June 14, 2012

Senator Loni Hancock
Elihu Harris State Building
1515 Clay Street
Suite 2202
Oakland, CA 94612

RE: Proposals for Amending AB1x 26 to Clarify Enforceable Obligations

Dear Senator Hancock:

We are writing to bring an immediate and serious concern to your attention. As we work to dissolve the Richmond Community Redevelopment Agency ("Former Agency") in accordance with the provisions of AB 1x 26, we are encountering difficulties in implementing an orderly wind-down of the Former Agency's activities. These difficulties stem from the State Department of Finance's ("DOF") interpretation of AB 1x 26 and have significant negative consequences for the economic health of the City of Richmond, the region, and by extension, the State.

The DOF has taken a position, which we believe is incorrect, that long-standing agreements executed prior to the effective date of AB1x 26 are not "enforceable obligations" and need not be honored. Disregard of these agreements in violation of the Contract Clause and contrary to the intent of AB1x 26 would subject the City of Richmond ("City") to substantial legal risk and result in significant negative consequences. Specifically, the DOF's position would result in the loss of over 900 jobs, 210 housing units (including 80 senior and 80 affordable units) and over $40 million in grant funding secured by the City and the Former Agency. We believe that, through clarification of AB 1x 26, our concerns can be rectified and these impacts averted. As these issues are not unique to the City of Richmond, we believe that clarification will help address concerns of cities and private parties across the state.

Several legislative avenues exist to provide clarification of the law. First, AB1x 26 provides that the California Law Revision Commission must draft a cleanup bill for consideration by the Legislature no later than January 1, 2013 (H&S Code ("HSC") §34189(b)). Several efforts directed at legislative amendments are currently underway. Most notably, the DOF has proposed a trailer bill to make changes to AB 1x 26 ("DOF Trailer Bill"). We understand that members of the Assembly Budget Subcommittee #4, chaired by Assembly Member Joan Buchanan (D-San Ramon), have voiced concerns with DOF's proposed language. As a follow-up to the Assembly Budget Subcommittee #4 meeting on Wednesday, May 23rd, the California League of Cities ("League") was asked to submit amendments to the DOF Trailer Bill, which would specifically identify the most objectionable provisions of the DOF Trailer Bill, along with any alternative language.

We submitted comments to the League for consideration in their amended language to the DOF Trailer Bill, and are asking for your support in implementing these changes either in the DOF Trailer Bill or in other proposed legislation.

At risk for City of Richmond (if enforceable obligations are not honored and projects are not built):

- *$40,478,765 in grant funding ($3,871,000 Federal, $13,382,765 Regional, $23,225,000 State Proposition 1B bond funds)*
- *$5,139,000 in wasted taxpayer funding for design, right-of-way, and utility relocation work*
- *210 housing units, including 80 senior and 80 affordable units*
- *Continued life safety problems for Marina Bay area due to not building the Officer Bradley A. Moody Memorial Underpass*
- *Inability to build public improvements to allow 100 transit-oriented housing units adjacent to BART*
- *Continued life safety problems for pedestrians, bicyclists, workers and residents in area around BART*
- *Substantial legal risk if existing agreements are not honored*

We believe these impacts can be avoided if AB 1X 26 is clarified through the following changes.

Definition of Enforceable Obligations Should Include Funding Agreements:

We request that the definition of "enforceable obligation" at HSC Section 34171(d) be clarified to include funding agreements entered into prior to the effective date of the legislation. This section currently defines enforceable obligations (among other things) to include "any legally binding and enforceable agreement that is not otherwise void as violating the debt limit or public policy," (HSC § 34171(d)(1)(E)). But DOF is taking the position that funding agreements are not enforceable obligations, a position that stands in contrast to the Constitution, as well as AB 1x 26 itself.

Specifically, the issue at hand is that the Former Agency entered into funding agreements with State, Regional and Federal entities prior to the enactment of AB1x 26 for the provision of funds for specific development projects. These funding agreements specifically spell out the Former Agency's obligation to provide the balance of funding to complete the projects. In relying on these agreements, significant sums have already been invested by both the Former Agency and third parties, including utility companies and developers, to advance these projects. The DOF has thus far determined that since construction contracts for projects funded through funding agreements have not yet been awarded, the funding agreements are not enforceable obligations. This interpretation will expose the City as the successor agency to the Former Agency to litigation to recoup the funds invested by third parties as well as other potential damages.

