AGENDA ITEM NO. 3.a.

City of Garden Grove

INTER-DEPARTMENT MEMORANDUM

Garden Grove City Council

Successor Agency to the
Garden Grove Agency for Community Development

To:	Matthew Fertal	From:	Economic Development
Dept:	Director		
Subject:	SUCCESSOR AGENCY RECONSIDERATION OF THE APPROPRIATENESS OF INCLUSION OF FINANCIAL OBLIGATIONS UNDER THE DISPOSITION AND DEVELOPMENT AGREEMENT WITH GARDEN GROVE MXD, INC. DATED APRIL 13, 2010 (THE "DDA") ON THE RECOGNIZED OBLIGATION PAYMENT SCHEDULE FOR THE PERIOD JANUARY 1, 2012 TO JUNE 30, 2012 (THE "FIRST ROPS") AND FOR THE PERIOD JULY, 2012 TO DECEMBER, 2012 (THE "SECOND ROPS"). THE FIRST ROPS AND SECOND ROPS ARE SOMETIMES COLLECTIVELY REFERRED TO HEREIN AS THE "APPLICABLE ROPS."	Date:	June 12, 2012

OBJECTIVE

The purpose of this report is for The City of Garden Grove as Successor Agency to the Garden Grove Agency for Community Development ("Successor Agency") to provide information to the governing body of the Successor Agency so that it may reconsider the appropriateness of the inclusion of the DDA on the ROPS and EOPS.

BACKGROUND/DISCUSSION

The DDA concerns a project to be located at 12601 and 12602 Leda Lane, 12581, 12591, 12621, and 12721 Harbor Boulevard, Garden Grove, California (Property) for the construction of approximately six hundred (600) rooms and a water park (Project), approximately 18,000 square feet of retail, including one or more restaurants, and a parking structure.
The Applicable ROPS included expenditure items incurred in connection with the DDA. The First ROPS was approved by the Oversight Board on April 9, 2012 and

sent to the California Department of Finance (DOF) on April 13, 2012.[1] It was resent on April 25, 2012 at the request of the DOF. The Second ROPS was approved by the Oversight Board on May 8, 2012 and sent to the DOF on May 10, 2012. DOF sought review of the First ROPS by letter dated April 25, 2012, and the Second ROPS by letter dated May 15, 2012.

DOF's purported exercise of jurisdiction was untimely as to the Applicable ROPS; however, for purposes of this staff report and recommendation, without conceding timeliness of DOF's actions, it is assumed *arguendo* that DOF timely requested review.

Subsequently, DOF sent a letter to the Successor Agency dated May 10, 2012 with respect to the First ROPS. In this letter, DOF took exception to certain projects, including the Project under the DDA, as not founded on Enforceable Obligations and thereby returned for reconsideration the First ROPS. In a follow-up letter dated May 25, 2012, DOF reiterated, verbatim, its summary rejection of the Successor Agency and Oversight Board's adjudications finding the DDA to be an Enforceable Obligation and thereby returned for reconsideration the both the First ROPS and the Second ROPS. Specifically, in directing the Successor Agency and Oversight Board to "reconsider" their prior adjudications, DOF maintains, among other things, the DDA is not an Enforceable Obligation because performance of various terms therein requires the Successor Agency's execution of future "agreements" to carry out the Successor Agency's duty to, among other things, acquire and transfer six parcels of real property. This conclusion was based on DOF's interpretation of Health & Safety Code Section 34163 which, among other things, "suspended" the right of the Former Agency from executing new agreements, which, in the view of DOF, applied to Successor Agency even where necessary to carry out pre-existing contractual commitments.

The DDA is an "Enforceable Obligation" under settled California contract law and, under the Dissolution Act, ABx1 26. The Project developer's attorneys have summarized why the agreement is an "Enforceable Obligation." See attached letter dated June 7, 2012.

The legal analysis is set forth as follows. In summary, DOF's counter-adjudicatory finding is contrary to law because settled law holds:

- Simply because future arrangements may be necessary to carry out the stated intent of two or more contracting parties does not make their agreement speculative, uncertain or otherwise unenforceable.
- Simply because performance may be conditioned on the occurrence of one or

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[1] Under the Statute, it is also noteworthy that there is no affirmative obligation to transmit the ROPS to DOF in the first instance.

more future events including, for example, the availability of third party financing or one party's "reasonable" satisfaction with the other's performance, an otherwise reasonably definite agreement will still be enforced.

- An "agreement to agree" – *i.e.*, an agreement to negotiate and execute future agreements or documents needed to accomplish a previously stated contractual duty in good faith, including the future transfer of real property does not make the underlying contract mandating such performance less binding or enforceable.

