Redevelopment Remains in Limbo Following Supreme Court Order and Partial Stay

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The fate of redevelopment has been hanging in the balance ever since Governor Brown announced in January a plan to eliminate redevelopment agencies as part of his plan to balance California's sinking budget. After many fits and starts, on June 30, 2011, Governor Brown signed into law AB 26 X1 and AB 27 X1; the former eliminated redevelopment agencies, while the latter provided a vehicle for cities to reconstitute them by committing to a series of "voluntary" payments – including about $1.7 billion in this budget year.

A lawsuit challenging the laws' constitutionality was quickly filed directly in the California Supreme Court. Late last week, the Supreme Court agreed to hear the case. In doing so, the Court issued a partial stay of the new laws pending its ultimate decision. But, like every other twist in this saga, even the Supreme Court's stay leaves matters a bit murky.

Under the stay, redevelopment agencies remain in existence, and they don't have to make the "voluntary" payments. For those agencies that could not afford the payments necessary to re-establish themselves, the Court's action is nothing short of a stay of execution.

On the other hand, the Court did not stay provisions that prevent redevelopment agencies from taking on new projects or commitments, meaning that while they continue to exist, they can do little more than manage existing obligations while awaiting a final ruling by the Court. Thus, for those agencies that planned on making the payments and continuing on with business as usual, the stay represents an unwelcome barrier to new projects.

What follows is a recap of the new laws, a discussion of the Supreme Court's order, and a forecast of where things are likely to go from here.

The Legislation: The Death and (Potential) Rebirth of Redevelopment

In June, the Governor signed two budget trailer bills that substantially reshaped the California Community Redevelopment Law ("Redevelopment Law"). First, the "Death" under AB 26 X1: the law immediately stripped redevelopment agencies of their authority to issue or sell bonds, incur new indebtedness, acquire or dispose of real property, enter into new contracts, etc. However, until their dissolution, redevelopment agencies retained the power to honor existing contracts and legal obligations, pay existing debts, etc. Arguably, cooperation and reimbursement agreements between cities or counties and their redevelopment agencies entered into prior to January 1, 2011, also remained in effect until October 1, 2011. Thus, many agencies have continued to fund ongoing city or county projects as preexisting obligations.

Unless they opted to participate in an "Alternative Voluntary Redevelopment Program," as of October 1, 2011, all redevelopment agencies were to be dissolved. Their assets, contracts and obligations were to be transferred to successor agencies. Most agreements between cities and counties and their redevelopment agencies, including cooperation and reimbursement agreements, were also slated for termination.

Now, the "Rebirth" under AB 27 X1: if a city or county elected to participate in the "Voluntary Alternative Redevelopment Program," it could do so by adopting an ordinance re-establishing its redevelopment agency and committing to annual community remittances to local school and special districts. For some cities, the amount of these so-called "pay to play" fees were so great as to present an insurmountable barrier to re-establishment. Other agencies quickly ran the numbers and determined that the benefits of continued redevelopment activities outweighed the burdens imposed by the pay-to-play fees.

The Lawsuit

On July 18, 2011, the California Redevelopment Association, the League of California Cities, and the cities of San Jose and Union City filed a petition for writ of mandate and application for stay in the California Supreme Court, arguing that the matter is of such importance that the Supreme Court should hear the case in the first instance. And while the State disagreed with all of the lawsuit's arguments on the merits, it did agree that the Supreme Court should hear the case.

In the meantime, many cities and counties throughout the state adopted ordinances reestablishing their redevelopment agencies under the Voluntary Alternative Redevelopment Program, but often with a catch. In agreeing to make the requisite community remittances, most of the ordinances state that they are being made under protest and without prejudice to recovering such payments if AB 26 X1 and 27 X1 are declared unconstitutional.

The Supreme Court Stay: Preserving the Status Quo

Last Thursday, the Supreme Court issued an order stating that it was taking the parties up on their invitation to hear the case under its original jurisdiction. The Court concurrently issued a partial stay, responding to the lawsuit's plea for a stay by August 15, 2011. But this was not all good news for redevelopment proponents.

The Court issued only a partial stay. And that partial stay was designed to preserve the status quo as it existed at that moment in time, not to stay the new laws in their entirety. Specifically, the Court stayed AB 27 X1 (the re-establishment statute) in its entirety; the Court also stayed those portions of AB 26 X1 which dissolved redevelopment agencies. However, the Court declined to stay the provisions AB 26 X1 which stripped redevelopment agencies of their power to take on new obligations.

On the one hand, many agencies are today in the same position they were a week ago. They are powerless to initiate new projects or enter into new contracts, but they can continue to function as they have since the Governor signed the two bills in June. For those cities or counties relying on cooperation and reimbursement agreements with their redevelopment agencies to fund ongoing projects, their day of reckoning has been postponed. So to, those cities unsure of their ability to make the pay-to-play payments by October 1 now have a bit of breathing room.

On the other hand, agencies that can afford the payments and would have reconstituted themselves under AB 27 X1 are arguably not in the same position as they were a week ago. To the extent they had plans to reconstitute and proceed with additional projects this fall, those plans are now on hold, as AB 26 X1 prevents such projects from moving forward. And this situation likely will not change until the Court issues its ultimate ruling, likely in January 2012. Compounding their uncertainty is a fear that the Court may ultimately uphold the constitutionality of AB 26 X1 but strike down 27 X1, thus removing any pathway to survival.

Finally, the stay throws a bit of a monkey wrench into the Governor's budget projections. He was counting on diverting $1.7 billion from redevelopment agencies to balance California's 2011-12 budget. While the money may ultimately be diverted, in the short run, the Court's stay ensures that California's budget will continue to fall further behind in its revenue projections.

What Happens Next?

Now that the Court has accepted jurisdiction over the dispute, respondents, who will be arguing on behalf of the State, have until September 9, 2011, to file their papers showing why the relief sought by the petitioners should not be granted. Any reply brief by the petitioners is to be filed by September 24. While no date has been set for oral argument, this briefing schedule was designed to facilitate oral argument late in 2011 with a final decision to be rendered before January 15, 2012.

For continuing updates on the status of this litigation, please visit our blog, *California Eminent Domain Report*.