NOVATO REDEVELOPMENT AGENCY

ASSET TRANSFER REVIEW

Review Report

January 1, 2011, through January 31, 2012

JOHN CHIANG
California State Controller

December 2013

JOHN CHIANG
California State Controller

December 4, 2013

Michael S. Frank, City Manager
City of Novato/Successor Agency
75 Rowland Way #200
Novato, CA 94945

Dear Mr. Frank:

Pursuant to Health and Safety Code section 34167.5, the State Controller's Office reviewed all asset transfers made by the Novato Redevelopment Agency to the City of Novato 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 it should be turned over to the Novato Redevelopment 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 of assets to the City of Novato or any other public agencies have been reversed.

Our review found that the Novato Redevelopment Agency transferred $38,980,502 in assets. These included unallowable transfers of assets to the City of Novato totaling $6,100,000, or 15.65%, that must be turned over to the Successor Agency.

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

Sincerely,

Original signed by

JEFFREY V. BROWNFIELD, CPA
Chief, Division of Audits

JVB/kw

Attachment

cc: Roy Given, Director of Finance
Marin County
Brian Cochran, Finance Manager
City of Novato
Matthew Hymel, City of Novato Successor Agency Oversight Board Chair
City of Novato
David Botelho, Program Budget Manager
California Department of Finance
Richard J. Chivaro, Chief Legal Counsel
State Controller's Office
Elizabeth Gonzalez, Bureau Chief
Division of Audits, State Controller's Office
Betty Moya, Audit Manager
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Mathew Rios, Auditor
Division of Audits, State Controller's Office

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Asset Transfer Review Report

Summary

The State Controller's Office (SCO) reviewed the asset transfers made by the Novato 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 $38,980,502 in assets. These included unallowable transfers of assets to the City of Novato totaling $6,100,000, or 15.65%, that 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 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 Code (H&S Code) beginning with section 34161.

In accordance with the requirements of H&S Code section 34167.5, the State Controller is required to review the activities of RDAs, "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," and the date on which the RDA ceases to operate, or January 31, 2012, whichever is earlier.

The SCO has identified transfers of assets that occurred after January 1, 2011, between the Novato RDA, the City of Novato, and/or other public agencies. 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 order 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 operations and procedures.
- Reviewed meeting minutes, resolutions, and ordinances of the City of Novato, the RDA, and the City Council of Novato.
- 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 RDA transferred $38,980,502 in assets. These included unallowable transfers of assets to the City of Novato totaling $6,100,000, or 15.65%, that must be turned over to the Successor Agency.

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

Views of Responsible Official

We issued a draft review report on August 12, 2013. Michael S. Frank, City Manager, responded by letter dated August 26, 2013, disagreeing with the review results. The City's response is included in this final review report.

Restricted Use

This report is solely for the information and use of the Novato RDA, City of Novato, 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

December 4, 2013

Finding and Order of the Controller

**FINDING—
Unallowable asset transfer to the City of Novato**

The Novato Redevelopment Agency (RDA) made an unallowable asset transfer of $6,100,000 in cash to the City of Novato. The asset transfer occurred after January 1, 2011, and the asset was not contractually committed to a third party prior to June 28, 2011.

On March 1, 2011, the RDA transferred $6,100,000 in cash to the City of Novato per Resolution R-4-11. The transfer was to repay 2011 promissory notes that had been established on February 1, 2011 per Resolution R-1-11. The notes were put in place to reaffirm the RDA's obligation to repay various funds of the City of Novato.

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 public agency after January 1, 2011. Those assets should be turned over to the Successor Agency for disposition in accordance with H&S Code section 34177(d) and (e).

H&S Code section 34175(b) states:

> All assets, properties, contracts, leases, books and records, buildings, and equipment of the former redevelopment agency are transferred on February 1, 2012, to the control of the successor agency, for administration pursuant to the provisions of this part. This includes all cash or cash equivalents and amounts owed to the redevelopment agency as of February 1, 2012.

Pursuant to H&S Code section 34175(b) the RDA was required to transfer all assets, including housing assets, to the Successor Agency.

H&S Code section 34177(d) states:

> Remit unencumbered balances of redevelopment agency 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…for allocation and distribution...[in accordance with]…Section 34188.

Pursuant to H&S Code section 34177(e), the Successor Agency is to "dispose of all former RDA assets...as directed by the oversight board. . . ."

Order of the Controller

Pursuant to H&S Code section 34167.5, the City of Novato is ordered to reverse the transfer of cash in the amount of $6,100,000, plus any interest earned, and turn over the assets to the Successor Agency.

The Successor Agency is directed to properly dispose of those assets in accordance with H&S Code sections 34177(d) and (e).

City's Response:

The City of Novato and Novato Successor Agency disagree with the SCO's preliminary determination that $6,100,000 in legal, valid repayments by the RDA to the City must be turned over to the Successor Agency.

The City states that all Loan Advance funds received by the RDA were after activation of the RDA in 1983 and per the 1983 Loan/Cooperation Agreement and adoption of the Redevelopment Plans. Additionally, the City states that the advances that the City loaned to the RDA were from the City's General Fund and were comprised of sales and use tax and property tax revenues.

The City's response continues with the following main points:

- Before the Adoption of ABx26, the RDA Repays the Majority of the Loan Advances to the City Using RDA Tax Increment Funds and Bond Proceeds. . . .
- The Independent Auditor Performing the "Other Funds & Accounts Due Diligence Review" Found and Determined the RDA's Loan Repayment At Issue Here was Not An Asset Transfer. . . .
- SCO Cannot Through an Audit Process Under ABx26 or Otherwise Invalidate or Reverse the Loan Repayment Made Pursuant to the Loan Agreement and project area Plans. . . .
- The RDA's Repayment of the Disputed Loan Repayment Amount Was Not an "Asset Transfer" Pursuant to Section 34167.5. . . .
- Section 34167.5 Is Not Applicable to the RDA's Repayment of the Disputed. . . .
- The 1983 Loan/Cooperation Agreement and Implementing Loan Advances are Enforceable Obligations. . . .
- No Legislative Intent to Appropriate the City's General Funds.
- Use of the City's Property Tax and Sales and Use Tax Revenues. . . .
- The RDA and City have Performed Their Perspective Obligations Under the 1983 Loan/Cooperation Agreement and. . . .
- The City also feels that the correct amount at issue is $5,219,813 as determined by the Department of Finance in its Due Diligence review letter dated April 20, 2013 (Attachment 2).

See Attachment for details of the City's response.

SCO's Comment:

The SCO disagrees with the City's interpretation of H&S Code 34167.5. The following sequence of events summarizes the City's actions in regards to repayment of outstanding advances made by the City to the former RDA:

- Since the activation of the RDA in 1983, the City advanced various loans to the RDA for specific projects. On November 11, 2003, the RDA entered into a promissory note (2003 Promissory Notes) with

the City whereby the RDA agreed to pay the City on or before November 2023. However, the RDA had made no payments to the City through fiscal year 2010.

- On February 8, 2011, Resolution No. R-1-11 was passed to reaffirm the notes and to begin repaying the total debt of $21,095,517.19 to the City (2011 Promissory Notes).
- On March 1, 2011, Resolution No. 4-11 was adopted to transfer $6,100,000 in cash for a partial payment to the City for the 2011 Promissory Notes.

