

B. The RDA’s Payment of \$126,850.00 to the City for the Purchase of the Donnell Hill Property Is Not Subject to Clawback Under Section 34167.5

The second asset transfer identified by the SCO is the “Cash-payment on land purchase (3/22/2011)” in the amount of \$126,850. (Draft Report, p. 4.) This \$126,850 payment was made by the RDA to the City in order to complete the purchase of the Donnell Hill Property, which had been sold and transferred from the City to the RDA for what was believed to be fair market value on April 28, 2009, two full years before the enactment of AB1x26. The Donnell Hill Property is currently in the possession of the Successor Agency and has been listed “for sale” on the Agency’s Long Range Property Management Plan (“LRPMP”).

The discussion set forth in Paragraph A above is incorporated herein and applies to the payment made by the RDA to the City to complete the purchase of the Donnell Hill Property, with particular notations as follows:

1. The sale of the Donnell Hill Property to the RDA was for an amount believed to be fair market value, based on market conditions when the property was transferred in 2009. The transfer of \$126,850 was not a last minute attempt to dispose of assets prior to dissolution. Rather, the *funds were used to purchase property for value* – property which is still held by the Successor Agency and for which the City will never be paid if the conclusions contained in the SCO’s draft report are not corrected.

The City sold the property to the RDA in 2009, but the RDA did not complete payment until 2011. The taxing entities will receive their pro-rata share of property tax revenues, pursuant to Health and Safety Code Section 34188 or other applicable laws, upon the sale of the property by the Successor Agency as proposed in the LRPMP. If the City is not allowed to keep the \$126,850 consideration paid for the property, then the City will suffer a “double hit,” in contradiction to the Legislature’s intent and statutory prescriptions as to how former RDA assets are to be disposed. In other words, because the sale of the property was a market-based transaction, the City should either be able to keep the \$126,850 paid for the property, or have the property returned to it, and the \$126,850 then may be properly distributed to the taxing entities based on their pro-rata shares.¹¹

2. The land transaction, including the RDA’s payment of \$126,500 on March 2011, was a fully performed and executed act consummated prior to the enactment of ABx1 26.
3. The land transaction is not a “transfer” for purposes of Section 34167.5. The SCO asset transfer review process is intended to determine assets transferred by the former redevelopment agency for no consideration.
4. The independent OFA DDR audit did not identify the land transaction as an asset transfer. The transaction was pursuant to an enforceable obligation defined in Section 34171(d)(1)(E): “Any legally binding and enforceable agreement or contract that is not otherwise void as violating the debt limit or public policy.” The OFA DDR was approved by the Oversight Board and DOF.
5. Section 34167.5 is not applicable to the land transaction because Section 34167.5 was not intended to authorize the SCO to order the reversal of completed transactions made by a redevelopment agency pursuant to an “enforceable obligation.” Section 34167(d), the section immediately preceding Section 34167.5 under which the SCO has performed the audit review, provides in paragraph (5):

“For purposes of this part [Part 1.8], “enforceable obligation” is defined to include any of the following:

(5) Any legally binding and enforceable agreement or contract that is not otherwise void as violating the debt limit or public policy.

The definition of “enforceable obligation” in Part 1.85 is the same. (§34171(d)(1)(E).)

6. The land transaction is an enforceable obligation under the law in effect prior to enactment of ABx1 26—the law applicable to the transaction. (§33430.)
7. The legislative intent analysis set forth with respect to the Loan Repayment applies with equal force to the interpretation of “enforceable obligation” with respect to the land transaction.
8. Under the doctrine of “completed acts,” There is no legislative intent to retroactively apply the provisions of ABx1 26 to invalidate the completed act of the land transaction.

¹¹ Neither the City nor the Successor Agency prefer the latter approach (the property returned to the City) because this approach would require an amendment to the LRPMP that would *remove* this property as a former RDA asset. As set forth in the LRPMP, the Successor Agency listed this property as being available for sale, and upon its sale, proceeds will be distributed in accordance with law.

9. Any "clawback" of the land transaction would violate the City's charter city status under the California constitution.
10. Any "clawback" of the land transaction violates the California Constitution as amended by Proposition 22.
11. **Conclusion:** The land transaction is not subject to clawback and the Draft Report must be revised to eliminate the transaction or identify the transaction as an allowable transfer. In the alternative, if the City is not allowed to keep the funds from the sale of the Donnell Hill Property, the Successor Agency should transfer the property back to the City. To conclude otherwise would result in the City suffering a "double hit" by losing both (1) title to the Donnell Hill Property and (2) the funds that it was supposed to receive in exchange for the property's sale. Moreover, the City will never be made "whole" because after the property is sold, the profits will be distributed to the taxing entities, rather than the City itself, in violation of applicable laws.

IV. **CONCLUSION**

For all of the reasons set forth above, Twentynine Palms respectfully submits that the Draft Report is in error both factually and legally and must be revised and corrected to show that no unallowable transfers occurred.

We recognize there may be differences of opinion as to certain issues, but certainly a Report based on erroneous information and application of incorrect legal standards, as is the Draft Report, serves no purpose.

Please contact either myself or Ron Peck, Interim City Manager, with any questions or requests for additional documents. We also would be pleased to have the opportunity to meet with you prior to issuance of the Final Report in order to address any ongoing concerns.

Thank you for cooperation.

Very truly yours,



Matt McCleary
Interim Community Development Director, City of
Twentynine Palms

cc: Richard J. Chivaro, Chief Legal Counsel, SCO (via overnight delivery)
Jeffrey W. Brownfield, Chief, Division of Audits, SCO (via overnight delivery)
Betty J. Moya, Audit Manager, Division of Audits, SCO (via overnight delivery)
Venus Sharifi, Auditor-in-Charge, Division of Audits, SCO (via oversight delivery)
Tuan Tran, Auditor, Division of Audits, SCO (via overnight delivery)

Attachments:

Exhibit A	City-RDA Loan Agreement, Resolutions, and Staff Report
Exhibit B	OFA DDR
Exhibit C	Oversight Board Resolution No. 13-06
Exhibit D	DOF Determination Letters (OFA DDR)

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