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# MEMORANDUM

**DATE:** March 14, 2013

**TO:** Oakland Oversight Board

**RE:** Transfers of Property from the Former Redevelopment Agency to the City of Oakland; Governmental Purpose Properties and Properties Contractually Committed to a Third Party – Item # 4

The City of Oakland (the "City") currently holds title to 34 parcels of real estate that the former Oakland Redevelopment Agency ("RDA") transferred to the City on the eve of the dissolution of the RDA. The City reports that these 34 properties have a total book value of approximately $108 million. The State Controller is currently reviewing these and other asset transfers to determine if the transfers should be reversed and the properties returned to the Successor Agency of the former RDA (the "Successor Agency"). The City wishes to retain title to the 34 properties. The City is asking the Oakland Oversight Board (the "Oversight Board") to retroactively approve the transfers of the 34 properties from the RDA to the City. The City maintains that 20 of the properties were constructed and used for a governmental purpose. The City maintains that the City has contractually committed 16 of the properties to third parties. For these reasons (governmental purpose and contractual commitments to third parties), the City argues that the properties should remain in the hands of the City and not "clawed-back" to the Successor Agency. This Memorandum provides the Oversight Board with the background, legal analysis and review of the 34 properties to assist the Oversight Board in making its decision to approve or not approve of the proposed retroactive transfers.

A. Background.

Pursuant to the legislation that dissolved the former redevelopment agencies, Assembly Bill x1 26 ("AB 26"), transfers of assets, including real property, from the former redevelopment agency to the sponsoring city after January 1, 2011 are subject to a "clawback" by the State Controller, whereby the Controller would order the properties to be transferred back to the Successor Agency. Once transferred back to the Successor Agency, the properties would be developed, used or sold in accordance with a long range property management plan prepared by the Successor Agency and approved by the Oversight Board and the Department of Finance ("DOF"). All sales proceeds and other revenue generated by the properties would be shared by and distributed to all of the taxing entities, rather than keep solely for the benefit of the City.

Just prior to its dissolution, the RDA transferred 79 parcels of real property to the City for the price of $1.00 each. The transfers were approved at an emergency joint meeting of the RDA and the City Council on March 3, 2011 and the deeds were recorded on January 31, 2012. The State Controller is currently reviewing all of the asset transfers. City staff reports that the Controller has advised City staff that if the Oversight Board retroactively approves certain property transfers as being for governmental purpose, or that certain properties should not be "clawed back" because the City has contractually committed the properties to third parties, then the Controller will not clawback those properties and they will remain in the hands of the City and not subject to the long range property management plan. Of course, if the Oversight Board were to retroactively approve of some or any of the transfers, such action is still subject to review and approval by DOF.

As in all of its activities, the Oversight Board's analysis and decision on these matters must be conducted keeping its dual fiduciary duties in mind --- to the taxing entities and to the holders of enforceable obligations. Each Oversight Board member owes a fiduciary duty to **all of the taxing entities**, not just the entity that such member represents on the Board.

Additionally, under section 34179(p) of the dissolution statute, for matters within the purview of the Oversight Board, the Oversight Board's decision supersedes those made by the Successor Agency or the staff of the Successor Agency.

B. Asset Transfer Review by the State Controller's Office

The City Memorandum to the Oversight Board dated February 25, 2013 ("City Memo") states that the

> "Controller team has advised City staff that approval by the Oakland Oversight Board of the previous transfers of real properties in governmental use or subject to enforceable obligations will remove these properties from the threat of clawback. The attached legislation [two resolutions] approves the previous transfer of the governmental use properties and the properties subject to third-party enforceable obligations, per the State Controller's Office requirements, so that the properties will not be required to be transferred back to ORSA per a clawback order and then back to the City again after approval of the Property Management Plan."

In order to advise the Oversight Board with regard to the City's two proposed Resolutions (one pertaining to the proposed governmental purpose transfers and one pertaining to the properties the City maintains it has contractually committed to third parties), I asked the City Attorney to provide me with the contact information of the representatives in the State Controller's Office who advised the City staff to seek this legislation from the Oversight Board. The City Attorney gave me two contacts. I left them voice messages and had a return call from the following four representatives of the State Controller's Office: Walter Barnes, the Chief of Special Projects, Jeff Brownfield,

the Chief of the Division of Audits, Scott Freesmeier, Auditor Manager and Michael Mock, Auditor-in-Charge. They explained the following points:

- The "real key" or the "bottom line" is that under Section 34167.5, all assets and properties that were transferred from the former RDA to the City after January 1, 2011 must be returned to the Successor Agency for the Successor Agency to determine, with Oversight Board Approval, what to do with the properties pursuant to the Long Range Property Management Plan.

- If some unauthorized transfers of property from the former RDA to the City took place **after** January 1, 2011, the State Controller will not clawback the properties if it would disrupt or penalize third parties that entered into contractual obligations with the City **after** the transfer occurred, but before June 28, 2011.

- As to contractual obligations to third parties that the former RDA had prior to the transfer of the properties to the City (such as 2004/2005/2006 lease disposition and development agreements, ground leases and other disposition and development agreements), when the former RDA transferred those properties to the City after January 1, 2011, those obligations to third parties were also transferred to the City, and if the properties are "clawed back", the properties with those obligations will be transferred back to the Successor Agency.

