MEMORANDUM

TO: Agency Commissioners

FROM: Fred Blackwell, Executive Director

SUBJECT: Approving a policy regarding the Agency’s use of future tax increment from the original Yerba Buena Center Redevelopment Project Area to fulfill its replacement housing obligations; Yerba Buena Center Redevelopment Project Area

On October 6, 2009, the Redevelopment Agency Commission adopted Agency Resolution No. 109-2009, which recommended that the Board of Supervisors of the City and County of San Francisco (“Board”) adopt an ordinance to accomplish the following: 1) extend by one year the effective date of the Yerba Buena Center Redevelopment Plan (“Plan”); and 2) upon the expiration of the one year extension, extend the time for issuance of debt and the receipt of tax increment under the Plan and also suspend the limit on the total number of dollars of tax increment revenue that may be received by the Agency for the sole purpose of financing Low and Moderate Income Housing Fund activities.

A proposed ordinance to extend the Plan is pending before the Board (File No. 091207) and is attached to the Resolution accompanying this Memorandum (“Proposed Ordinance”). On November 9, 2009, the Land Use and Economic Development Committee of the Board approved the Proposed Ordinance and referred it to the full Board for consideration at the meeting of November 24, 2009.

As introduced and as approved by the Land Use and Economic Development Committee of the Board, the Proposed Ordinance contains the following language: “This Ordinance shall not be effective until the Redevelopment Agency shall have adopted a policy requiring that it use, to the greatest extent feasible, any tax increment revenue authorized by the Affordable Housing Plan Amendment to fulfill the Agency’s Housing Obligation by assisting Affordable Housing in the South of Market area.” Section 2.n. of the Proposed Ordinance.

The Resolution before the Commission would satisfy the condition regarding the effectiveness of the Proposed Ordinance. If the Board disapproves or substantially changes the condition, the Resolution will not become effective.
The approval of this Resolution expressing the Agency's policy on use of future tax increment from the original Plan area is not a "project" as defined in the California Environmental Quality Act Guidelines Section 15378(b)(4) because this Resolution is adopted solely to enable the continued funding of Low and Moderate Income Housing Fund activities, and no specific affordable housing project is being approved at this time.

Agency staff recommends authorization of the Resolution.

(Originated by Jim Morales, General Counsel)

Fred Blackwell
Executive Director

Attachment 1:

Commission Memorandum (Oct. 6, 2009) regarding Resolution No. 109-2009 (w/o attachments)
MEMORANDUM

TO:        Agency Commissioners

FROM:      Fred Blackwell, Executive Director

SUBJECT:   Approving Amendments to The Yerba Buena Center Redevelopment Plan to Extend by One Year the Time Limit on the Effectiveness of the Plan Pursuant to Section 33331.5 of the Community Redevelopment Law and to Extend Tax Increment Authority for Affordable Housing Funding Pursuant to Sections 33333.7 (Senate Bill No. 2113) and 33333.8; and Authorizing Transmittal to the Board of Supervisors of the City and County of San Francisco; Yerba Buena Center Redevelopment Project Area

EXECUTIVE SUMMARY

As part of the effort to resolve the State of California’s budget crisis, the California Legislature adopted, in a special legislative session, Assembly Bill No. 26 (Statutes 2009, Chapter 21) (“AB 26”), which required redevelopment agencies to transfer funds to their local Educational Revenue Augmentation Fund (“ERAF”). The California Redevelopment Association (“CRA”) has announced that it will challenge the constitutionality of AB 26, as a follow-up to its successful litigation against last year's ERAF payment. Under AB 26, the Redevelopment Agency of the City and County of San Francisco (“Agency”) must deposit approximately $29 million into the ERAF. A portion of this amount will come from tax increment generated pursuant to the Yerba Buena Center (“YBC”) Redevelopment Plan, which expires on January 1, 2010. AB 26 also provides that a redevelopment agency may extend by one year redevelopment plans when the agency allocates the ERAF payment. If the CRA litigation invalidates AB 26, the one year extension of redevelopment plans will likely expire as well. Prior to the adoption of AB 26, the Agency had planned on amending the YBC Redevelopment Plan to extend tax increment authority for funding affordable housing activities, as provided by Senate Bill No. 2113 (Statutes 2000, Chapter 661) and related laws. The resolution before the Commission approves two amendments to the YBC Redevelopment Plan: the one year extension under AB 26 and the extension of tax increment authority for affordable housing. Notably, the extension of the YBC Redevelopment Plan for affordable housing funding becomes effective when either 1) the one year extension under AB 26 expires on January 1, 2011, or 2) a court invalidates AB 26 prior to January 1, 2011.