This position is counter to the Constitution and AB1x 26. First, Article I, §10 of the Constitution provides that "[n]o state shall…pass…any…law impairing the Obligation of Contracts." The DOF's disregard of existing agreements arguably violates the Contracts Clause,[1] a challenge that is likely to be

[1] In *Energy Reserves Group, Inc. v. Kansas Power and Light Co.* 459 U.S.400 (1983), the Supreme Court articulated a three-step test for evaluating Contract Clause challenges. The inquiry is based on: (1) whether the state law has, in fact, operated as a substantial impairment of a contractual relationship, (2) whether the state can demonstrate that it has a significant and legitimate public purpose which the regulation is intended to serve, and (3) whether the adjustment of the rights and responsibilities of contracting parties is based upon reasonable conditions and is of a character appropriate to the public purpose asserted in support of the regulation.

raised in litigation. Second, the DOF's actions are in conflict with the intent of AB1x 26 itself as the legislation includes several provisions clearly indicating that enforceable obligations must be honored by redevelopment agencies as well as successor agencies. (*See* HSC § 34167(f) ("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 perform its obligations"); HSC § 34177(a),(c)("Successor agencies are required to do all of the following: (a) Continue to make payments due for enforceable obligations…(c) Perform obligations required pursuant to any enforceable obligation")). Again, the DOF's disregard of the existing agreements is in conflict with the intent of AB 1x 26.

DOF's interpretation is inconsistent with the purpose of the funding agreements, which we necessarily view as binding upon the funding entities, and likewise upon us. If the Former Agency were to follow DOF's direction and violate the existing agreements, the City would be subject to substantial legal risk. Lawsuits have already been filed for violation of contractual obligations based on similar facts. (*See Southern California Housing Resource and Development LLC, et al. v. State of California Department of Finance et al.* (Sac. Sup. Ct., June 7, 2012) Petition for Writ of Mandate and Verified Compliant for Declaratory and Injunctive Relief (No. 34-2012-80001171)(developers claim the state violated constitutional protections for existing contracts tied to a 98-unit affordable housing development in concluding that such contracts are not enforceable obligations under AB1x 26)). More litigation will follow, especially since AB 1x 26 does not provide an administrative process for objecting to determinations made by the DOF.[2]

Based on the foregoing, we request that the legislation specifically list funding agreements as enforceable obligations that must be honored by all contracting parties.[3]

Multi-phased Projects Subject to Disposition and Development Agreements:

We also request that the language be clarified to address an inconsistency we have encountered due to DOF's apparent reading of HSC Section 34163(b) (prohibits redevelopment agencies from entering into contracts) in conjunction with of HSC Section 34177(c) (requiring successor agencies to perform obligations pursuant to any enforceable obligation). In cases where an enforceable obligation exists to complete a multi-phased project, that obligation may require subsequent contracts, agreements, etc. in order to perform the underlying obligation. An example is the Disposition and Development Agreement (DDA) for the Richmond Transit Village project, which is a transit-oriented development to be implemented in two phases and was executed prior to the effective date of AB 1x 26. The DDA requires the Former Agency to complete specified public improvements in sequence. DOF's apparent interpretation has been that, notwithstanding an enforceable DDA, if a construction contract has not been awarded, no enforceable obligation exists and the law prohibits the entering into new contracts. This interpretation is incorrect and threatens to expose the Successor Agency to legal action for nonperformance under the terms of the DDA.

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[2] We support the League's efforts to propose amendments to the DOF Trailer Bill that would create processes for administrative dispute resolution.

[3] It may be noted that this issue has garnered widespread attention as the League's proposed amendments to the DOF Trailer Bill propose a process to fund "shovel ready" housing developments as future enforceable obligations dispersed over three years. (Proposed HSC §§ 34171 (d)(1)(H), 34180 (l)).

First, as noted above, AB1x 26 provides that successor agencies are required to "make payments due for enforceable obligations" and to "perform obligations required pursuant to any enforceable obligation." (HSC § 34177(a),(c)). Accordingly, as the DDA requires the Former Agency to complete specified public improvements in sequence, the successor agency must do so in order to perform its obligations under the DDA. Second, the prohibition against entering into contracts is one that applied to redevelopment agencies during the period of time that the redevelopment agencies were ordered to wind-down their affairs prior to the transfer of assets to successor agencies. The prohibition does not apply to successor agencies and so, as long as the successor agency is implementing an enforceable obligation, it should not be prohibited from entering into contracts to do so.

Based on the foregoing, we request that the legislation clarify that successor agencies may enter into agreements necessary to implement enforceable obligations.

Recognition of Obligations for Projects Which Have Secured Leveraged Funds:

Finally, we offer a modest, common-sense proposal for consideration. In addition to the above statements regarding the enforceability of funding agreements and similar devices that provide for the provision of State, Federal and regional funds to a former agency, we ask that consideration be given to recognizing obligations for projects which have secured outside funds via these agreements through the use of former redevelopment agency funds, where the redevelopment agency's funds are leveraged at a 1:1 ratio or higher. The effect of recognizing these arrangements made prior to the effective date of AB 1x 26 would serve a public purpose by logically recognizing that there exist situations where DOF would effectively be trading one dollar of property tax for one dollar (or more) of Federal funding which will be lost by the state, resulting in a net loss to the economy.

Summary

We respectfully request your office give consideration to our proposed clarifying changes to AB 1x 26. There is much at risk, as indicted above, for the citizens of Richmond. We thank you for your continued support of the City of Richmond. Please feel free to contact me if you have any questions.

Sincerely,

Patrick Lynch, Director
City of Richmond as Successor Agency to the
Richmond Community Redevelopment Agency
(510) 412-2053