- In its Asset Transfer Assessments in other jurisdictions, the State Controller's Office has stated (and what it proposes to do with regard to Oakland) that the original transfer of assets after January 1, 2011 from the former RDA to the City was unauthorized, but if the Oversight Board has taken action (including retroactively) to approve the transfer of the properties that were constructed and used for a governmental purpose, the State Controller has no need to take any further action with regard to those properties, and the decision as to whether the property was constructed and used for a governmental purpose will be reviewed by the DOF.

There appears to have been a misunderstanding between City staff and the Controller's office. The representatives from the Controller's office told me they did not ask the Oversight Board to take any action; they simply told City staff that if the Oversight Board had approved of the transfer of properties constructed or used for a governmental purpose, the Controller would take no further action on those properties. That is all.

We therefore turn to examine the proposed transfer of properties constructed and used for a governmental purpose.

C. Governmental Purpose.

The City contends that the following 20 properties have been constructed and used for a governmental purpose and asks that the Oversight Board retroactively approve their transfer from the RDA to the City:

| No. | Use Category - Description | Address | Held By | Area | Parcel Number | Book Value | Size SqFt |
|---|---|---|---|---|---|---|---|
| PROPERTY HELD IN RETENTION FOR GOVERNMENT USE | | | | | | | |
| 1 | Street - Sunshine Court | SUNSHINE COURT | City | Coliseum | 040-3319-047-02 | | 1,084 |
| 2 | Street - Sunshine Court | SUNSHINE COURT | City | Coliseum | 040-3319-047-03 | | 17,182 |
| 3 | Parking - AMTRAK Station | 73RD AVE | City | Coliseum | 041-3901-007-03 | $337,332 | 2,766 |
| 4 | Parking - AMTRAK Station | 73RD AVE | City | Coliseum | 041-3901-007-05 | $332,403 | 35,000 |
| 5 * | Education & Entertainment - Fox Theater | 521 19TH STREET | City | Central District | 008-0642-016 | | 64,697 |
| 6 | Park - Wade Johnson | 12TH ST | City | Oak Center | 004-0037-032-05 | | 10,080 |
| 7 | Park - Wade Johnson | POPLAR STREET | City | Oak Center | 004-0059-014 | | 28,582 |
| 8 | Park - Wade Johnson | 1205 POPLAR STREET | City | Oak Center | 004-0059-015 | | 4,563 |
| 9 | Park - Wade Johnson | 1316 E 12TH ST | City | Oak Center | 004-0059-016 | | 4,216 |
| 10 | Park - Wade Johnson | 1224 KIRKHAM CT | City | Oak Center | 004-0059-017 | | 4,295 |
| 11 | Park - Wade Johnson | 1228 KIRKHAM CT | City | Oak Center | 004-0059-018-02 | | 1,223 |
| 12 | Park - Leona Creek | LEONA CREEK DR | City | Coliseum | 041-4212-002 | | 217,872 |
| 13 | Sod Farm - Coliseum | 66TH AVE | City | Coliseum | 041-3901-010 | $1 | 47,480 |
| 14 | Parking - Coliseum | 8000 SOUTH COLISEUM WAY | City | Coliseum | 042-4328-001-24 | $1,400,000 | 383,328 |
| 15 | Recreation - Oakland Ice Center | 540 17TH STREET | City | Central District | 008-0641-008-05 | $10,588,072 | 70,567 |
| 16 | Parking Garage - City Center West | 1260 M L KING JR WAY | City | Central District | 002-0027-006-03 | $21,446,577 | 140 |
| 17 | Parking Garage - City Center West | M L KING JR WAY | City | Central District | 002-0027-006-05 | part of 27-6-3 | 78,103 |
| 18 * | Parking Garage - University of California Office of the President | 1111 FRANKLIN | City | Central District | 002-0051-013-01 | $2,419,000 | 0 |
| 19 | Parking Garage - Franklin 88 | 9TH ST | City | Central District | 002-0101-001 | $2,818,000 | 13,406 |
| 20 | Parking Garage - Telegraph Plaza | 2100 TELEGRAPH AVENUE | City | Central District | 008-0648-016-03 | $781,911 | 72,398 |
| **Sub-Total Parcels held for a governmental use.** | | | | | | **$40,123,296** | **1,056,982** |

* Properties qualify as and are listed as both governmental use and enforceable obligations.

The chart above is taken from the City staff report to the Oversight Board. The 20 properties are used for the purposes of parking lots and garages, streets, education and theater, parks, recreation and a sod farm. Before turning to address each property, we first examine the specific statutory provision, the purposes of the dissolution statute and the information we have learned about the decisions of DOF and the State Controller on this issue in other jurisdictions.

Under Health & Safety Code § 34181(a), the Oversight Board must direct the Successor Agency to dispose of all assets and properties of the former RDA, but the Oversight Board

> "may instead direct the Successor Agency to transfer ownership of those assets that were constructed and used for a governmental purpose, such as roads, school buildings, parks, police and fire stations, libraries and local administrative buildings to the appropriate public jurisdiction pursuant to any existing agreements relating to the construction or use of such an asset."