Pursuant to H&S Code section 34167.5, the SCO is required to order the return of any asset transfers by the RDA to the City after January 1, 2011.

Regarding the City's assertion that the true amount at issue is $5,219,813, this figure is the total Other Funds and Accounts (OFA) in the Department of Finance's (DOF) April 20, 2013 letter (Attachment 2). However, the figure includes a disallowance of $6,036,959, which is the amount that the DOF determined to be ineligible. However, after we discussed this issue with the DOF, it agreed that the correct amount for its adjustment should have been $6,100,000, a difference of $63,041.

The finding and Order of the Controller still remains as stated. However, if the City complies with the DOF's notice to transfer $5,219,813 to the county auditor-controller, which includes an $817,146 adjustment approved by the DOF (see attachment 2, DOF's final determination letter), the City will still owe $63,041 to the Successor Agency.

It should be noted that the letter issued by the DOF to the City of Novato, dated April 20, 2013, regarding the DOF's review of the Due Diligence Report, states:

> Pursuant to HSC section 34167.5 and 34178.8, the California State Controller's Office (Controller) has the authority to claw back assets that were inappropriately transferred to the city, county, or any other public agency. Determinations outlined in this letter do not in any way eliminate the Controller's authority.

The finding and Order of the Controller remains as stated.

Attachment 1—
The City of Novato's Response to the Draft Review Report

In addition to the attached letter, the city provided additional documents. Due to their size, we are not including them as an attachment to this report. Please contact the City of Novato for copies of the following documents:

Exhibit A – RDA Resolution No. R-1-83 and City Council Ordinance No. 509
Exhibit B – State Treasurer's Report (pertinent pages) dated October 1984, and SCO report dated May 1, 2012
Exhibit C – City Council Resolution No. 38-83, RDA Resolution No. R-4-83, and 1983 Loan/Cooperation Agreement
Exhibit D – Ordinance No. 1040 and the Novato Project Area Plan
Exhibit E – Ordinance No. 1394 and the Hamilton Field Project Area Plan
Exhibit F – Ordinance No. 1412 and the Downtown Project Area Plan
Exhibit G – Ordinance Numbers 1470, 1471, and 1472
Exhibit H – Loan Advance Documents
Exhibit I – RDA Resolution No. R-16-03 and 2003 Promissory Note
Exhibit J – RDA Resolution No. R-1-11
Exhibit K – Novato OFA DDR
Exhibit L – Oversight Board Resolution No. OB-1-13
Exhibit M – DOF Final Determination Letter re: OFA DDR dated April 20, 2013

THE CITY OF
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August 26, 2013

VIA E-MAIL, OVERNIGHT DELIVERY, AND
U.S. CERTIFIED MAIL, RETURN RECEIPT REQUESTED

Steven Mar
Chief, Local Government Audits Bureau
Division of Audits
California State Controller's Office
300 Capitol Mall, Suite 1850
P.O. Box 942850
Sacramento, CA 94250-5874

RE: City of Novato and Novato Successor Agency's Response to SCO's Draft Asset Transfer Review Report Transmitted to Novato by Letter Dated August 12, 2013, and Received on August 19, 2013

Dear Mr. Mar:

As you know from our previous communications, I am the City Manager for the City of Novato ("**City**") and am Executive Director of the City of Novato As Successor Agency to the Dissolved Redevelopment Agency of the City of Novato ("**Novato Successor Agency**").

I am in receipt of Jeffrey V. Brownfield's letter to me dated August 12, 2013, sent by certified mail and received by me on August 19, 2013. I confirmed my receipt of Mr. Brownfield's by email to you at about 7:51 p.m. on August 19, 2013.

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 34167.5[1] of all "asset transfers"[2] made by the former Redevelopment Agency of the City of Novato ("**RDA**") to the City or any other public agency after January 1, 2011.

The Draft Report, on page 3, lists as an "unallowable transfer" the following:

> The Novato Redevelopment Agency (RDA) made an unallowable transfer of $6,100,000 in cash to the City of Novato. The asset transfer occurred after January 1, 2011,

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[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 what constitutes an "asset transfer" and does not define that phrase or either of those words.

> and the asset was not contractually committed to a third party prior to June 28, 2011.

The next paragraph on page 3 states:

> On March 11, 2011, the RDA transferred $6,100,000 in cash to the City of Novato per Resolution R-4-11. The transfer was to repay 2011 promissory notes that had been established on February 1, 2011 per Resolution R-1-11. The notes were put in place to reaffirm the RDA's obligation to repay various funds of the City of Novato.

With respect to the foregoing described $6,100,000 "transfer," page 3 of the Draft Report sets forth the following proposed Order of the Controller:

> Pursuant to H&S Code section 34167.5, the City of Novato is ordered to reverse the transfer of cash in the amount of $6,100,000, plus any interest earned, and to turn over the assets to the Successor Agency. [¶] The Successor Agency is directed to properly dispose of those assets in accordance with H&S Code sections 34177(d) and (e).

The City and Novato Successor Agency disagree with and object to the SCO's preliminary determination that $6,100,000 (the "**Disputed Loan Repayment Amount**")[3] in legal, valid loan repayments by the RDA to the City must be returned to the Novato Successor Agency for ultimate payment to the county auditor-controller and distribution to affected taxing agencies.

This response letter—timely submitted to you within 10 days of my receipt of Mr. Brownfield's letter on August 19, 2013—provides the City and Novato Successor Agency's justification as to why the proposed findings and Order of the State Controller, as set forth above, must be omitted from the SCO's final report.

1. The Novato RDA and 1983 Loan/Cooperation Agreement.

Pursuant to Sections 33100 and 33101, the RDA was "activated" and enabled to exercise powers under the California Community Redevelopment Law (§33000 *et seq.*) (the "**CRL**") on May 3, 1983, when the RDA adopted Resolution No. R-7-83 implementing City Council Ordinance No. 509 (adopted on October 3, 1972) and completed the statutorily-required steps necessary to activate the RDA by filing the requisite paperwork with the California Secretary of State.[4]

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[3] As noted later in this letter, the Department of Finance concluded, with respect to this same repayment, that the amount at issue is $5,219,813.00, *not* $6,100,000.00.

[4] Under the redevelopment law, a redevelopment agency exists within each

Attached hereto as **Exhibit A** and incorporated herein by reference is a true and correct copy of RDA Resolution No. R-1-83 and City Council Ordinance No. 509. Attached hereto as **Exhibit B** and incorporated herein by reference are true and correct copies of (i) a report from the State Treasurer[5] dated October 1984, and (ii) a report from *your office* dated May 1, 2012, both of which confirm the RDA was activated in 1983. (*See* Exhibit ("**Ex.**") B, pp. 82, 83, 125.)

Pursuant to the CRL, the RDA, once "activated," was a legally separate public agency from the City. (§§ 33003, 33100, 33120, 33123, 33125.) Pursuant to the CRL, the governing body of the RDA, or its Board of Directors (the "**RDA Board**"), was a legally separate legislative body from the City Council of the City (the "**City Council**"), even though members of the RDA Board may have been the same as the City Council. (§§ 33002, 33007, 33200(a); *Pacific States Enterprises v. City of Coachella* (1993) 13 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."].)

