

**Office of
The City Attorney
City of San Diego**

**MEMORANDUM
MS 59**

(619) 533-5800

DATE: May 21, 2010

TO: Executive Director and the Board of Directors of the Redevelopment Agency of the City of San Diego

FROM: City Attorney

SUBJECT: Use of Redevelopment Agency Funds for Social Services Programs or Operations of Homeless Shelters

INTRODUCTION

The Redevelopment Agency of the City of San Diego (Agency) has funded capital improvements and other allowable costs associated with increasing, improving, and preserving homeless shelters and transitional housing serving the homeless within the City of San Diego (City). Agency staff is considering expanding its financial assistance to include funding social service programs and operations of homeless shelters within the City. Agency staff has asked this Office to provide a legal opinion on the use of Agency funds for social service programs and operations of homeless shelters.

QUESTION PRESENTED

May the Agency use Agency funds for social service programs or operations of homeless shelters?

SHORT ANSWER

No. The Agency may not use Agency funds for social service programs or operations of homeless shelters.

ANALYSIS

I. REDEVELOPMENT IS FINANCED BY TAX INCREMENT FUNDS

The Agency is a public body, corporate and politic, that exercises governmental functions and has the powers prescribed to it in the California Community Redevelopment Law (Community Redevelopment Law). Cal. Health & Safety Code §§ 33100, 33122.

The Community Redevelopment Law is set forth at California Health and Safety Code sections 33000 et seq. Since the Agency is a creature of statute, the Agency's authority to act and spend funds must be provided in the Community Redevelopment Law. The legal justification for use of the extraordinary public powers authorized by the Community Redevelopment Law is the elimination of blight. *Berman v. Parker*, 348 U.S. 26 (1954).

The primary funding source relied on by the Agency to finance its activities under the Community Redevelopment Law is tax increment revenue. Tax increment revenue is the Agency's ability to receive and spend a portion of property tax revenues from the increase in assessed value of real property that has occurred after adoption of a redevelopment plan for a project area. Cal. Health & Safety Code §§ 33670, 33678. Tax increment revenue is used "to pay the principal of and interest on loans, moneys advanced to, or indebtedness (whether funded, refunded, assumed, or otherwise) incurred by the redevelopment agency to finance or refinance, in whole or in part, the redevelopment project." Cal. Health & Safety Code § 33670(b); Cal. Const. art. XVI, § 16.

II. TAX INCREMENT FUNDS MUST BE SPENT ON REDEVELOPMENT ACTIVITY

Tax increment revenue must be spent on redevelopment activity, which includes redevelopment as prescribed in California Health and Safety Code sections 33020 and 33021 that primarily benefits the project area. Cal. Health & Safety Code § 33678(a) and (b).

Redevelopment is defined, in part, as the planning, development, replanning, redesign, clearance, reconstruction, or rehabilitation, or any combination of these, of all or part of a survey area, and the provision of those residential, commercial, industrial, public, or other structures or spaces as may be appropriate or necessary in the interest of the general welfare, including recreational and other facilities incidental or appurtenant to them. Cal. Health & Safety Code § 33020.

Additionally, redevelopment is defined to include: (a) the alteration, improvement, modernization, reconstruction, or rehabilitation, or any combination of these of existing structures in a project area; (b) the provision for open-space types of use, such as streets and other public grounds, space around buildings, public or private buildings, structures and improvements, and improvements of public or private recreation areas and other public grounds; and (c) the replanning or redesign or original development of undeveloped areas that are stagnant

or improperly utilized or that require replanning and land assembly for reclamation or development in the interest of the general welfare. Cal. Health & Safety Code § 33021.

Neither section 33020 nor section 33021 of the California Health and Safety Code provide that redevelopment includes the provision of social service programs or operations of a homeless shelter or any other such facility or the provision of any similar type of services.

III. LOW AND MODERATE INCOME HOUSING FUNDS MUST BE USED TO INCREASE, IMPROVE, AND PRESERVE AFFORDABLE HOUSING

Not less than 20 percent of all taxes allocated to the Agency pursuant to California Health and Safety Code section 33670 shall be used by the Agency for the purposes of increasing, improving, and preserving the City's supply of low- and moderate- income housing available at affordable housing cost. Cal. Health & Safety Code § 33334.2(a).

Funds required to be used for affordable housing pursuant to California Health and Safety Code section 33334.2 "shall be held in a separate Low and Moderate Income Housing Fund until used." Cal. Health & Safety Code § 33334.3(a). These restricted funds are commonly referred to as the "Housing Funds," while the remaining tax increment funds received by the Agency are commonly referred to as the "Non-Housing Funds."