It is noteworthy that the Oversight Board "may" direct the transfer of governmental purpose properties to the City; the Oversight Board is not required to do so. The decision whether to retroactively direct the transfers of the 20 properties does not involve any holders of enforceable obligations, but the Oversight Board does need to adhere to its fiduciary duty to all

of the taxing entities in deciding whether to retroactively direct the Successor Agency to transfer these 20 properties.

The State Controller's website states that "Oversight boards may send an asset back to a local government if it serves a legitimate governmental purpose and there is no objection by the Governor's Department of Finance." The Oversight Board must determine if any of the 20 properties were "constructed and used for a governmental purpose." Section 34181(a), set forth above, calls out certain governmental purposes such as roads, parks and school buildings. It does not include parking, recreational facilities, theaters or sod farms, but the words "such as" seem to indicate that "governmental purpose" is not meant to be limited to just those purposes listed in the statute. We understand from discussions with other Oversight Board counsel throughout the state that in other jurisdictions, DOF has accepted as "governmental purpose" properties used for the following purposes: a flood channel, a park and a pedestrian walkway. We also understand that DOF has not accepted **all** parking lots and garages as governmental purpose properties. One Oversight Board received a rejection from DOF of a transfer of parking lots and garages in which DOF explained that "parking lots and structures that are for mixed use and open to individuals other than governmental employees do not qualify as a governmental purpose." In another circumstance, DOF indicated that it would approve the transfer of parking garages that are also open to the public as for a governmental purpose, but only as part of the Long Range Property Management Plan.

There is a certain economic logic and justification to DOF's decision with regard to parking lots and garages when the purpose of the dissolution statute - to make more money available to cities, counties, special districts and school and community college districts - is considered. A parking lot or parking garage that is just for governmental employees does not generate revenue. If it is allowed to remain in the hands of the City, the other taxing entitles are not disadvantaged. If, however, a parking lot or parking garage that generates revenue (i.e., open to the public for parking for a fee) is allowed to remain in the hands of the City, those revenues will go to the City alone and will not be shared with the county, special districts, or the school and community college districts. If the revenue generating parking lot is transferred back to the Successor Agency, all of the taxing entities will share in the net revenue.

The State Controller has completed over 20 Asset Transfer Reviews. In its November 2012 review of RDA to city asset transfers in West Sacramento, the State Controller concluded that 12 properties were transferred to the city from the former RDA, but these properties did not need to be transferred back to the Successor Agency because the Oversight Board had retroactively approved the transfers as being for governmental purpose. The 12 properties were used for the following purposes: a right-of-way, a bridge, roads, flood protection, a park and associated parking for the park, and a pump station. The Controller noted several times in the review that the properties had **"zero book value".**

Of the 20 properties claimed to be used for governmental purpose here, the City staff identified the following properties as having **zero book value**: Sunshine Court (#1 and 2), the Wade Johnson and Leona Street Parks (#6 through 12) and the Fox Theater (#5), and gave a

$1.00 book value to the sod farm (#13). The City staff reports that the rest of the proposed governmental purpose properties have a total book value of **over $40 million**.

As discussed above, the value of the properties and the revenue they generate are important for the Oversight Board to consider. The dissolution statute does not contemplate that the transfer of property to the City be for no or nominal consideration. In fact, it provides that asset disposition to the City will result in the distribution of income to the taxing entities. In referring to the transfers from a Successor Agency to the City of properties constructed and used for a governmental purpose, Section 34181(a) provides:

> "Any compensation to be provided to the Successor Agency for the transfer of the asset shall be governed by the agreements relating to the construction or use of that asset….Asset disposition may be accomplished by a distribution of income to taxing entities proportionate to their property tax share from one or more of the properties that may be transferred to a public or private agency for management pursuant to the direction of the Oversight Board."

In addition, Section 341870(f) of the dissolution statute provides for compensation to the taxing entities if the City wishes to retain any properties for future development:

> "If a city, county, or city and county, wishes to retain any properties or other assets for future redevelopment activities, funded from its own funds or under its own auspices, it must reach a compensation agreement with the other taxing entities to provide payments to them in proportion to their shares of the base property tax, as determined pursuant to Section 34188, for the value of the property retained."

One other provision of the dissolution statute should also be considered in this analysis. The so-called trailer bill, AB 1484, sets forth provisions with regard to the long-range property management plan that the Successor Agency will prepare to address the disposition and use of the real properties of the former RDA; the long range property management plan will be presented to the Oversight Board and DOF for approval. The four permissible uses allowed under the long range property management plan are: retention of the property for governmental purposes, retention of the property for future development, sale of the property, or use of the property to fulfill an enforceable obligation. Section 34191.5(c)(2)(B) of the statute provides:

> "If the plan directs the liquidation of the property or the use of revenues generated from the property, <u>such as lease or parking revenues</u>, for any purpose other than to fulfill an enforceable obligation or other than that specified in subparagraph (A) [liquidation of the property for a project identified in an approved redevelopment plan], the proceeds from the sale shall be distributed as property tax to the taxing entities" [emphasis added].