On the same day that the RDA was activated, May 3, 1983, the City Council approved and adopted Resolution No. 38-83, and the RDA Board approved and adopted Resolution No. R-4-83, both of which approved that certain Cooperative Agreement entered into on May 3, 1983 (the "**1983 Loan/Cooperation Agreement**"). Attached hereto as **Exhibit C** and incorporated herein by reference are true and correct copies of City Council Resolution No. 38-83, RDA Resolution No. R-4-83, and the 1983 Loan/Cooperation Agreement.

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community but must be "activated" by adoption of an ordinance that declares there is a "need for the agency to function in the community." (§33101.) The agency shall cause a certified copy of the ordinance to be filed with the county clerk." (§33102 [Note, in 1998, after the RDA was activated, §33012 was amended by Senate Bill 1652 to require ordinances to be filed with the County Clerk, as opposed to the Secretary of State].) Section 33013 also provides that: "[i]n any proceeding involving the validity or enforcement of, or relating to, any contract by an agency, the agency is conclusively deemed to have been established and authorized to transact business and exercise its powers upon proof of the filing with the Secretary of State of such an ordinance." Here, while the City Council adopted Ordinance No. 509 in 1972, it did not take the "final steps" of filing the requisite documents with the Secretary of State until 1983, and thus, the RDA was not officially "activated" until 1983.

[5] Only the relevant portions of the State Treasurer's report are attached to this Petition. The full copy of the report (which is nearly 300 pages long) can be accessed electronically at: <http://www.treasurer.ca.gov/cdiac/reports/redevelopment.pdf>.

Under the 1983 Loan/Cooperation Agreement, the City agreed to provide the RDA with staff assistance, supplies, and other services and facilities to carry out redevelopment functions as authorized under the CRL. Additionally, the 1983 Loan/Cooperation Agreement provided for, among other things:

- "The City may, but is not required to, advance necessary funds to the Agency or to expend funds on behalf of the Agency for the preparation and implementation of a redevelopment plan..." (Ex. C, p. 132, § 2.)

- "The City will keep records of activities and services undertaken pursuant to this Agreement and the costs thereof in order that an accurate record of the Agency's liability can be ascertained." (Ex. C, p. 132, § 3.)

- "The Agency agrees to reimburse the City for all costs incurred for the services by the City pursuant to this Agreement...it is the express intent of the parties that the City shall be entitled to repayment of the expenses incurred by the City under this Agreement, consistent with the Agency's financial ability, in order to make the City whole as soon as possible." (Ex. C, p. 132, § 4.)

- "Although the parties recognize that payment may not occur for a few years and that repayment may also occur over a period of time, it is the express intent of the parties that the expenses incurred by the City under this Agreement shall be entitled to payment, consistent with the [RDA's] financial ability, in order to make the City whole as soon as practically possible." (*Ibid.*)

- "The obligations of the Agency under this Agreement shall constitute indebtedness of the Agency within the meaning of Section 33670 *et seq.* of the Community Redevelopment Law, to be repaid to the City by the Agency with interest as ten percent (10%) per annum or the maximum rate allowed by law." (Exhibit C, p. 133, § 5.)

Resolution No. 38-83 explained the purpose for the City Council's approval of the 1983 Loan/Cooperation Agreement:

- "To set forth activities, services and facilities which the City will render for and make available to the Agency in furtherance of the activities and functions of the Agency under the [CRL];" and

- "Provide that the Agency will reimburse the City for actions undertaken and costs and expenses incurred by it [*i.e.,* the City] for and on behalf of the Agency." (Ex. C, p. 126.)

Resolution No. R-4-83 similarly provides the purpose for the RDA Board's approval of the 1983 Loan/Cooperation Agreement:

- "To set forth activities, services, and facilities which the City will render for and make available to the Agency in furtherance of the activities and functions of the Agency under the [CRL];" and

- "To provide that the Agency will reimburse the City for actions undertaken and costs and expenses incurred by it [*i.e.,* the City] for and on behalf of the Agency." (Ex. C, p. 129.)

With the approval of the 1983 Loan/Cooperation Agreement on May 3, 1983, the RDA and City established a line of credit (or similar financial arrangement) whereby the RDA committed tax increment funds to repay all future City fund advances to the RDA that the RDA then used in furtherance of the redevelopment activities in redevelopment project areas established in the City pursuant to the CRL.

2. <u>Adoption of Redevelopment Plans for Novato, Hamilton Field, and Downtown Redevelopment Projects</u>.

Following its activation in 1983, the RDA commenced steps leading to the adoption of redevelopment plans for the Novato, Hamilton Field, and Downtown Redevelopment Projects. Each redevelopment plan had specific provisions for City loans and requirements for the RDA to repay those City loans.

Under the CRL, once a redevelopment agency is "activated" by a city, there is a lengthy public process that must be followed for the adoption of a "redevelopment plan" prior to the redevelopment agency's ability to further the purposes of redevelopment in a specified "project area" within the community. (*See*, § 33330; *Evans v. City of San Jose* (2005) 128 Cal.App.4th 1123, 1131-1133.)

A redevelopment plan serves as a planning document that sets forth the basic goals, powers, and limitations within which a redevelopment agency will carry out the redevelopment of a project area or project areas over the course of several decades. (See, §§ 33300, 33333.2(a).) The CRL set forth requirements concerning the content of a plan, such as a boundary description of the project area(s), diagram and description in general terms of open space and streets, and time limits to incur and repay debt. (§§ 33332, 33333, 33333.6.) Notably, ***every redevelopment plan must describe generally the proposed method of financing the redevelopment of the project area.*** (*Id.*, § 33334.)

No redevelopment plan can be adopted without the legislative body as defined in the CRL (*i.e.,* here the City Council) holding a public hearing on the matter. (Code §§ 33355, 33360.) After the legislative body has considered and responded to any objections, the legislative body may adopt a redevelopment plan

by ordinance. (*Id.*, §§ 33364, 33365, 33367.) Unless the decision of the legislative body is, pursuant to Section 33501, challenged by a "validation action" or "reverse validation action" under Code of Civil Procedure sections 860 *et seq.* within the time limits set forth in Section 33500, the decision of the legislative body concerning the adoption of a redevelopment plan, and all prior proceedings taken in connection therewith, are "final and conclusive" and may not be judicially challenged. (§§ 33368, 33500; Code Civ. Proc. §§ 860, 863, 869.)

a. **Novato Project Area Plan.**

On November 29, 1983, the City Council, by adoption of Ordinance No. 1040, enacted and approved the Redevelopment Plan for the Novato Redevelopment Project ("**Novato Project Area**" or "**Novato Project Area Plan**"). True and correct copies of Ordinance No. 1040 and the Novato Project Area Plan are attached hereto as **Exhibit D** and incorporated herein by this reference.

- The Novato Project Area Plan established, as required by the CRL, methods of financing the redevelopment project. Specifically, the Novato Project Area Plan provides in pertinent part:

- The RDA is authorized to obtain advances, borrow funds and create indebtedness in carrying out the Novato Project Area Plan.

- The principal and interest on such advances, funds, and indebtedness are to be paid by tax increment funds or any other funds available to the RDA.

- Advances and loans for survey and planning and for the operating capital for the administration of Novato Project Area "may be provided by the City until adequate tax increment or other funds are available or sufficiently assured to repay the advances and loans . . . from sources other than the City." (Ex. D, p. 175 [Novato Project Area Plan, § 501].)