"In carrying out the purposes of this section, the agency may exercise any or all of its powers for the construction, rehabilitation, or preservation of affordable housing for extremely low, very low, low- and moderate-income persons or families . . ." Cal. Health & Safety Code § 33334.2(e). California Health and Safety Code Section 33334.2(e) lists specific purposes by which the Agency may use Housing Funds to increase, improve, and preserve affordable housing in the City which include, without limitation, acquiring or improving real property, rehabilitating building or structures, constructing buildings or structures, acquiring buildings or structures, providing subsidies to, or for the benefit of, extremely low, very low, low- and moderate- income persons, families, or households, and preserving the availability to lower income households of affordable housing in housing developments. Section 33334.2(e) does not, however, identify social service programs or operations as an appropriate use of Housing Funds.

Further, the Community Redevelopment Law allows for limited expenditures of Housing Funds toward planning and general administrative activities associated with the development, improvement, and preservation of affordable housing to the extent such expenses are not disproportionate to the amount actually spent by the Agency for the costs of production, improvement, or preservation of that housing. Cal. Health & Safety Code § 33334.3(d). The Agency is required by California Health and Safety Code section 33334.3(d) to determine annually that the planning and administrative expenses are necessary for the production, improvement, or preservation of low- and moderate- income housing.

The planning and general administrative costs which may be paid using Housing Funds are those expenses incurred by the Agency which are directly related to the programs and activities authorized under subdivision (e) of California Health and Safety Code section 33334.2 and are limited to the following: (a) costs incurred for salaries, wages, and related costs of the Agency's staff or for services provided through interagency agreements, and agreements with contractors, including usual indirect costs related thereto; and (b) costs incurred by a nonprofit corporation which are not directly attributable to a specific project. Cal. Health & Safety Code § 33334.3(e).

In accordance with California Health and Safety Code section 33334.3(e), planning and general administrative activities appropriately funded using Housing Funds are related to those activities conducted by the Agency itself or on behalf of the Agency and directly related to the Agency's programs and activities that increase, improve, and preserve the City's affordable housing. Section 33334.3(e) does not identify planning and general administrative activities related to third party social service programs or operations as an appropriate use of Housing Funds.

The Community Redevelopment Law's intent to limit the Agency's authority to use tax increment funds for administrative expenses is further evidenced in California Health and Safety Code section 33678 which specifically prohibits the Agency from using tax increment revenue for the purpose of paying for employee or contractual services of any local governmental agency unless those services are directly related to redevelopment as defined in California Health and Safety Code sections 33020 and 33021 and the powers established in the Community Redevelopment Law. Cal. Health & Safety Code § 33678(b).

The Agency has used Housing Funds for the construction of transitional housing serving the homeless, homeless shelters and other allowable costs for the purposes of increasing, improving, and preserving affordable housing. The Community Redevelopment Law as codified, however, has created some confusion on a redevelopment agency's authority to use Housing Funds toward increasing, improving, and preserving affordable housing in the form of homeless shelters. Specifically, the codified version of a portion of special legislation set forth of California Health and Safety Code section 33021.1 states:

In a city and county, redevelopment includes improving, increasing, or preserving emergency shelters for homeless persons or households. These shelters may be located within or outside of established redevelopment project areas. Notwithstanding any other provision of law, only redevelopment funds other than those available pursuant to Section 33334.3 may be used to finance these activities.

California Health and Safety Code section 33021.1 was enacted pursuant to Senate Bill No. 1026 (SB 1026) in part at the request of the Redevelopment Agency of the City and County of San Francisco, which is a redevelopment agency serving jointly the City and County of San

Francisco. When section 33021.1 was codified into the Community Redevelopment Law, an important portion of SB 1026 was not codified, namely Section 3 which states:

However, nothing in this act or Section 33201.1 of the Health and Safety Code shall be deemed to authorize or limit, or in any way modify any authority of a redevelopment agency, other than a redevelopment agency in a city and county, to improve, increase, or preserve emergency shelters for homeless persons or households, either inside or outside a project area, from funds available pursuant to Section 33334.3 of the California Health and Safety Code or any other source.

Therefore, Section 33021.1 does not apply to redevelopment agencies established by a city only, like the Agency, as opposed to a redevelopment agency established jointly by a city and a county. As such, the Agency is authorized to use Housing Funds for the construction, rehabilitation, or preservation of homeless shelters provided that the homeless shelters serve to increase, improve, and preserve affordable housing.