In other words, the sales proceeds and revenue stream from properties under the long range property management plan must be disbursed to all of the taxing entities. DOF's website provides additional direction on this issue:

> "If the PMP [the long range property management plan] proposes to sell or transfer the property to the city or county that created the RDA, then HSC section 34180(f) requires that the Successor Agency reach a compensation agreement with the affected taxing entities to provide each entity a payment in proportion to its share of the base property tax generated by the property. If such an agreement cannot be reached with each affected taxing entity, the subdivision requires the property's value to be established by an independent appraiser approved by the Oversight Board."

It is important to keep in mind that to the extent any properties are allowed to remain in the hands of the City, they will not be part of the long range property management plan (City staff has so stated in its February 25, 2013 Memorandum on the Property Management Plan), and all sales proceeds and revenues from those properties would be for the benefit of the City **only**, and no monies would flow to the other taxing entities.

We will now proceed to examine each property, keeping in mind the issues of value and revenue stream addressed above. The information below on each of the properties is based on descriptions in the City staff's February 25, 2013 Memorandum (the "City Memo").

#1-2 Sunshine Court. Two parcels that function as a City street. Zero book value. Recommend approval for retroactive transfer to the City for governmental purpose.

#3-4 Parking-Amtrack Station. Two parcels used as public parking for train passengers and the parcels are also leased to a parking lot operator for use as overflow parking for Coliseum events. (The amount of this revenue stream was not disclosed in the City Memo.) Book value of the parcels is approximately $670,000. Based on reports from other jurisdictions, DOF is not likely to approve these as governmental purpose transfers. The revenue from these parcels should be shared with all of the taxing entities, and would be if it the parcels are clawed back and made part of the long term property management plan. If the parcels were clawed back and then transferred to the City for future development as part of a transit-oriented development (as indicated in the City Memo), Health & Safety Code ("HSC") Section 34180(f) requires the Successor Agency to reach a compensation plan with the taxing entities. Recommend no retroactive transfer to the City for governmental purpose.

#5 Fox Theater. The theater houses the Oakland School for the Arts, as well as the theater, a bar, and a restaurant/diner. The portion housing the school could constitute a "school building" under Section 34181(a) of the dissolution statute. The other uses, theater, bar and restaurant, are harder to fit into "governmental purpose," especially as that term has been interpreted by DOF. The City Memo reports the book value at zero. It appears from the City Memo that the City has received some repayments from loans in excess of $35 million made by the RDA, although the City Memo also states that the loans made by the RDA are behind three

loans totaling $31 million, and the City has received no net revenues from RDA loan repayments after operating costs and debt service on the other three loans have been paid. Nonetheless, it appears that the RDA loaned over $35 million to four entities. When and if those loans are repaid, that money should flow to the benefit of all of the taxing entities. This is a complex property. Recommend clawing this property back for closer study as part of the long range property management, with potential revenue stream from loan repayments in the future to the taxing entities.

#6-12 Wade Johnson Park and Leona Creek Park. Seven parcels that function as two City parks. Zero book value. Recommend approval for retroactive transfer to the City for governmental purpose.

#13 Coliseum Sod Farm. Growing sod for use by the Oakland Raiders and the Oakland A's (pursuant to the franchise agreements) does not qualify as a governmental purpose. The City Memo states that the book value of the property is $1.00, but reports that the appraised value is one million dollars. If the parcel is clawed back and then transferred to the City for future transit-oriented development (as discussed in the City Memo), HSC Section 34180(f) requires the Successor Agency to reach a compensation plan with the taxing entities. Recommend no retroactive transfer to the City for governmental purpose.

#14 Coliseum Parking. This parcel is co-owned with Alameda County and is under a parking franchise agreement to provide parking to the sports teams and for events at the Coliseum (revenue not stated) and also generates $1400 per month in fees for use by AT&T. The book value is listed as $1.4 million, but the appraised value is listed as $3.5 million. Parking for sporting and other events does not appear to be a governmental purpose as interpreted by DOF. If the parcel is clawed back and then transferred to the City for future transit-oriented development (as discussed in the City Memo), HSC Section 34180(f) requires the Successor Agency to reach a compensation plan with the taxing entities. Recommend no retroactive transfer to the City for governmental purpose.

#15 Oakland Ice Center. There is no recent appraisal of the property, but the book value is reported at $10,588,072. The City Memo states that the property was acquired for future development; it was not acquired for governmental purpose, as required for transfer to the City under the dissolution statute. The Center is a recreational facility, and although 1000 Oakland public school students use the facility for free each year, it is operated and managed by a private company, San Jose Arena Management ("SJAM") under a 5 year management agreement executed on December 20, 2010, and used primarily by private individuals and groups for hockey, skating, lessons and corporate events, all under a fee schedule. This does not sound like use for a "governmental purpose." SJAM received 50% of the net revenues up to a net total of $450,000 and all additional net revenue is divided 65% to SJAM and 35% to the City. For the fiscal year 2011/12, the City's share of revenues was $333,240. The City spent some of that revenue on capital repairs (no details were given, but presumably one-time expenses), debt service on solar panel (on-going until 2020), with a net of $98,080 to the City remaining after those payments (which the City states is being reserved for capital repairs in 2013). The City receives $31,860.00 per year in lease payments from leasing the snack bar and pro shop. The

City states that is uses $21,515.06 of this revenue to pay for the Center's annual contribution to the Downtown Oakland Business Improvement District, leaving over $10,000 a year in leasing revenues to the City. If the parcel is clawed back and then transferred to the City for continued recreational uses, HSC section 34180(f) requires the Successor Agency to reach a compensation plan with the taxing entities. Recommend no retroactive transfer to the City for governmental purpose.