The Novato Project Area Plan also authorized, pursuant to the CRL, for the RDA to collect "tax increment" for purposes of funding redevelopment activities for the Novato Project Area. (Ex. D, pp. 177- 178 [Novato Project Area Plan, § 502].)

b. **Hamilton Field Project Area Plan.**

On July 14, 1998, the City Council, by adoption of Ordinance No. 1394, enacted and approved the Redevelopment Plan for the Hamilton Field Project ("**Hamilton Field Project Area**" or "**Hamilton Field Project Area Plan**"). True and correct copies of Ordinance No. 1394 and the Hamilton Field Project Area Plan are attached hereto as **Exhibit E** and incorporated herein by this reference.

- The Hamilton Field Project Area Plan established, as required by the CRL, methods of financing the redevelopment project. Specifically, the Hamilton Field Project Area Plan provides in pertinent part:

- The RDA is authorized to obtain advances, borrow funds and create indebtedness in carrying out the Hamilton Field Project Area Plan.

- The principal and interest on such advances, funds, and indebtedness are to be paid by tax increment funds or any other funds available to the RDA.

- Advances and loans for survey and planning and for the operating capital for the administration of the Hamilton Field Project Area "may be provided by the City until adequate tax increment or other funds are available or sufficiently assured to repay the advances and loans . . . from sources other than the City." (Ex. E, p. 214 [Hamilton Field Project Area Plan, § 501].)

The Hamilton Field Project Area Plan also authorized, pursuant to the CRL, for the RDA to collect "tax increment" for purposes of funding redevelopment activities for the Hamilton Field Project Area. (Ex. E, pp. 214-216 [Hamilton Field Project Area Plan, § 502].)

c. Downtown Project Area Plan.

On June 29, 1999, the City Council, by adoption of Ordinance No. 1412, enacted and approved the Redevelopment Plan for the Downtown Novato Redevelopment Project ("**Downtown Project Area**" or "**Downtown Project Area Plan**"). True and correct copies of Ordinance No. 1412 and the Downtown Project Area Plan are attached hereto as **Exhibit F** and incorporated herein by this reference.

The Downtown Project Area Plan established, as required by the CRL, methods of financing the redevelopment project. Specifically, the Downtown Project Area Plan provides in pertinent part:

- The RDA is authorized to obtain advances, borrow funds and create indebtedness in carrying out the Downtown Project Area Plan.

- The principal and interest on such advances, funds, and indebtedness are to be paid by tax increment funds or any other funds available to the RDA.

- Advances and loans for survey and planning and for the operating capital for the administration of the Downtown Project Area "may be provided by the City until adequate tax increment or other funds are available or sufficiently assured to repay the advances and loans . . . from sources other than the City." (Ex. F, p. 271 [Downtown Project Area Plan, § 501].)

The Downtown Project Area Plan also authorized, pursuant to the CRL, for the RDA to collect "tax increment" for purposes of funding redevelopment activities for the Downtown Project Area. (Ex. F, pp. 272-274 [Novato Project Area Plan, § 502].)

The Novato Redevelopment Project Area, the Hamilton Field Redevelopment Project Area, and the Downtown Project Area are hereinafter collectively referred to herein as "**Project Areas**" and/or "**Project Area Plans.**"

The Project Area Plans, had, pursuant to the CRL, powers granted to the RDA commonly used to further the redevelopment projects in those plans, including, among other things: (a) acquisition of real property; (b) management of property; (c) relocation assistance; (d) rehabilitation, remodeling, demolition, or removal of buildings, structures, and improvements; (e) rehabilitation, development, and construction of low and moderate income housing within the City; (f) redevelopment of land by private enterprise and public agencies; and (g) the installation, construction, reconstruction, redesign, or reuse of streets, utilities, curbs, gutters, sidewalks, traffic control devices, flood control facilities, and other public facilities and improvements. (Ex. D, pp. 158, 161-167 [Novato Project Area Plan, §§ 301, 307-329; Ex. E, pp. 201, 203-208 [Hamilton Field Project Area Plan, §§ 301, 307-329]; Ex. F, pp. 255, 258-264 [Downtown Project Area Plan, §§ 301, 307-329].)

d. Merger of Project Areas Pursuant to the CRL.

The Project Areas were subsequently amended and merged on or about April 8, 2003 pursuant to City Council Ordinance Numbers 1470, 1471, and 1472. True and correct copies of these Ordinances are attached hereto as **Exhibit G** and incorporated herein by reference.

e. The Novato, Hamilton Field, and Downtown Area Plans Are All Legally and Conclusively Valid.

It is critical to note that ***none*** of the Project Area Plans were invalidated pursuant to Sections 33368, 33500, 33501, and Code of Civil Procedure 860 *et seq.*, the exclusive means for challenging them under State law and all were, and are, legally valid against all challenge.

3. **After Activation of the RDA, Adoption of the 1983 Loan/Cooperation Agreement, and Adoption of the Redevelopment Plans, Subsequent Loan Advances from the City to the RDA Were Authorized, Documented, And Repaid.**

The 1983 Loan/Cooperation Agreement was implemented by and through the City's provision to the RDA of a series of loan advances over the course of 28 years (the "**Loan Advances**"). The Loan Advances were documented by way of individual promissory notes, financing agreements, and other supplemental documentation (the "**Loan Advance Documents**" and, collectively with the 1983 Loan/Cooperation Agreement, the "**Loan Agreement**"). Attached hereto as **Exhibit H** and incorporated herein by this reference are true and correct copies of the Loan Advance Documents.

Pursuant to the Loan Agreement, the City authorized and loaned moneys from the City's Funds for capital improvement projects, property acquisition, "seed money," and other purposes in conformity with the CRL, in implementing redevelopment programs and projects, and as an investment in the City's redevelopment project areas.

The vast majority (approximately 70%) of the City's Funds that were advanced to the RDA over the years were comprised of the City's sales and use tax revenues allocated to the City and derived under the Bradley-Burns Uniform Local Sales and Use Tax Law, and ad valorem property tax revenues allocated to the City and derived under Article XIIIA of the State Constitution and implementing provisions in Revenue and Taxation Code section 96 *et seq.* (commonly referred to as the "AB 8 share" or "pro rata" property tax allocation provisions).

The remaining portion of the City's Funds (approximately 30%) was comprised of the City's Development Impact Fees (the "**Special Fund**"), which is a special fund created to collect revenue from development impact fees and other exactions in order to mitigate the impacts of new development on the City's infrastructure. According to State Law, and in particular, the Mitigation Fee Act (Gov. Code §§ 66000 *et seq.*), the monies contained in the Special Fund must be used "solely for the purpose for which the fee was collected." (Gov. Code §§ 66006, 66008.) While the City has the authority to invest surplus funds (such as those in the City's Special Fund) that are not needed for current operations by loaning them to the RDA (*see e.g.,* Gov. Code §§ 53601, 66006(b)(1)(G)), the law ultimately requires that the funds be returned to the City and expended "solely for the purpose for which the fee was collected" – *i.e.*, improvements to infrastructure, ***not*** distribution to taxing agencies. (Gov. Code §§ 66006, 66008.)