In addition to California Health and Safety Code section 33334.2, California Health and Safety Code section 33449 provides that:

[N]otwithstanding Section 33440, or any other provision of law, an agency may, inside or outside any project area, acquire land, donate land, improve sites, or construct or rehabilitate structures in order to provide housing for persons and families of low or moderate income, as defined in Section 41056, and very low income households, as defined in Section 41067, and may provide subsidies to, or for the benefit of, such persons and families or households to assist them in obtaining housing within the community nothing in this section shall empower an agency to operate a rental housing development beyond such period as is reasonably necessary to sell or lease the housing development.

Thus, although California Health and Safety Code section 33449 allows the Agency to acquire land, improve sites, construct or rehabilitate structures, or provide subsidies in order to provide affordable housing, section 33449 does not include the authority for the Agency to fund social service programs and operations of homeless shelters. In fact, section 33449 specifically limits the Agency's ability to operate a rental housing that the Agency owns itself for so long as necessary to sell or lease the housing development. Cal. Health & Safety Code § 33449.

From a review of the Community Redevelopment Law and the Agency's authority in connection with affordable housing, it is clear that, except for directly related administrative expenses, such authority involves either physical construction or rehabilitation of affordable housing or direct

action to increase available affordable units by providing subsidies or purchasing covenants. None of the Agency's authority includes, or can be interpreted to include, social service programs or operations of a homeless shelter.

IV. NON-HOUSING FUNDS MAY NOT BE USED TO FUND SOCIAL SERVICE PROGRAMS OR OPERATE HOMELESS SHELTERS

California Health and Safety Code section 33334.2(a) requires not less than 20 percent of all taxes allocated to the Agency pursuant to California Health and Safety Code section 33670 be deposited into the Agency's Low and Moderate Income Housing Fund. Thus, the Agency is permitted to deposit more than 20 percent of tax increment revenue, including portions of its Non-Housing Funds, into the Low and Moderate Income Housing Fund. If so deposited by the Agency, the Agency must treat these funds as Housing Funds and comply with the provisions set forth in the Community Redevelopment Law pertaining to the use of Housing Funds.

The Community Redevelopment Law provides certain authority for the Agency to assist with the construction or rehabilitation of residential and commercial buildings using Non-Housing Funds. Specifically, the Agency may fund the construction or rehabilitation of publicly owned buildings pursuant to California Health and Safety Code sections 33445 and 33679, provide commercial rehabilitation loans pursuant to California Health and Safety Code section 33444.5, provide residential construction and rehabilitation loans pursuant to California Health and Safety Code section 33750 et seq., and construct foundations, platforms, and other like structural forms necessary for the provision or utilization of air rights sites for buildings used for residential, commercial, industrial, or other uses contemplated by the redevelopment plan pursuant to California Health and Safety Code section 33440.

From a review of the Community Redevelopment Law and the Agency's authority in connection with the construction and rehabilitation of structures using Non-Housing Funds, it is clear the authority relates to physical work to the structure. None of the Agency's authority includes, or can be interpreted to include, social service programs or operations of a homeless shelter.

V. TAX INCREMENT FUNDS MUST BE USED TO PRIMARILY BENEFIT THE PROJECT AREA

Tax increment revenue must be spent on redevelopment activity that primarily benefits the project area. Cal. Health & Safety Code § 33678(b).

The requirement that the use of tax increment funds shall primarily benefit the project area serves to preclude a redevelopment agency from spending tax increment funds for many community facilities that solely provide a general community benefit and do not primarily benefit the project area from which the tax increment is generated. The issue of homelessness is a community-wide concern. Thus, without the specific authority in the Community Redevelopment Law for the Agency to provide for social service programs or operations of

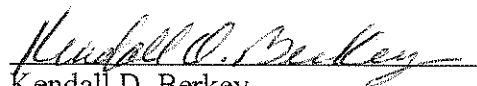
homeless shelters, the use of tax increment for these purposes may be considered contrary to the requirements set forth in California Health and Safety Code section 33678(b) in that such expenditure would provide a broad community benefit rather than a benefit primary to the project area.

CONCLUSION

Since the Agency is a creature of statute, the Agency's authority to act and spend funds must be provided in the Community Redevelopment Law. The Community Redevelopment Law does not provide the requisite authority for the Agency to use Agency funds for social service programs and operations of homeless shelters.

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By



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cc: William Anderson, Assistant Executive Director
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