#16-17 Parking Garage – City Center West. The City Memo states that the garage was "built to provide parking for four development sites and parking for the general public"; 81% of the 1461 parking spaces are currently under long-term parking licenses at market rates to service the private development sites. This use for a predominantly private purpose does not meet the statutory test of being "constructed for a governmental purpose." Even though it appears that some City-owned vehicles and City employees park in the garage, this is a small percentage of the use, and the DOF, in other jurisdictions, has determined that this type of use does not constitute governmental purpose. The City Memo reports that in April 1996, the City transferred the property to the former RDA, and as consideration for the transfer, the former RDA assumed responsibility for a $22 million loan, which the RDA paid in full in FY 2008/09. Yet, two years later, on the eve of the RDA's dissolution, the RDA transferred the property (valued at $9.3 million on an income approach and $54 million on a replacement cost approach) to the City for $1.00. The net revenue for the garage and its several retail spaces was approximately $630,000 in FY 2011/12, all of which flows to the City and none to the other taxing entities. Recommend no retroactive transfer to the City for governmental purpose.

#18 Parking Garage –University of California Office of the President ("UCOP"). The former RDA acquired the UCOP Garage to provide parking for a future private development (mixed use office and retail) of adjacent property at 1111 Broadway; it currently provides 145 parking spaces for a fee to the public. The UCOP Garage was not constructed for a governmental purpose, and under recent DOF determinations, it is not used for a governmental purpose. The garage generated $169,000 in revenue in FY 2011/12, all of which flowed to the City and none of which was dispersed to the other taxing entities. The City Memo reports that based on an income approach, the UCOP Garage is valued at approximately $2.6 million; however, the former RDA entered into a Purchase and Sale Agreement in October 2008 to sell the Garage to SKS Investment Partners for $4.35 million, which price increases annually until Closing. If this property is allowed to remain with the City, the City will reap the $4.35 million+ benefit while having paid the RDA only $1.00 for the property. Unless the property is clawed back, none of the other taxing entities will realize a dime from the $4.35 million sale to SKS. Recommend no retroactive transfer to the City for governmental purpose or otherwise.

#19 Franklin 88 Garage. The Franklin 88 Garage consists of 135 parking spaces and was built as replacement parking for the surface parking that was on the site prior to the development of a hotel and housing project. Again, it does not appear to meet the test of having been constructed and used for a governmental purpose. The annual revenue to the City (after payment of association dues) is approximately $12,000, plus the City receives a share of revenue received by the parking company that manages the facility, all of which now flow to the City with none to the other taxing entities. The former RDA purchased the property in November

2004 for $2,818,000, and transferred it to the City for $1.00. Recommend no transfer to the City for governmental purpose.

#20 Telegraph Plaza Garage. The City Memo reports that this facility was purchased to expand downtown public parking and to replace public parking that was lost in the Uptown District due to development. Again, it does not meet the test of "constructed and used for a governmental purpose" as determined by DOF in other jurisdictions. An appraisal in October 2008 valued the property at $7 million; the City Memo reports that the current value based on comps is $5.18 million, and based on revenue is $5.562 million. The former RDA purchased the property from the City in July 2009 for $7 million; yet less than two years later, the RDA transferred the property back to the City for $1.00. The parking revenue from the garage during FY 2011/12 was $361,526, all of which flowed to the City with none going to the other taxing entities. Recommend no transfer to the City for governmental purpose.

D. No Clawback if the City has Contractually Committed the Property to a Third Party.

Set forth in the chart below are 16 properties that the City argues should not be subject to the clawback from the State Controller because the City is contractually committed to third parties with regard to those properties. Our recommendation is for the Oversight Board to take no action on this matter for the reasons set forth below.