The terms and conditions in the Loan Agreement expressly provide that funds loaned from the City to the RDA were to be repaid, and could be repaid in advance without penalty at the RDA's option. The Loan Agreement is a valid agreement and arrangement between separate public agencies, 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 to the RDA and terms of repayment by the RDA. No coercion or duress was involved with the negotiations or decisions to enter into the Loan Agreement, and none of the terms were unconscionable. None of the Loan Advances violated the debt limit of the City.

Each Loan Advance had a specific purpose and mandatory loan terms, and was made pursuant to and was consistent with the 1983 Loan/Cooperation Agreement. The City and RDA prepared all of the proper documentation and authorization for each Loan Advance, all of which were reflected in the RDA's accounting records. Each Loan Advance was formally approved by separate actions of each body (the RDA Board and City Council) at duly noticed meetings.

To further assure the Loan Advances were properly documented, the RDA, on November 11, 2003, executed a promissory note in favor of the City in the amount of $6,596,804.35 (the "**2003 Promissory Note**") to memorialize the total amount of money advanced from the City to the RDA up to that date. Attached hereto as **Exhibit I** and incorporated herein by reference are true and correct copies of RDA Resolution No. R-16-03 and the 2003 Promissory Note.

The 2003 Promissory Note has a twenty (20) year term, and provides that principal and interest are to be paid from the tax increment revenue generated by the RDA. In addition, interest on the 2003 Promissory Note began to accrue upon execution, and payments on interest were due each year on June 30.

The Resolution authorizing the execution of the 2003 Promissory Note expressly acknowledges that the City advanced the money pursuant to the 1983 Loan/Cooperation Agreement. (*See*, Exhibit I, p. 332 ["Whereas, such advances were made pursuant to that certain [1983 Loan/Cooperation Agreement] dated as of May 3, 1983, between the City and the Agency, which agreement provided for the pledge of tax increment revenue for repayment of advances made by the City to or on behalf of the Agency for the Redevelopment Project."].)

After the execution of the 2003 Promissory Note, the City continued to advance the RDA loan funds for capital improvement projects and property acquisitions as an investment in the Project Areas, consistent with, and pursuant to, the 1983 Loan/Cooperation Agreement.

On February 8, 2011, in order to re-affirm and begin paying down its total debt, the RDA adopted Resolution No. R-1-11 declaring that its total debt to the City was $21,095,517.19. This figure included the original amount memorialized in the 2003 Promissory Note ($6,596,804.35), which with 10% interest grew to $13,333,354.49, and an additional $7,762,162.70 the City had advanced in loan funds to the RDA after 2003. A true and correct copy of RDA Resolution No. R-1-11 is attached hereto as **Exhibit J** and incorporated herein by reference.

Also on or about February 8, 2011, the RDA authorized the execution of multiple additional promissory notes (one note for each City fund from which the RDA had been advanced money) (collectively, the "**2011 Promissory Notes**"). In particular, the RDA executed each of the following promissory notes:

CITY FUND SOURCE	RDA NOTE AMOUNT
General Fund	$2,669,859.99
Emergency & Disaster Fund	$1,098,714.53
Insurance Reserve Fund	$ 378,647.51
Vehicle/Equipment Replacement Fund	$ 675,842.18
Public Financing Authority Fund	$ 755,508.70
Development Impact Fees Fund	$1,064,927.61
Subdivision Park Trust (Quimby) Fund	$ 721,575.64
Community Facilities Fund	$ 387,086.54

The total value of the 2011 Promissory Notes was $7,762,162.70. True and correct copies of each of the 2011 Promissory Notes are attached hereto as **Exhibit J** and incorporated herein by reference. The 2003 and 2011 Promissory Notes are collectively referred to herein as the "**Promissory Notes.**"

The 2011 Promissory Notes each included terms and conditions consistent with the 1983 Loan/Cooperation Agreement and the implementing 2003 Promissory Note, including without limitation: (a) interest shall accrue on the amount set forth in the Note beginning on December 31, 2010; (b) interest shall be payable on June 30 of each year; and (c) the principal and interest on the Promissory Notes shall be payable from tax increment revenue received by the RDA.

All Loan Advance funds received by the RDA – more than two-thirds of which were from the City's General Fund comprised of sales and use tax and property tax revenues – were used for valid redevelopment purposes. At all times when the City made Loan Advances, where such funds were used for publicly owned improvements and to be repaid by the RDA with tax increment, the City Council and RDA Board complied with all relevant requirements under the CRL, including Section 33445.

The Loan Agreement, including all of the implementing components, the Loan Advance Documents, and the Promissory Notes, is and are all warrants, contracts, obligations, and/or evidences of indebtedness under applicable State

law, including Government Code section 53511. At the time of repayment for all Loan Advances, the only source of revenue the RDA had to repay the Loan Advances was tax increment revenue allocated to the RDA pursuant to Article XVI, Section 16, of the State Constitution and Section 33670. ***No*** party filed any proceeding challenging the Loan Agreement or any of the implementing Loan Advance Documents within the 60 (or 90) days after the City and the RDA entered into the Loan Agreement or any of the implementing Loan Advance Documents including the Promissory Note.

4. Before the Adoption of ABx1 26, the RDA Repays the Majority of the Loan Advances to the City Using RDA Tax Increment Funds and Bond Proceeds.

On March 1, 2011—*nearly three months before* AB1x26 was adopted—the RDA repaid outstanding balances owed to the City pursuant to the 1983 Loan/Cooperation Agreement and its implementing Loan Advance Documents based on the availability of tax increment funds from the RDA. On March 1, the RDA authorized a cash payment to the City in the amount of $6,100,000 from RDA cash reserves. ***The Draft Report, on page 3, identifies this lawful and valid repayment by the RDA to the City as the RDA's sole invalid "asset transfer."***[6]

Under the terms of the 1983 Loan/Cooperation Agreement and Loan Advance Documents, the RDA incurred no penalty for prepaying any or all of the remaining balances due to the City under said documents. With the prepayment of the total remaining principal to the City in March 2011, the RDA released itself from the obligation to pay the City the remaining interest payments on the Loan Advances (at approximately 10% per annum, depending on the applicable Loan Advance Documents).

The funds that constituted the principal when loaned by the City to the RDA, and the funds, when repaid by the RDA to the City, constitute the City's Funds. Moreover, no party filed any proceeding challenging any warrant and/or payment on the above-referenced Loan Advances within 60 (or 90) days after such warrant or payment was made. The repayments were fully performed and executed acts pursuant to prior executory contractual obligations.

5. The Independent Auditor Performing the "Other Funds & Accounts Due Diligence Review" Found and Determined the RDA's Loan Repayment At Issue Here Was *Not* An Asset Transfer.

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[6] Also in March 2011 the RDA Board issued tax allocation bonds to pay off the remaining balance owed to the City under the 1983 Loan/Cooperation Agreement and implementing Loan Advance Documents including the Promissory Notes. The repayment to the City from the proceeds of these tax allocation bonds is identified in the Draft Report as a permitted transfer and thus is not at issue.

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 requires 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).)[7] In other words, the independent auditor was required to review the same "transfers" the State Controller is reviewing pursuant to Section 34167.5 and which is at issue in the Draft Report submitted to Novato.

Critical to the analysis is that nowhere in the provision of ABx1 26 on which the SCO is relying—Section 34167.5—did the Legislature define the term "asset transfer" or either of those words individually.[8] 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.

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[7] 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).)

[8] 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 March 15, 2012, 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) applies.

