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Re: ***DOF's Final Determination on the Due Diligence review for the Low and Moderate Income Housing Fund***

Dear DOF Representatives:

On December 15, 2012, the DOF issued a final determination to the Successor Agency, advising that "the Agency's LMIHF balance available for distribution to the affected taxing entities continues to be \$54,515,252." The purpose of this correspondence is to advise the DOF of the Successor Agency's remittance of \$12,518,741 to the Los Angeles County Auditor-Controller. As to the balance of the funds requested, the Successor Agency considers the request to be in error and wrongful as discussed below. All statutory references in this letter are to the Health and Safety Code ("HSC").

I

THE DOF FAILED TO RECOGNIZE THE FORMER RDA'S PRE-EXISTING LOAN COMMITMENTS TO THIRD PARTY DEVELOPERS IN VIOLATION OF HSC 341719D)(1).

In accordance with HSC section 34179.5(e), the Successor Agency requested an opportunity to meet and confer with the DOF in correspondence dated November 15, 2012, a copy of which is enclosed under Tab A. The grounds for the Successor Agency's disagreement with the DOF determination, along with documentation, were set forth in the Successor Agency's November 15 correspondence. The DOF and Successor Agency met and conferred on December 4, 2012. The DOF issued its final determination on December 15, 2012, a copy of which is enclosed under Tab B.

The DOF's basis for requiring the "claw back" of \$22,635,323 in LMIHF assets encumbered to third party housing developers is as follows:

Cash transfers to the City of Santa Monica in the amount of \$55 million. Finance denied the transfer as no evidence was submitted the funds were to be used for an enforceable obligation. The Agency contends the transferred cash was used to pay enforceable obligations as the former RDA transferred certain powers to the City via a Cooperation Agreement entered into on September 1, 2010, to carry out the affordable housing projects. However, HSC section 34171 (d) (2) states that agreements, contracts, or arrangements between the city that created the RDA and the former RDA are not enforceable; therefore, the Cooperation Agreement is no longer valid.

The Successor Agency's response to the DOF's determination is as follows:

As noted in the Successor Agency's November 15, 2012 correspondence, the Successor Agency encumbered approximately \$22,635,323 in low and moderate income housing proceeds to finance the construction of nine (9) affordable housing projects. *All of these funds were disbursed or encumbered to non-profit developers to finance the construction of these projects, based upon loan commitments executed by the former RDA before June 28, 2011.*

The Successor Agency submitted supporting documentation to the DOF, including a listing of these housing projects under Tab C of its November 15 correspondence. Copies of the loan agreements executed by the former RDA for these projects and copies of the construction loan commitment letters executed by the former RDA for these projects were previously provided to DOF during the DOF's review of ROPS I and ROPS II.

Third party construction loan commitment letters executed by former RDAs prior to June 28, 2011 constitute enforceable obligations within the meaning of HSC 34171(d)(1)(E), *and have been recognized as such by the DOF in DDR determinations for other successor agencies.* In fact, on December 18, 2012, the DOF approved payment by the Successor Agency of loan funds that were committed by the former Redevelopment Agency pursuant to a third-party loan commitment letter agreement (see Tab C). Ironically, the DOF approved the payment using LMIHF funds on ROPS III, three days after directing the Successor Agency to remit the same funds to the County Auditor Controller under the guise of the DDR.

Nothing in AB 1x 26 or AB 1484 authorizes the DOF to initiate a "claw back" of LMIHF assets from non-profit affordable housing developers who have pre-existing RDA loan commitments. HSC section 34176(a)(1) specifically authorizes the City to perform these housing functions. Furthermore, HSC 34171(d)(1)(E) specifically provides that an enforceable obligation includes "[a]ny legally binding and enforceable agreement or contract that is not otherwise void as violating the debt limit or public policy." As such, the DOF's determination to claw back these LMIHF funds from third party developers is invalid.

II

THE DOF HAS NO AUTHORITY TO ORDER THE DISTRIBUTION OF RESTRICTED BANK OF AMERICA PROCEEDS TO THE TAXING ENTITIES IN VIOLATION OF HSC SECTION 34179.59(C)(6).

The DOF's basis for requiring the claw back of \$19.3 million in restricted Bank of America loan proceeds is as follows:

The Agency also contends \$19.3 million of the transferred funds is restricted proceeds from a bank loan. However, per the DDR, the amount transferred is for the payment on the loaned funds. The proceeds from the line of credit have historically been used to fund projects. The DDR did not identify any restricted assets. Further, per the Agency's Recognized Obligation Schedules; the bank loan is approved to be paid with RPTTF funds, not LMIHF.