- DOF's reference to a subpart of the Dissolution Act which addresses the suspension of the activities of the Former Agency and not the Successor Agency notwithstanding, the Dissolution Act contemplates the ability of both Original and Successor Agencies to transfer title to "assets" after the Dissolution Act's effective date when appropriate as part of the enforceable obligation and/or winding down.

FINANCIAL IMPACT

The financial impact is the same as set forth in the First Amended and Restated Disposition and Development Agreement. There have been no economic changes to the DDA.

RECOMMENDATION

Staff recommends that The City of Garden Grove as Successor Agency to the Garden Grove Agency for Community Development:

- Approve the attached Resolution;

- Reconsider, re-approve, and re-affirm (a) the DDA with GGMXD, as an "Enforceable Obligation" as defined by Health and Safety Code § 34167(d)(5) and § 34171(d)(1)(E), and (b) the Applicable ROPS;

Greg Blodgett

GREG BLODGETT
Senior Project Manager

Attachment 1: Resolution – Successor Agency
Attachment 2: Letter from Enterprise Counsel Group ALC, attorneys for GGMXD, Inc., and McWhinney Property Group, LLC, attaching relevant exhibits.

Recommended for Approval

Matthew Fertal

Matthew Fertal
Director

RESOLUTION NO. ____

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF GARDEN GROVE ACTING AS SUCCESSOR AGENCY TO THE GARDEN GROVE AGENCY FOR COMMUNITY DEVELOPMENT CONFIRMING THE DETERMINATION THAT THE DISPOSITION AND DEVELOPMENT AGREEMENT BETWEEN THE FORMER AGENCY AND GARDEN GROVE MXD IS AN ENFORCEABLE OBLIGATION PROPERLY INCLUDED ON THE RECOGNIZED OBLIGATION PAYMENTS SCHEDULE

WHEREAS, the City of Garden Grove, Acting as Successor Agency to the Garden Grove Agency for Community Development ("Successor Agency") is acting as Successor Agency to the Garden Grove Agency for Community Development ("Former Agency") pursuant to ABx1 26; and

WHEREAS, the Former Agency entered into a Disposition and Development Agreement ("DDA") with Garden Grove MXD, Inc. ("Developer"), dated as of April 13, 2010 (prior to the effective date of ABx1 26); and

WHEREAS, the Former Agency and the Successor Agency included the DDA as an enforceable obligation on the Enforceable Obligation Payment Schedules ("EOPS") and as a current obligation under the DDA in the Recognized Obligation Payment Schedule ("ROPS") for the period of January 1, 2012 to June 30, 2012 and for the period July 1, 2012 to December 31, 2012 (the "Applicable ROPS") prepared pursuant to ABx1 26; and

WHEREAS, the Oversight Board for the Successor Agency approved the Applicable ROPS; and

WHEREAS, the State of California Department of Finance ("DOF") objected to inclusion of the DDA as an enforceable obligation pursuant to the Applicable ROPS; however the DOF's objection to the Applicable ROPS was not made within the time required by ABx1 26; and

WHEREAS, the DOF asserts that the DDA is not an enforceable obligation because (1) the DDA requires the Successor Agency to enter into future agreements, including, among other things, to acquire and convey to the Developer six (6) parcels of real property, (2) Health & Safety Code Section 34163 prohibited the Former Agency from entering into new agreements; and

WHEREAS, Health & Safety Code Section 34189, added by ABx1 26, provides that, "[c]ommencing on the effective date of ABx1 26, all provisions of the Community Redevelopment Law that depend on the allocation of tax increment to redevelopment agencies, including, but not limited to, Sections 33445, 33640, 33641, 33645, and subdivision (b) of Section 33670, shall be inoperative"; and

WHEREAS, Health & Safety Code Section 34173(b), added by ABx1 26, provides that, "[e]xcept for those provisions of the Community Redevelopment Law that are repealed, restricted, or revised pursuant to the act adding this part, *all authority, rights, powers, duties, and obligations previously vested with the former redevelopment agencies, under the*

Community Redevelopment Law, are hereby vested in the successor agencies" (emphasis added); and

WHEREAS, Health & Safety Code Sections 34167(d)(5) and 34171(d)(1)(E), added by ABx1 26, define "enforceable obligation" to include "[a]ny legally binding and enforceable agreement or contract that is not otherwise void as violating the debt limit or public policy"; and

WHEREAS, Health & Safety Code Section 34177(c), added by ABx1 26, requires the Successor Agency to "[p]erform obligations required pursuant to any enforceable obligation"; and

WHEREAS, the Successor Agency has the authority to enter into agreements under the California Community Redevelopment Law and is required to perform obligations, including obligations that require the Successor Agency to enter into future agreements, as required by enforceable obligations such as the DDA; and

WHEREAS, by this Resolution, the Successor Agency desires to re-affirm that the DDA is an "enforceable obligation" within the meaning of Health & Safety Code Sections 34167(d)(5) and 34171(d)(1)(E) and to re-affirm its approval of the Applicable ROPS, including the DDA as an enforceable obligation of the Former Agency and the Successor Agency.

NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF GARDEN GROVE ACTING AS SUCCESSOR AGENCY TO THE GARDEN GROVE AGENCY FOR COMMUNITY DEVELOPMENT:

Section 1. The foregoing recitals are true and correct and constitute a substantive part of this Resolution.

Section 2. The Successor Agency hereby re-affirms that the DDA is an "enforceable obligation" within the meaning of Health & Safety Code Sections 34167(d)(5) and 34171(d)(1)(E) and re-affirms its approval of the Applicable ROPS.

Section 3. This Resolution shall be effective immediately upon adoption.

Section 4. The City Clerk on behalf of the Successor Agency shall certify to the adoption of this Resolution.

APPROVED AND ADOPTED this ____ day of June 2012.

CITY OF GARDEN GROVE ACTING AS SUCCESSOR AGENCY TO THE GARDEN GROVE AGENCY FOR COMMUNITY DEVELOPMENT

_____

Mayor

(SEAL)

ATTEST:

_____
City Clerk on behalf of Successor Agency

APPROVED AS TO FORM:

_____
City Attorney on behalf of Successor Agency

STATE OF CALIFORNIA)
COUNTY OF ORANGE) ss.
CITY OF GARDEN GROVE)

I, _____, City Clerk of the City of Garden Grove, hereby certify that the foregoing resolution was duly adopted by the City Council of the City of , Garden Grove, serving as Successor Agency to the Garden Grove Agency for Community Development, at its regular [special] meeting held on the _____ day of June, 2012, and that it was so adopted by the following vote:

AYES:

NOES:

ABSENT:

ABSTAIN:

_____
City Clerk on behalf of Successor Agency

(SEAL)

ENTERPRISE
COUNSEL GROUP
A Law Corporation

David A. Robinson
drobinson@enterprisecounsel.com

June 7, 2012

VIA EMAIL (jimde@ci.garden-grove.ca.us);
CONFIRMED VIA FIRST CLASS U.S. MAIL

CONFIDENTIAL AND STRICTLY PRIVILEGED;
ATTORNEY-CLIENT COMMUNICATION

James DellaLonga, Sr. Project
Manager/Administrative Officer
Economic Development Department
City of Garden Grove as Successor Agency to
the Garden Grove Agency for Community
Development
11222 Acacia Parkway
Garden Grove, CA 92824

Mayor William J. Dalton
Board Chairman
Oversight Board of the City of Garden Grove
as Successor Agency
11222 Acacia Parkway
Garden Grove, CA 92824

Re: *Water Park Hotel Development*

Dear Mr. DellaLonga and Mayor Dalton:

We write on behalf of Garden Grove MXD, Inc. (GGMXD), as assignee of Garden Grove MXD LLC, party to that certain Disposition and Development Agreement (DDA) dated May 12, 2009, as amended and restated on April 13, 2010.[1] That agreement with the Garden Grove Agency for Community Development (Original Agency) concerns a project to be located at 12601 and 12602 Leda Lane, 12581, 12591, 12621, and 12721 Harbor Boulevard, Garden Grove (Property). The DDA firmly established the terms and conditions for the disposition of the Property to the Developer and the development of a water park hotel project (Project). As explained more fully below, the DDA is an "Enforceable Obligation" under settled California contract law and, therefore, the recent legislation known as the Dissolution Act, ABx1 26.[2]

Garden Grove MXD, Inc., as counter-party's assignee to the DDA, is an interested party to this same Enforceable Obligation.[3]

[1] Exh. 1 (First Amended and Restated DDA).

[2] The text of the Dissolution Act is attached as Exh. 2.

[3] Exh. 3 (Assumption and Assignment Agreement).

We write in light of the procedural history detailed below to provide additional information explicating the nature of the DDA as an Enforceable Obligation.