(*See*, §§ 34179.5(c)(1)-(6), 34179.6(c).) Specifically, Section 34179.5(b)(3) defines "transferred" for purposes of the DDR as: "[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);

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 Novato Successor Agency hired the independent accounting firm of R. J. Ricciardi, Inc. ("**RJR**") to prepare the OFA DDR. RJR was a firm that was approved by the Marin County Department of Finance (which serves as the Marin County "Auditor-Controller"). A true and correct copy of the OFA DDR is attached hereto as **Exhibit K** and incorporated herein by reference.

RJR, over a period of several weeks, conducted an exhaustive review of the RDA's and Successor Agency's assets, cash, and cash equivalents. The results of RJR's review of these assets, cash, and cash equivalents were detailed in text and in numerous spreadsheets in the OFA DDR. (*See*, *generally,* Ex. K.)

RJR determined that the RDA's repayment [consisting of the $6,100,000 at issue here and the remainder from the aforementioned proceeds of the 2011 tax allocation bond which is not at issue here] of the $21,455,600 loaned to it by the City pursuant to the Loan Agreement did not constitute an "asset transfer" comprised of "cash or cash equivalents" available for remittance to the Auditor-Controller. Rather, the repayment was made pursuant to enforceable obligations between the RDA and the City. It further concluded that the individual Loan Advances, as evidenced by the Loan Advance Documents including the Promissory Notes, were all a product of the 1983 Loan/Cooperation Agreement. (Ex. K, pp. 438, 440 [DDR pp. 8 & 10].)

As a result, RJR determined that the $21,455,600 (which includes the $6,100,000 at issue here) in repayment of principal to the City, pursuant to the Loan Agreement, was not available for remittance to the taxing agencies. (*Ibid.*) After completing the OFA DDR, RJR determined that the amount of cash and cash equivalents available for transfer to the Taxing Entities was a ***negative*** $817,416.00.

The Oversight Board of the City's Successor Agency (the "**Oversight Board**")—comprised in part by some of the taxing agencies who would receive funds available for disbursement from the $6,100,000 at issue here—held two (2) separate public meetings and discussed the conclusions of the OFA DDR, including the $6,100,000 loan repayment issue. At the second 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 true and correct copy of Oversight Board Resolution No. OB-1-13 is attached hereto as **Exhibit L** and incorporated herein by reference.

The OFA DDR was timely submitted to the Department of Finance ("**DOF**"). After a "meet and confer" with the Novato Successor Agency, DOF ultimately determined that of the total loan repayment amount, $5,219,813 was an impermissible transfer and ordered that amount transferred to the Auditor-Controller for distribution to the taxing agencies. A true and correct copy of DOF's final determination letter on the OFA DDR, dated April 20, 2013 letter is attached hereto as **Exhibit M** and incorporated herein by reference.[9]

On May 22, 2013, City and Novato Successor Agency filed a Petition for Writs of Mandate and Complaint for Injunctive and Declaratory Relief (Sacramento County Superior Court Case No. 34-2013-80001496) against DOF, the SCO, and other Respondents/Defendants, asserting that DOF's determination with respect to the OFA DDR and its order that $5,219,813 be turned over to the Auditor-Controller was illegal and invalid. The case is pending.

6. SCO Cannot Through an Audit Process Under ABx1 26 or Otherwise Invalidate or Reverse the Loan Repayment Made Pursuant to the Loan Agreement and Project Area Plans, All of Which Are, as a Matter of Law Deemed Valid For All Time.

At the time of the respective adoptions of each of the Project Area Plans the then-applicable law under the CRL provided that the decision by a city council to adopt a redevelopment plan, and all proceedings taken in connection therewith, "shall be final and conclusive" and not subject to any judicial undoing unless, "any action questioning the validity of any redevelopment plan, or the adoption or approval of a redevelopment plan, or any of the findings or determinations of the agency or legislative body in connection with a redevelopment plan [is] brought pursuant to Section 33501 within the time limits prescribed in Section 33500." (§ 33368.)

In 1983, 1998, and 1999, the time limit to bring a "validation action" or "reverse validation action" was 60 days from the adoption of the ordinance approving a redevelopment plan. (See, 41A West's Ann. HSC (1999 ed.) former

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[9] At the very least the SCO should acknowledge and agree the amount at issue is $5,219,813 as determined by the Department of Finance, not $6,100,000 as set forth in the Draft Report.

§§ 33500, 33501; Code of Civ., Proc. §§860-870.5; *McLeod v. Vista Unified Sch. Dist.* (2008) 158 Cal.App.4th 1156, 1167.)[10] As such, any challenge to (a) the RDA's authority to borrow funds from the City to create an indebtedness of the RDA, and/or (b) repayment of that indebtedness by the RDA to City from tax increment or any other available funds, as specifically set forth in the Project Area Plans, could only be brought within the 60-day limitations period. No such validation actions were brought.

Similarly, at the time the 1983 Loan/Cooperation Agreement and all Loan Advances were approved, 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 City/RDA warrants, contracts, obligations, and other evidences of indebtedness at issue here—which committed RDA tax increment and other funds for repayment—fall 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 any of the City loans to the RDA, or the loan repayments—including the $6,100,000 repayment at issue here—could only be brought within the 60-day limitations period and none were timely brought.

Well-settled precedent holds that the invalidation of the financing mechanisms in the Project Area Plans, which authorized the RDA to repay the City for moneys borrowed, is now forever barred. The same is true for the 1983 Loan/Cooperation Agreement and all of the implementing loan documentation including the Loan Advances and Promissory Notes.

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

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[10] At the times the three Novato redevelopment plans, described above, were adopted, the applicable statute of limitations to challenge those actions by way of reverse validation action under Sections 33500 and 33501 was 60 days. Sections 33500 and 33501 were later amended by Senate Bill 1206, effective January 1, 2007, changing the statute of limitations period was later extended to 90 days (Stats. 2006, ch. 595, §§ 15, 16), and then 2 years for plans adopted after January 1, 2011 (Stats.2011-12 1st Ex.Sess., ch. 5, § 2, Stats. 2012, ch. 26, § 2). Here, the 60-day limitations period applies. (See, e.g., Civ. Code § 3; *Evangelatos v. Superior Court of Los Angeles* (1988) 44 Cal.3d 1188, 1217 [no retroactive application of a change in law that would defeat past litigation or reliance thereon].)

'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 Project Area Plans and the Loan Agreement. (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, "For 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 repayment made under the terms provided in the Project Area Plans and Loan Agreement, all of which are, as a matter of law, deemed valid for all time. (*City of Ontario, supra,* 2 Cal.3d at 341-342; *McLeod, supra,* 158 Cal.App.4th at 1169.)

7. The RDA's Repayment of the Disputed Loan Repayment Amount Was Not an "Asset Transfer" Pursuant to Section 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 RDA's payment to the City of the Disputed Loan Repayment Amount was not a "transfer" for purposes of Section 341567.5. In repaying the Disputed Loan Repayment Amount to the City, the RDA did not transfer funds to the City without any consideration (as defined under black-letter contract law). The 1983 Loan/Cooperation Agreement was a legal, valid, and binding agreement between the City and RDA (and thus so too were the Loan Advances made pursuant to the 1983 Loan/Cooperation Agreement).

The RDA's payment of the Disputed Loan Repayment Amount was similarly 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." Because the funds loaned by the City to the RDA 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.].)