| No. | Use Category - Description | Address | Held By | Area | Parcel Number | Book Value | Size SqFt |
|---|---|---|---|---|---|---|---|
| **PROPERTY HELD TO FULFILL AN ENFORCEABLE OBLIGATION - ARMY BASE** | | | | | | | |
| 1 | Oakland Army Base | BURMA ROAD | City | Army Base | 0000-0507-001-10 | $48,939,425 | 758,743 |
| 2 | Oakland Army Base | MARATIME STREET | City | Army Base | 0000-0507-001-11 | part of 507-1-10 | 4,171,442 |
| 3 | Oakland Army Base | WAKE AVENUE | City | Army Base | 0000-0507-004-01 | part of 507-1-10 | 0 |
| 4 | Oakland Army Base | WAKE AVENUE | City | Army Base | 0000-0507-004-04 | part of 507-1-10 | 503,758 |
| 5 | Oakland Army Base | WAKE AVENUE | City | Army Base | 0000-0507-005 | part of 507-1-10 | 75,010 |
| 6 | Oakland Army Base | BURMA ROAD | City | Army Base | 0000-0507-006 | part of 507-1-10 | 413,820 |
| 7 | Oakland Army Base | MARATIME STREET | City | Army Base | 0000-0507-007 | part of 507-1-10 | 65,340 |
| 8 | Oakland Army Base | WAKE AVENUE | City | Army Base | 0000-0507-008 | part of 507-1-10 | 644,506 |
| **Sub-Total - Army Base parcels with enforceable obligations.** | | | | | | **$48,939,425** | **6,632,619** |
| **PROPERTY HELD TO FULFILL AN ENFORCEABLE OBLIGATION - ADDITIONAL SITES** | | | | | | | |
| 9 | Forest City - Uptown Residential | 1911 TELEGRAPH AVENUE | City | Central District | 008-0716-052 | $6,022,384 | 76,599 |
| 10 | Forest City - Uptown Residential | 1911 TELEGRAPH AVENUE | City | Central District | 008-0716-054 | $4,313,844 | 54,868 |
| 11 | Forest City - Uptown Residential | 1911 TELEGRAPH AVENUE | City | Central District | 008-0716-056 | $5,808,532 | 73,879 |
| 12 | Sears - Replace Auto Repair | 490 TOMAS L BERKELEY WAY | City | Central District | 008-0649-009 | $2,744,125 | 10,766 |
| 13 | Sears - Replace Auto Repair | 2016 TELEGRAPH | City | Central District | 008-0649-010 | part of 649-9 | 9,370 |
| 14 | Rotunda Garage - Commercial/Residential | 524 16TH STREET | City | Central District | 008-0620-009-03 | | 6,697 |
| 15 * | Education & Entertainment - Fox Theater | 521 19TH STREET | City | Central District | 008-0642-016 | | 64,697 |
| 16 * | Parking Garage - University of California Office of the President | 1111 FRANKLIN | City | Central District | 002-0051-013-01 | $2,419,000 | 0 |
| **Sub-Total - Additional parcels with enforceable obligations.** | | | | | | **$21,307,885** | **296,876** |
| **Total - Parcels with enforceable obligations.** | | | | | | **$70,247,310** | **6,929,495** |

* Properties qualify as and are listed as both governmental use and enforceable obligations.

1. This is Not a Task of the Oversight Board – It is in the Jurisdiction of the State Controller.

Section 34167.5 of the dissolution statute provides:

> "Commencing on the effective date of the act adding this part, the [State] Controller shall review the activities of redevelopment agencies of the State to determine whether an asset transfer has occurred after January 1, 2011, between the city or county, or city and county that created a redevelopment agency or any other public agency, and the redevelopment agency. 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 October 1, 2011, to the successor agency, if a successor agency is established . . ."

The statute is clear that the review of asset transfers to the City and a decision whether those assets should be transferred back to the Successor Agency is for the State Controller to determine and then order; the statute does not give those tasks or powers to the Oversight Board. The Oversight Board has no jurisdiction to determine if the City has contractual obligations to a third party. It is true that the Oversight Board has the obligation and power under the dissolution statute to determine if the former RDA, and now the Successor Agency, have "enforceable obligations" to third parties. The Oversight Board makes these determinations when reviewing and approving the ROPs and the Due Diligence Reviews. But Section 34167.5 involves a determination as to whether the City has contractual obligations to a third party, and that is beyond the Oversight Board's duties and powers under the dissolution statute.

The City argues that the Oversight Board has the authority under Section 34181(a) to dispose of "all assets and properties of the former redevelopment agency". Actually, the statute reads that the Oversight Board shall direct the Successor Agency to "dispose of all assets and properties of the former redevelopment agency . . . Disposal shall be done expeditiously and in a manner aimed at maximizing value." The 16 properties at issue, with a book value of over $70 million were transferred from the RDA to the City for $1.00 each, and the City wants the Oversight Board to retroactively approve such transfer. The Board should not take this action – it would violate the Board's fiduciary duties to the taxing entities to do so. A "sale" of property worth $70 million to the City for $16.00 does not "maximize value" to the taxing entities – the full value of the properties flows only to the City. If the properties are clawed back, the properties will be part of the long range property management plan, duties to enforceable obligations will still be honored and the Board's fiduciary duty to all of the taxing entities will also be upheld.

2. The State Controller's Office Has Not Invited the Oversight Board to Retroactively Approve of Property Transfers Where the City is Supposedly Contractually Committed to Third Parties.

The Supplemental Memo argues that the City is seeking Oversight Board approval on this issue "at the invitation of the State Controller's Office in order to facilitate their pending review of Oakland asset transfers, and that the Board's retroactive approval would "exempt those properties from clawback to ORSA."

As set forth above, it appears there was a misunderstanding between the City staff and the Controller's Office. According to the four representatives from the Controller's Office with whom I spoke, the Controller's Office simply told City staff that if the Oversight Board had approved of the transfer of properties constructed and used for a governmental purpose, the Controller would take no further action on those properties.