The Successor Agency's response to the DOF's determination is as follows:

The Bank of America proceeds were restricted as to purpose given that Section 1.1 of the Bank of America Loan Agreement specifically required that these loan proceeds be used "to provide financing for housing activities eligible for funding from the Borrower's Low and Moderate Income Housing Fund from the Earthquake Recovery Redevelopment Project Area." See enclosed correspondence by MGO to the DOF under Tab D. These proceeds were separately listed on line 2 of Exhibit A of the housing DDR and reported as "[t]he proceeds of the debt, or asset amount transferred, was entirely encumbered for housing projects, pursuant to housing covenants of the Bank of America loan, entered into on May 1, 2008."

This information was presented to the DOF as part of its November 15 correspondence and in correspondence addressed to the DOF on May 16, 2012. Ignoring all of the documentation presented to the DOF, the DOF's final determination conjures a new pretext to require the claw back of these restricted funds that is based on the mistaken assumption of fact (nowhere presented in the Successor Agency's DDR or meet and confer appeal) that the Bank of America loan proceeds were being held by the Successor Agency to pay debt service on the Bank of America loan.

More importantly, however, nothing justifies the DOF's order to claw back these restricted proceeds so that they can be distributed to the taxing entities as part of the DDR process. As noted in the Successor Agency's November 15 correspondence, HSC section 34179.5(c)(6) clearly requires the DOF to *deduct* any restricted proceeds from any payments due to the taxing entity. As the DOF has failed to discharge its duty under HSC section 34179.5(c)(6), the DOF's determination is invalid.

III

THE DOF'S THREAT TO CLAWBACK THE LMIHF FUNDS THAT HAVE BEEN DISBURSED OR ENCUMBERED TO THIRD PARTY DEVELOPERS IS CONTRARY TO HSC SECTION 37179.6

As explained the above, the Successor Agency has remitted LMIHF funds to the County Auditor-Controller, in accordance with the following table:

LMIHF Balance Available for Distribution To Taxing Entities		
DOF Adjustment from Licensed Auditor's Report	:	\$54,515,252
Deduct Restricted proceeds per HSC 34179.5(c)(6)	:	(\$19,361,188)
Deduct Enforceable Obligations per HSC 34179.5(c)(6)	:	(\$22,635,323)
Balance remitted to County Auditor-Controller	:	\$12,518,741

According to the DOF's December 15, 2012 letter, HSC section 34179.6(f) requires the Successor Agency to transmit to the County Auditor Controller the amount of LMIHF funds determined by the DOF to be available for distribution to the taxing entities within five working days, "plus any interest those sums accumulated while in possession of the recipient." In fact, Section 34179.6(f) contains no reference to interest. Consequently, any withholding of interest is unauthorized.

The DOF's letter also states that "if funds identified for transmission are in the possession of the successor agency, and if the successor agency is operated by the city that created the former redevelopment agency, then the failure to transmit the identified funds may result in offsets to the city's sales and use tax allocation, as well as its property tax allocation." As mentioned earlier, the Successor Agency has remitted all of the LMIHF funds identified by the DOF as available for distribution. The Successor Agency cannot remit funds that have been committed to third parties prior to June 28, 2011 or that have been disbursed to third parties based upon pre-existing commitments of the former RDA.

Furthermore, the Successor Agency's remittance of restricted Bank of America proceeds to the County Auditor-Controller would violate the Bank of America loan covenants and is contrary to Health and Safety Code section 34197.5(c)(6). Therefore, the DOF has no authority to initiate a claw back of the City's general funds revenues under HSC section 34179.6(h)(1)(A) or (C). Furthermore, please be advised that any unauthorized claw back may subject the State to civil penalties pursuant to HSC section 34179.6(i).

CONCLUSION

Finally, the DOF's December 15, 2012 letter ends by threatening that the "willful failure to return assets that were deemed an unallowable transfer or failure to remit the funds identified above could expose certain individuals to criminal penalties under existing law." We believe that such threat of criminal penalties is inappropriate at best and possibly far worse. However,

December 21, 2012

Page 5

we will address the DOF's threat of criminal penalties separately with the Attorney General and DOF's General Counsel.

In closing, our office sends this letter to clearly delineate the Successor Agency's objection to the DOF's determinations regarding the DDR. The issues raised in this letter are not intended to be an exhaustive list of the legal grounds for objecting to DOF's determinations. The Successor Agency does not intend to waive any constitutional, statutory, legal, or equitable rights in lodging this written objection. We expressly reserve and continue to reserve any and all rights, privileges, and defenses available whether existing under law or equity.

Thank you for your consideration,



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General Counsel to the Successor Agency

MJM/bcm

Enclosure

cc: Ms. Kristina Burns, Program Specialist III, Los Angeles County
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