Staff recommends approval of the two amendments to the YBC Redevelopment Plan and the transmittal of the amendments to the Board of Supervisors of the City and County of San Francisco for final adoption.
DISCUSSION

The ERAF Extension of Redevelopment Plans

On July 24, 2009, the California Legislature enacted, in a special legislative session, Assembly Bill No. 26 (Statutes 2009, Chapter 21) ("AB 26"), which added, among other things, Sections 33690 and 33690.5 to the California Health and Safety Code. AB 26 requires the Agency to make a payment estimated to be $29 million in fiscal year 2009-10 and $5.9 million in fiscal year 2010-11 for deposit into the Educational Revenue Augmentation Fund ("ERAF") of the City and County of San Francisco. AB 26 was enacted at a special session of the California Legislature and thus becomes effective on October 23, 2009, the 91st day after adjournment of the special session. Cal. Constitution, Article 4, Section 8(c). Under AB 26, the California Director of Finance shall notify the Agency of the exact amount due in fiscal year 2009-10 by November 15, 2009 and the amount due in fiscal year 2010-11 by November 15, 2010. The Agency must remit the amount due in fiscal year 2009-10 to ERAF by May 10, 2010.

AB 26 also added Section 33331.5 to provide that when a redevelopment agency is required to make an ERAF payment pursuant to Section 33690 and the agency has allocated the full amount of the payment, the local legislative body may amend a redevelopment plan to extend by one year the time limit on the effectiveness of the plan ("ERAF Extension"). Section 33331.5 also provides that when an ERAF Extension is adopted, neither the legislative body nor the agency is required to comply with the process for plan amendments otherwise required by the Community Redevelopment Law. The effect of extending the time limit on the effectiveness of older redevelopment plans (i.e., adopted prior to 1994) is also to extend by one year the time limit to receive property taxes and repay indebtedness. See Section 33333.6(b).

In a related action before the Agency Commission, the Agency is considering an amendment to its fiscal year 2009-10 budget to, among other things, allocate approximately $29 million for the ERAF payment. The Agency will deposit this amount in the ERAF by May 10, 2010. A portion of the allocated amount is tax increment revenue generated under the Yerba Buena Center Redevelopment Plan ("YBC Plan"). If the Commission approves the allocation for the ERAF payment, the Agency may seek a one year extension of the YBC Plan.

The Board of Supervisors of the City and County of San Francisco ("Board of Supervisors") originally approved the YBC Plan on April 25, 1966 (Ordinance No. 98-66). Since adoption, the Board of Supervisors has amended the YBC Plan 12 times, most recently by (1) adding the Emporium Site Area (Ordinance 236-00, October 10, 2000); (2) extending the time limit for the establishment of indebtedness to the date of the YBC Plan expiration (Ordinance No. 211-03, August 12, 2003); and (3) extending the effectiveness of the YBC Plan by one year because of the 2003-04 ERAF payment (Ordinance No. 1-05, January 4, 2005).

1 All future section references in this memorandum are to the Community Redevelopment Law, California Health and Safety Code, Sections 33000 et seq. unless otherwise noted.
The YBC Plan (excluding the Emporium Site Area) will expire on January 1, 2010, after which time the Agency shall have no authority to act pursuant to the YBC Plan except to pay previously incurred indebtedness, to comply with affordable housing obligations, and to enforce existing covenants, contracts, or other obligations. California Health and Safety Code, Section 33333.6(a). The debt repayment deadline for the YBC Plan is currently January 1, 2020. (The Emporium Site Area will remain subject to the YBC Plan until 2030.) The YBC Plan (excluding the Emporium Site Area) imposes a $600 million limit on the total amount of tax increment revenue that the Redevelopment Agency may receive cumulatively over the life of the YBC Plan for redevelopment activities.

Under the proposed ERAF Extension for the YBC Plan, the new expiration date for plan effectiveness would be January 1, 2011 and the new deadline for receiving and repaying indebtedness would be January 1, 2021.

The California Redevelopment Association ("CRA") has announced that it will file a lawsuit challenging the validity of AB 26. Last year, CRA brought a successful lawsuit invalidating the fiscal year 2008-09 ERAF payment required under Assembly Bill No. 1389 (Statutes 2008, Chapter 751). California Redevelopment Assoc. v. Genest (Superior Ct. Sacramento County, April 30, 2009, No. 34-2008-00028334). In the Genest decision, the Superior Court held that the 2008-09 ERAF payment obligation violated Article XVI, Section 16 of the California Constitution because it was not sufficiently related to redevelopment purposes. The State of California recently decided not to pursue an appeal of this decision.