3. The Contractual Commitments to Third Parties the City Inherited from the Former RDA When the Properties were Transferred Does Not Prevent a Clawback of the Properties.

At the time the 16 properties were transferred on the eve of the dissolution of the RDA from the RDA to the City, the RDA had existing obligations to third parties under general leases, disposition and development agreements, lease disposition and development agreements and other agreements dating from 2004, 2005, 2006 and 2008. When these properties were transferred to the City, the contractual obligations to third parties associated with these properties were also transferred to the City. If the properties are clawed back to the Successor Agency, the third party contractual obligations would also return to the Successor Agency.

If, on the other hand, after the properties were transferred to the City, the City had committed a property to a third party, and then the property was clawed back, that third party would lose its contractual rights, if Section 34167.5 did not provide a safe harbor for contractual commitments made by the City to third parties. None of the contractual commitments that the City argues should prevent a clawback are contracts the City entered into with third parties after the transfer of properties was made from the former RDA to the City – all of them were pre-existing obligations of the former RDA.

As set forth above, the four representatives from the State Controller's Office made it very clear that if some unauthorized transfers of property from the former RDA to the City took place after January 1, 2011, pursuant to Section 34167.5 of the dissolution statute, the State Controller will not clawback the properties if it would disrupt or penalize third parties that entered into contractual obligations with the City after the transfer. Clawing back these 16 properties would not disrupt or penalize any third parties with contractual commitments – these commitments would simply be transferred back to the Successor Agency.

As I have mentioned to the Oversight Board previously, our firm is part of a discussion group of other counsel to Oversight Boards throughout the State, most of whom have previously been counsel to cities and former redevelopment agencies. I posed the question to this group as to whether Oversight Boards have the jurisdiction to approve of the transfers of property to avoid a clawback when the City claims it has contractual obligations to third parties pursuant to Section 34167.5. First, the group unanimously agreed this is not within the jurisdiction of the Oversight Board – it is a determination to be made exclusively by the State Controller. Second, the group also unanimously agreed that the City's contractual commitments to third parties that would defeat a clawback under Section 34167.5 refers to and protects third parties that enter into contracts with the City after the properties were transferred. The City reports no such post-transfer contractual commitments to third parties here.

E. Bond-Financed Property.

The City maintains, in its Supplemental Memo, that "some restrictions on funds generated from properties purchased with bond funds may prevent such revenues from being distributed to the taxing entities." Although we do not believe that the issue of any potential restrictions on funds generated from properties purchased with bond funds is pertinent to the issue of whether the particular properties that have been constructed and used for a governmental purpose should be transferred to the City, because the City has raised it, it must be addressed.

The City states in its Supplemental Memo that bond counsel advised as follows:

> "revenue from bond assets, such as loans funded from tax allocation bond funds and property purchased with bond funds would have to be used consistent with the original bond covenants for other redevelopment purposes. This would be true whether the bonds are taxable or tax-exempt.…If these properties [the 34 properties at issue here] are sold, the proceeds would be restricted to use for redevelopment purposes within the redevelopment project area that issued the bonds. Net revenues generated by the properties would be subject to the same restriction."

After reading the Supplemental Memo, I asked the City Attorney for the applicable codes, regulations and covenants and told him that I wished to speak to bond counsel. The City Attorney forwarded me the contact information for Steve Melikian of the Jones Hall law firm. I discussed this matter with Mr. Melikian. I learned the following from that conversation:

1. Tax Exempt Bonds. With regard to a property that was purchased or financed with tax exempt bonds, pursuant the IRS regulations, if the property is sold, in order for the interest on the bonds to maintain a tax exempt status for the benefit of the bondholders, the proceeds must be reinvested within 2 years in another governmental project. If the property were clawed back to the Successor Agency and sold, the proceeds must be used for a governmental project, such as a new school or other capital expense for any of the taxing entities. The fact that the property was purchased or financed with tax exempt bonds does not mean that the property

must remain in the hands of the City and does not mean that the proceeds can only be used "for other redevelopment purposes."

2. Taxable Bonds. The IRS restriction on re-investing proceeds from the sale of bond-financed properties into other governmental projects is not imposed on taxable bonds - the holders of taxable bonds have no tax exempt status that needs to be maintained. In addition, as long as the bond payments are made from tax increment to the bondholders, the bondholders have no right to object to how the proceeds from the sale of bond-financed property are reinvested – the taxable bond holders have no interest in the properties. Bond counsel reported that some redevelopment advocates take the position that provisions in redevelopment plans may impose restrictions on the use of proceeds of the sale of bond-financed properties, but that DOF disagrees with that position; bond counsel had no opinion on the issue other than that arguments exist on both sides, and that the statute is not clear.