Further, in repaying the Disputed Loan Repayment Amount, the RDA repaid 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,* 46 Cal.3d at 1087 .)

8. Section 34167.5 Is Not Applicable to the RDA's Repayment of the Disputed Loan Repayment Amount.

Section 34167.5 was not intended to authorize the SCO to order the reversal of payments made by a redevelopment agency pursuant to enforceable obligations. Section 34167(f), which directly precedes Section 34167.5 (both sections are within Part 1.8 of Division 24 of the Health and Safety Code), provides "Nothing 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." Furthermore, Section 34167(d) provides:

> For purposes of this part [Part 1.8], "enforceable obligation" is defined to include 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.

As discussed above, the CRL and public policy not only authorized but encouraged agreements between the RDA and City to fund redevelopment agency projects and programs. Because the 1983 Loan/Cooperation Agreement (and thus the implementing Loan Advances) fit within the definition of "enforceable obligation" under Part 1.8 of ABx1 26, Section 34167(f) expressly authorized the RDA to continue to make payments and perform its obligations under the 1983 Loan Agreement and implementing Loan Advances. An order from the SCO to reverse the RDA's payments and performance under the 1983 Loan/Cooperation Agreement and implementing Loan Advances would ***directly interfere*** with the RDA's authority to make such payments and perform its obligations pursuant to enforceable obligations—and is directly contrary to Part 1.8. The SCO does not have authority to order the RDA to repay the Disputed Loan Repayment Amount to the Successor Agency.[11]

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[11] 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

9. **<u>The 1983 Loan/Cooperation Agreement and Implementing Loan Advances Are Enforceable Obligations Under Applicable CRL Provisions Prior to ABx1 26 and Are Enforceable Obligations under Applicable Provisions in ABx1 26 and AB 1484</u>**.

a. The Loans Are Enforceable Obligations Under The Pre-ABx1 26 CRL Which Was In Force When the Loans Were Repaid.

At the time the RDA fully repaid the City according to the terms and conditions in the 1983 Loan/Cooperation Agreement and implementing Loan Advances, the repayment was pursuant to enforceable contracts 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 repayment, ABx1 26 had not been enacted***. In fact, at the time of repayment, 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, 2011[12] and then was signed into law by the Governor the evening of June 28, 2011.

b. The Loans 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

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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>.

[12] 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.

those provisions, however, Part 1.8 clearly provides that, "Nothing 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.) As noted above, 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.

Because the 1983 Loan/Cooperation Agreement and the implementing Loan Advances fit within the definition of "enforceable obligation" under the suspension provisions (*e.g.,* Part 1.8) of ABx1 26, the RDA was fully authorized to repay all outstanding Loan Advances 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* Case). In other words, the *dissolution* provisions in ABx1 26, with the reformation of deadlines by the *CRA* case, did not become operative until February 1, 2012.

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 1983 Loan/Cooperation Agreement and implementing Loan Advances are enforceable obligations under the plain meaning of the applicable sections of Part 1.8.

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.[13]

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).)

Part 1.85 also contains the following "carve-out":

> 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 1983 Loan/Cooperation Agreement and implementing Loan Advances also fit 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 meaning" analysis, the 1983 Loan/Cooperation Agreement and implementing Loan Advances are enforceable obligations under two paragraph of Section 34171(d)(1):

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[13] Neither the definition of "enforceable obligation" in Part 1.8 nor in Part 1.85 was amended by AB 1484.

- 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.

The Loan Advances made pursuant to the 1983 Loan/Cooperation Agreement were (A) legally and validly made pursuant to express provisions in the CRL, California Constitution, and case law, (B) the monies borrowed by the RDA were borrowed for capital improvement projects and were legally required to be repaid pursuant to the terms of the 1983 Loan/Cooperation Agreement and implementing Loan Advances, at times specified in the Loan Documents, and (C) at no time were either the 1983 Loan Agreement or implementing Loan Advances void as violating the debt limit or public policy.

The 1983 Loan/Cooperation Agreement and implementing Loan Advances are also enforceable obligations under the "carve out" in Section 34171(d)(2) of Part 1.85, in that the 1983 Loan Agreement was entered into within the first two years of the enabling of the RDA. Each of the Loan Advances was made pursuant to the 1983 Loan/Cooperation Agreement. Under the ***express terms*** of the 1983 Loan/Cooperation Agreement, all funds loaned by the City to the RDA were required to be repaid. (See Ex. C, 1983 Loan/Cooperation Agreement, § 4.)

Under a legislative intent analysis, the 1983 Loan/Cooperation Agreement and implementing Loan Advances are "enforceable obligations" under Part 1.85, *even if they do not satisfy the carve-out language in Section 34171(d)(2).* This conclusion is compelled because the 1983 Loan/Cooperation Agreement and implementing Loan Advances *do* satisfy 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 Section 34171(d)(2).

As noted by the court in issuing a preliminary injunction against the Department of Finance in *City of Pasadena Successor v. Matosantos*, Sacramento County Superior Court Case No. 34-2012-00134585-CU-MC-GDS, 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). 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 1983 Loan/Cooperation Agreement and implementing Loan Advances 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 repayment 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, another very recent court ruling supports 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 repayment of the Disputed Loan Repayment Amount are currently being litigated in the case entitled, *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 repayment of the Disputed Loan Repayment Amount are almost identical to the Murrieta situation, with the exception that City and Novato Successor Agency have presented far more complete documentation for the loan and advances than what was before the Court in the *City of Murrieta* matter.

10. 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.

The City loaned general fund monies to the RDA. 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 repayment 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) (See, paragraph 5 below).

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 RDA's repayment to the City of all general fund monies owed under the 1983 Loan/Cooperation Agreement and implementing Loan Advances are legally valid under ABx1 26 and AB 1484, and are not subject to an order of reversal by the SCO.

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

Aside from the enforceability of the 1983 Loan/Cooperation Agreement and implementing Loan Advances under the express language in ABx1 26 and AB 1484, constitutional provisions prohibit the distribution of the funds used to pay the Disputed Loan Repayment Amount 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 1983 Loan/Cooperation Agreement and implementing Loan Advances 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 transactions consummated by the City's 1983 Loan/Cooperation Agreement and implementing Loan Advances—the "front" end being the City's loaning of funds from the general fund, and the "back" end being the repayment to the City of those originally-loaned general funds—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 ABx1 26 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 Disputed Loan Repayment Amount, 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).

12. The RDA and City Have Performed Their Respective Obligations Under the 1983 Loan/Cooperation Agreement and Implementing Loan Advances, and There Is No Clear Legislative Intent to Retroactively Apply ABx1 26 to the Repayment of Performed City/RDA Loans.

Apart from the constitutional issues discussed above, the doctrine of "completed acts" dictates that the loan repayment 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

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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."

(*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 $6,100,000 repayment made on March 1, 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 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 <u>not</u> 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.

CONCLUSION

For all of the reasons set forth above, the City and the Novato Successor Agency respectfully submit that the RDA's payment of the Disputed Loan

Repayment Amount—be it $6,100,000 as set forth in the Draft Report or $5,219,813 as determined by DOF—is not subject to reversal under the SCO asset transfer review process and that the SCO's findings and Order, as set forth in the Draft Report of August 12, 2013 [received August 19, 2013] must be omitted from the SCO's final report.