In enacting AB 26, the Legislature imposed new conditions on the use of ERAF moneys in an apparent attempt to address the Genest decision and overcome the shortcomings of the previous ERAF legislation. AB 26 requires that ERAF moneys shall be provided "only to a K-12 school district or county office of education that is located partially or entirely within any project area of [a] redevelopment agency" and that each school district receiving these funds shall be notified "of each redevelopment agency from which the K-12 school district received funds." Section 33690(j)(1) & (2). Furthermore, AB 26 requires local school districts to use ERAF moneys "to serve pupils living in the redevelopment areas or in housing supported by redevelopment agency funds" and directs redevelopment agencies to provide "whatever information schools districts and county offices of education need to accomplish this purpose." Section 33690(j)(5).

In spite of these legislative changes to the new ERAF legislation, CRA asserts that AB 26 suffers from the same defect as the previous ERAF legislation, namely, that it violates the constitutional requirements that tax increment be used for the financing of redevelopment projects.

[T]he unquestionable purpose of this budget bill is to help balance the State’s budget—which does not qualify as a constitutionally permitted use of redevelopment funds. Under AB 26, schools won’t receive one dime more than already guaranteed from the State. AB 26 simply shifts the obligation from the State to redevelopment agencies. Further, it is not enough that tax increment be spent within a redevelopment project area. The constitutional requirement is
that tax increment be spent to repay indebtedness incurred to finance the 
redevelopment project.

CRA, Redevelopment Agencies Prepare Second 
Lawsuit to Block Unconstitutional Raids of 
Redevelopment Funds, Frequently Asked 
Questions, at Section 4 (attached)

In light of this imminent litigation, there is some risk that a court may invalidate not only the 2009-10 ERAF payment obligation, but also the ERAF Extension, which is based on an agency’s ERAF payment. A court’s invalidation of AB 26 could occur prior to January 1, 2011, the date when the YBC Plan would expire if an ERAF Extension was adopted.

Extension of Tax Increment Authority for Affordable Housing Activities

Long before the legislature authorized an ERAF Extension, the Agency had planned to extend the tax increment authority under the YBC Plan to fund affordable housing activities. This extension is authorized under Sections 33333.7 and 33333.8 because the Agency has unfulfilled affordable housing obligations related to its early redevelopment activities that removed, and did not replace, thousands of units of affordable housing.

In 2000, the California Legislature adopted Senate Bill No. 2113 (Statutes 2000, Chapter 661 codified at Section 33333.7) (“SB 2113”). This legislation applies only to San Francisco. Its purpose is to provide the Agency with a special financing tool for the replacement of 6,709 affordable housing units lost during the Agency’s early redevelopment activities.2 Prior to 1976, state law did not impose a replacement housing obligation on redevelopment agencies. In enacting SB 2113, the Legislature found that the “Redevelopment Agency of the City and County of San Francisco, due to its unique housing situation and net loss of affordable housing units in [older] project areas, wishes, to the greatest extent feasible, to replace these lost units according to the formulas set forth in Section 33413 of the Health and Safety Code.” (Statutes 2000, Chapter 661 § 1(b)). SB 2113 allows the Agency to amend its older redevelopment plans to extend the dates for issuance and repayment of tax increment debt and to remove the “cap” on the cumulative amount of tax increment that the Agency can receive from a project area.

As originally enacted, SB 2113 authorized the Agency to incur indebtedness exclusively for Low and Moderate Income Housing Fund activities until the earlier of either January 1, 2014 or the Agency’s replacement of all affordable housing lost as a result of the implementation of redevelopment plans adopted prior to 1976. SB 2113 also authorized the Agency to receive tax increment funds through 2044 to repay indebtedness incurred to fund these Low and Moderate Income Housing Fund activities. Subsequent legislation lifted the SB 2113 time limitations to authorize the use of tax increment financing until the Agency fulfills its housing obligation by replacing all of the units that it previously destroyed.