3. Income and Revenues from Bond-Financed Properties. Bond counsel advised that there is no authority that he knows of that requires that the income or revenue from bond-financed properties must be used "for redevelopment purposes within the redevelopment project area that issued the bonds," as argued in the City's Supplemental Memo. The City itself does not appear to be taking that position in its use of the net revenue from some of the bond-financed properties. For example, with regard to the City Center West garage, a taxable bond-financed property, the City reports that "Net revenues from the garage and the retail tenants [over $625,000 in FY 2011/12] are placed in the City's parking fund and used to cover staff and capital improvement costs." Supplemental Memo, page 23. With regard to the Telegraph Plaza Garage, also a taxable bond-financed property, the City reports that the net revenues ($361,526 in FY 2011/12) are paid into a fund that is "used to pay expenses and improvements to the City's parking garages citywide, electric power for the City's traffic signals, as well as supporting staff in PWA, Traffic Engineering and other City departments. " Supplemental Memo, page 32. The City's use of the revenue from these garages is clearly not "for redevelopment purposes within the redevelopment project area that issued the bonds."

4. Properties Purchased/Financed with both Bonds and with Other Funds. For the 34 properties at issue, City staff has identified the bonds and/or other sources of funds to finance or purchase the properties and the line item on the ROPS 13-14A where the bond payment appears; the ROPS 13-14A in turn identifies the amount of total outstanding debt on each of the bonds. As can been seen from the list below, some of the properties (City Center West Garage, Forest City-Uptown Residential, Sears Parcel and Rotunda Garage-16th Street Remainder Site) were purchased/financed with bonds and other sources of funds. Even if there were any restrictions on the use of the proceeds from the bond-financed portions, no such restrictions would apply to the pro rata share of proceeds attributable to the non-bond funds. We do not have all of the percentage allocations, and making the detailed calculations is not important here, but the point is that the proceeds and revenues from some if not all of these properties could benefit all of the taxing entities (not just the City), even if IRS restrictions applied to a sale of the tax exempt bond-financed properties.

- Sunshine Court -- Central City East 2006A TE Bonds; - Line 203 ($63,756)
- Coliseum Amtrak parking -- Coliseum 2006B T Bonds; - Line 248 ($503,839)
- Fox Theater -- Central District 1986 TE Bonds; - Line 68 ($6,057, 348)
- Wade Johnson Park -- unknown;
- Leona Creek open space-- Coliseum 2003 T Bonds, $4.0 million for infrastructure; - Refinanced
- Oakland Ice Center -- Central District 1989 TE Bonds; - Line 69 ($1,489,463)
- Coliseum parcels -- Coliseum 2006B T Bonds; - Line 248 ($503,839)
- City Center West Garage -- Central District 2009 T Bonds, $16 million, and operations, $6 million; - Line 73 ($144,199)
- UCOP Garage -- Central District 1986 TE Bonds; - Line 68 ($6,057, 348)
- Franklin 88 Garage -- unrestricted;
- Telegraph Plaza Garage -- Central District 2009 T Bonds. – Line 73 ($144,199)
- Forest City, Uptown Residential -- land: various TE/T Bonds, $13.4 million, various unrestricted, $2.7 million; monetary subsidies: City capital funds $5.3 million, various TE/T Bonds $7.9 million, restricted federal grant and other funds $6.7 million and unrestricted funds $5.3 million; - Lines 68-73 ($6,057,348; $1,489,463; $1,158,799; $10,358,144; $147,181; and $144,199, respectively)
- Sears parcels -- Central District 2003 TE Bonds, $1.6 million, and unrestricted, $1.1 million; - Line 70 ($1,158,799)
- Rotunda Garage, 16th Street Remainder Site -- 54% Central District 1986 TE Bonds, 46% unrestricted; - Line 68 ($6,057,348)

5. Once Bonds are Repaid. Once bonds are repaid to bondholders, any covenants that allegedly would apply would clearly no longer be applicable. As can be seen from the outstanding debt amounts listed above, as taken from ROPS 13-14A , a few of the bonds are very close to being repaid (City Center West Garage, Telegraph Plaza Garage, portions of Forest City-Uptown Residential and the Coliseum parking and parcels).

F. Operational Costs.

In its Supplemental Memo, the City argues that if the properties were clawed back and the Successor Agency is responsible for the costs of maintaining and carrying the properties, for some of the governmental purpose properties, most of the net positive revenue would be eliminated. The City points this out in response to a question from a Board member as to whether the clawback of the properties to the Successor Agency would result in a cost to the Successor Agency. Interestingly enough, during the emergency joint session of the RDA and the City Council on March 3, 2011, on the eve of the RDA's dissolution, when the RDA proposed to transfer 79 properties to the City, a member of the City Council asked the same question of City staff as to what operational costs the City would then inherit. City staff responded that first, since the transfer would be made at a price of $1.00 per property, the City had no acquisition cost. City staff also reassured the Council member about her concerns, stating that the garages generated hundreds of thousands of dollars in revenue. Specifically, City staff reported that the City Center West garage generated just under a million dollars per year in net revenue – enough money to cover all of the costs of owning all of the other properties over time. Unless something has changed in the interim, the same reassurances should apply today to the Oversight Board and the Successor Agency.

G. Recommendation

On the governmental purpose transfers, we recommend that the Oversight Board retroactively approve the transfer of properties #1-2, Sunshine Court and #6-12, Wade Johnson Park and Leona Creek Park. We recommend that the Oversight Board take no action with regard to the 16 properties that the City argues should not be clawed back because the City is contractually committed to third parties with regard to those properties.

We welcome any comments or questions with regard to this matter.