Please contact me 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,

Michael Frank
City Manager, City of Novato &
Executive Director, Novato
Successor Agency

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)
Nesha Neycheva, Auditor-in-Charge, Division of Audits, SCO (via overnight delivery)
Matthew Rios, Auditor, Division of Audits, SCO (via overnight delivery)

Attachments:

Exhibit A — RDA Resolution No. R-1-83 and City Council Ordinance No. 509
Exhibit B — State Treasurer's Report (pertinent pages) dated October 1984, and SCO Report dated May 1, 2012
Exhibit C — City Council Resolution No. 38-83, RDA Resolution No. R-4-83, and 1983 Loan/Cooperation Agreement
Exhibit D — Ordinance No. 1040 and the Novato Project Area Plan
Exhibit E — Ordinance No. 1394 and the Hamilton Field Project Area Plan
Exhibit F — Ordinance No. 1412 and the Downtown Project Area Plan
Exhibit G — Ordinance Numbers 1470, 1471, and 1472
Exhibit H — Loan Advance Documents
Exhibit I — RDA Resolution No. R-16-03 and 2003 Promissory Note
Exhibit J — RDA Resolution No. R-1-11
Exhibit K — Novato OFA DDR
Exhibit L — Oversight Board Resolution No. OB-1-13
Exhibit M — DOF Final Determination Letter re OFA DDR dated April 20, 2013

Attachment 2—
DOF Final Determination Letter

DEPARTMENT OF FINANCE

EDMUND G. BROWN JR. ▪ GOVERNOR
915 L STREET ■ SACRAMENTO CA ■ 95814-3706 ■ WWW.DOF.CA.GOV

REVISED

April 20, 2013

Mr. Brian Cochran, Finance Manager
City of Novato
75 Rowland Way, Suite 200
Novato, CA 94952

Dear Mr. Cochran:

Subject: Other Funds and Accounts Due Diligence Review

This letter supersedes the California Department of Finance's (Finance) original Other Funds and Accounts (OFA) Due Diligence Review (DDR) determination letter dated March 8, 2013. Pursuant to Health and Safety Code (HSC) section 34179.6 (c), the City of Novato Successor Agency (Agency) submitted an oversight board approved OFA DDR to the Finance on January 11, 2013. The purpose of the review was to determine the amount of cash and cash equivalents available for distribution to the affected taxing entities. Finance issued an OFA DDR determination letter on March 8, 2013. Subsequently, the Agency requested a Meet and Confer session on one or more items adjusted by Finance. The Meet and Confer session was held on March 21, 2013.

Based on a review of additional information and documentation provided to Finance during the Meet and Confer process, Finance has completed its review of those specific items being disputed. Specifically, the following adjustments were made:

- Disallowed cash transfers in the amount of $21,455,600. Our review indicates that the former Redevelopment Agency (RDA) transferred cash to the City of Novato (City) during the period January 1, 2011 through June 30, 2011 to repay city loans. Of the $21,455,600 transferred $14,563,041 were proceeds from 2011 Tax Allocation Bonds. The bonds were issued specifically to repay the City loans. The proceeds were used for the purpose for which they were issued, and this transfer is allowable. Therefore, Finance is reversing its adjustment by $14,563,041.

  The remaining amount of $6,892,559 represents a payment of loans that were issued after the first two years of the RDA's creation. HSC section 34179.5 (c) (2) states the dollar value of assets and cash transferred to the creator of the RDA by the former RDA or successor agency between January 1, 2011 through June 30, 2012 must be evidenced by documentation of the enforceable obligation that required the transfer. HSC section 34179.5 (b) (2) states that for the purpose of the HSC section governing the DDRs, "enforceable obligation" includes any of the items listed in HSC section 34171 (d). HSC section 34171 (d) (2) states "enforceable obligation" does not include any agreements, contracts, or arrangements between the creator of the RDA and the former RDA. As such, the transfer is not an enforceable obligation and pursuant to HSC section 34167.5, asset transfers after January 1, 2011, between the creator of the RDA

and the former RDA for which an enforceable obligation does not exist is not permitted. Therefore, the payment of these loans is not permitted, and the OFA balance available for distribution is adjusted by $6,892,559.

On April 10, 2013, after the Meet and Confer process, the Agency provided additional accounting records showing $855,600 of the payments were made in October 2010. Therefore, Finance is reversing $855,600 of its adjustment.

Finance notes that the repayment of these loans may become enforceable obligations after the Agency receives a Finding of Completion from Finance. If the oversight board makes a finding that the loans were for legitimate redevelopment purposes, these loans should be placed on future Recognized Obligation Payment Schedules (ROPS) for repayment. Refer to HSC section 34191.4 (b) for more guidance.

The Agency's OFA balance available for distribution to the affected taxing entities is $5,219,813 (see table below).

OFA Balances Available For Distribution To Taxing Entities		
Available Balance per DDR:	$	(817,146)
Finance Adjustments:		
Disallowed transfers to City		6,036,959
Total OFA available to be distributed:	$	5,219,813

This is Finance's final determination of the OFA balances available for distribution to the taxing entities. HSC section 34179.6 (f) requires successor agencies to transmit to the county auditor-controller the amount of funds identified in the above table within five working days, plus any interest those sums accumulated while in the possession of the recipient. Upon submission of payment, it is requested you provide proof of payment to Finance within five business days.

If funds identified for transmission are in the possession of the successor agency, and if the successor agency is operated by the city or county that created the former redevelopment agency, then failure to transmit the identified funds may result in offsets to the city's or the county's sales and use tax allocation, as well as its property tax allocation. If funds identified for transmission are in the possession of another taxing entity, the successor agency is required to take diligent efforts to recover such funds. A failure to recover and remit those funds may result in offsets to the other taxing entity's sales and use tax allocation or to its property tax allocation. If funds identified for transmission are in the possession of a private entity, HSC 34179.6 (h) (1) (B) states that any remittance related to unallowable transfers to a private party may also be subject to a 10 percent penalty if not remitted within 60 days.

Failure to transmit the identified funds will also prevent the Agency from being able to receive a finding of completion from Finance. Without a finding of completion, the Agency will be unable to take advantage of the provisions detailed in HSC section 34191.4. Specifically, these provisions allow certain loan agreements between the former redevelopment agency (RDA) and the city, county, or city and county that created the RDA to be considered enforceable obligations. These provisions also allow certain bond proceeds to be used for the purposes in which they were sold and allows for the transfer of real property and interests into the Community Redevelopment Property Trust Fund once Finance approves the Agency's long-range property management plan.

In addition to the consequences above, willful failure to return assets that were deemed an unallowable transfer or failure to remit the funds identified above could expose certain individuals to criminal penalties under existing law.

Pursuant to HSC sections 34167.5 and 34178.8, the California State Controller's Office (Controller) has the authority to claw back assets that were inappropriately transferred to the city, county, or any other public agency. Determinations outlined in this letter do not in any way eliminate the Controller's authority.

Please direct inquiries to Evelyn Suess, Supervisor, or Mary Halterman, Analyst, at (916) 445-1546.

Sincerely,

STEVE SZALAY
Local Government Consultant

cc: Ms. Cathy Capriola, Assistant City Manager, City of Novato
Mr. Roy Given, Director of Finance, Marin County Auditor-Controller
California State Controller's Office

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