2In 2003, HCD certified that San Francisco had a need to replace 6,709 units. Letter, J. Bornstein to M. Rosen (April 18, 2003).
In 2001, the California Legislature adopted Senate Bill No. 211 ("SB 211") and added Sections 33333.8 and 33333.6(f) to the Community Redevelopment Law. (Statutes 2001, Chapter 741) Under Section 33333.8, a redevelopment plan’s time limits for the receipt of tax increment revenue and the repayment of debt must be suspended until the redevelopment agency fulfills its affordable housing obligations. The law also suspends the limit on the total amount of tax increment funds that a redevelopment agency may receive for any project area until the housing obligation is satisfied. Significantly, Section 33333.8(a)(1)(E) defines these housing obligations to include “the obligation to provide replacement housing pursuant to subdivision (a) of Section 33413, Article 9 (commencing with Section 33410), and other similar and related statutes.” Section 33333.6(f) confirms that the suspension of plan limits to fulfill housing obligations applies to redevelopment plans, such as the YBC Plan, that were adopted on or before December 31, 1993. This suspension of tax increment limits applies to every redevelopment project area established under the Community Redevelopment Law “[n]otwithstanding any other provision of law.” Section 33333.8(a).

In effect, SB 211 acknowledged the housing obligation of the City and Agency to replace the 6,709 units of affordable housing that were destroyed and not replaced before 1976. Subsequently, SB 211 established the steps that a redevelopment agency must take when it has an unfulfilled housing obligation. SB 2113, in combination with the later enacted SB 211, allows the Agency to amend older redevelopment plans to extend the dates for issuance and repayment of tax increment debt until it replaces all of the 6,709 units and to remove the “cap” on the cumulative amount of tax increment that the Agency can receive from a project area for this purpose. After a redevelopment plan is amended pursuant to Section 33333.8, all subsequent tax increment funds generated in the project area (other than amounts needed to repay previous bond issues or required by law to be passed through to other taxing entities) must be used solely to finance affordable housing and related administrative costs.

To date, the Board of Supervisors, upon the recommendation of the Agency, has adopted SB 2113 amendments to five redevelopment plans that either expired or imposed other tax increment limitations: the Embarcadero-Lower Market (Golden Gateway) Redevelopment Plan, the Hunters Point Redevelopment Plan, and the India Basin Industrial Park Redevelopment Plan pursuant to Ordinance No. 15-05; the Rincon Point-South Beach Redevelopment Plan pursuant to Ordinances Nos. 115-07 and 201-07; and the Western Addition A-2 Redevelopment Plan pursuant to Ordinance No. 316-08.

If the ERAF Extension was not available, Agency staff would be recommending that the Agency Commission approve a SB 2113 amendment to the YBC Plan to take effect by January 1, 2010. In light of the advantages to the Agency of an ERAF Extension, Agency staff, however, proposes a YBC Plan amendment that initially adopts the one year ERAF Extension, which extends the land use jurisdiction, the tax increment authority, and other aspects of the YBC Plan until January 1, 2011. Given that the CRA litigation, if successful, would invalidate the law on which the ERAF Extension is based, the YBC Plan could expire before the Agency and Board of Supervisors have the opportunity to enact a SB 2113 YBC Plan amendment. To avoid this
possibility and the detrimental effect it would have on the Agency’s funding of affordable housing, Agency staff also proposes another YBC Plan amendment to implement SB 2113 and thus extend the Agency’s tax increment authority to fund Low and Moderate Income Housing Fund activities. This aspect of the Plan amendment will become effective upon expiration of the ERAF Extension, whether that occurs by the statutory deadline of January 1, 2011 or by court order at an earlier date.

The adoption of an ordinance pursuant to Sections 33331.5, 33333.7 and 33333.8 is not a “project” under Section 15378(b)(4) of the California Environmental Quality Act (“CEQA”) Guidelines because the ordinance maintains a government funding mechanism enabling the Agency to continue to receive tax increment funding and does not involve any commitment to any specific project that may result in a potentially significant physical impact on the environment.

CONCLUSION

Staff recommends that the Agency submit a request to the Board of Supervisors to adopt an ordinance amending the YBC Plan in the following ways: 1) extend, pursuant to Section 33331.5, by one year the effective date of the YBC Plan; and, 2) upon expiration of the Plan, and for the exclusive purpose of fulfilling the Agency’s housing obligations under Sections 33333.8 and 33333.7, (a) extend the Agency’s authority to establish indebtedness to be paid with the proceeds of property tax; (b) extend the time limit for the receipt of tax increment revenue to repay indebtedness; and (c) suspend the $600,000,000 limit on the amount of tax increment funds that the Redevelopment Agency may receive.

Originated by Jim Morales, General Counsel

Fred Blackwell
Executive Director

Attachment 1: CRA, Redevelopment Agencies Prepare Second Lawsuit to Block Unconstitutional Raids of Redevelopment Funds, Frequently Asked Questions