I. Procedural History

Background

As you know, as part of the 2011-12 State budget bill, the California Legislature enacted, and the Governor signed, companion bills ABx1 26 and ABx1 27 (the Dissolution Act), adding Parts 1.8 and 1.85 to Division 24 of the California Health and Safety Code, which laws require that each redevelopment agency be dissolved unless the community that created it enacts an ordinance committing it to making certain payments.[4] However, the California Supreme Court issued a decision in *California Redevelopment Association v. Matosantos*, 53 Cal.4th 231, on December 29, 2011, upholding (as against then pending constitutional challenges) ABx1 26 and invalidating ABx1 27, dissolving all redevelopment agencies throughout the State effective February 1, 2012, and striking down the option to continue existence contingent on committing to making those certain payments.[5]

The Dissolution Act, to the extent not yet invalidated by the California Supreme Court,[6] provides that "Successor Agencies" be designated to take assignment, possession and control of all assets and properties belonging to the former redevelopment agencies and provides that, with certain exceptions, all authority, rights, powers, duties, and obligations previously vested with the former redevelopment agencies, under the Community Redevelopment Law, are vested in the Successor Agencies.[7]

On August 23, 2011, pursuant to Health and Safety Code § 34169(g), the Original Agency (a/k/a Garden Grove Agency for Community Development) adopted Resolution No. 705 approving the Original Agency's Enforceable Obligation Schedule (EOPS), which EOPS lists all of the Original Agency's Enforceable Obligations pursuant to the Dissolution Act.[8] The DDA

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[4] Exh. 2 (Text of the Dissolution Act).

[5] Exh. 4 (*California Redevelopment Association v. Matosantos*).

[6] As explained in Chief Justice Cantil-Sakuye's concurring decision, *Matosantos* did not address "as applied" constitutional challenges to the Dissolution Act. For the reasons stated herein, such "as applied" challenges may still prevail. Similarly, footnote 2 of *Matosantos* explains: "Amicus curiae City of Cerritos et al. raises additional constitutional arguments against the validity of Assembly Bills 1X 26 and 1X 27 based on provisions neither raised nor briefed by the parties. We do not consider them." *See* Exh. 4. These additional constitutional challenges have been raised in subsequent lawsuits.

[7] Exh. 2, Health and Safety Code § 34173(b).

[8] Exh. 5 (EOPS Project Name "Waterpark Hotel DDA," item No. 19).

was among the Enforceable Obligations approved and included on the EOPS.[9]

Less than a month later, on September 13, 2011, under Health and Safety Code § 34169(h) the Original Agency adopted Resolution No. 706 approving an Initial Recognized Obligation Payment Schedule (IROPS) and duly transmitted the IROPS to the Successor Agency (a/k/a the City of Garden Grove). The DDA was also listed on the IROPS.[10] That Resolution was carried by unanimous vote.[11]

The Dissolution Act calls for each Successor Agency to have an "Oversight Board" with certain responsibilities.[12] The Oversight Board has fiduciary responsibilities to all holders of Enforceable Obligations.[13] Furthermore, the Oversight Board is vested with the power to make factual determinations (administrative adjudications) necessary to decide which obligations are "Enforceable" under the Dissolution Act.[14] In fulfillment of these statutory responsibilities, on April 9, 2012 the Oversight Board for the City of Garden Grove determined the DDA is indeed an Enforceable Obligation, and ratified the Successor Agency's Resolution that included the DDA on the Recognized Obligation Payment Schedule (ROPS).[15] Under the Dissolution Act, the Department of Finance (DOF) may review Oversight Board actions.[16] However, such review must be "requested" within three business days.[17] DOF requested review by email on April 18, 2012. Arguably, therefore, DOF failed to timely request review and, as a consequence, DOF exceeded its statutorily defined jurisdiction by purporting to initiate an untimely review of the Oversight Board's April 9, 2012 action.

Thus, the DDA was duly approved as an Enforceable Obligation under the Dissolution Act *pursuant to separate and successive administrative adjudications* approving and adopting the EOPS, IROPS and ROPS.

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[9] Id.

[10] Exh. 6 (Resolution No. 706).

[11] Id.

[12] Exh. 2, Health and Safety Code § 34179.

[13] Id.

[14] Exh. 2, Health & Safety Code § 34177(l)(2)(B).

[15] Exh. 7 (Oversight Board Minutes of Apr. 9, 2012, Meeting).

[16] Exh. 2, Health & Safety Code § 34179(h).

[17] Id.

The Present Controversy

We understand the ROPS was voluntarily transmitted to the DOF on April 13, 2012. It was retransmitted on April 25, 2012 reportedly to correct an administrative error.[18]

Subsequently, DOF sent a letter to the Successor Agency dated May 10, 2012.[19] In this letter, DOF took exception to certain projects, including the Project, as not founded on Enforceable Obligations.[20] In a follow up letter dated May 25, 2012, DOF reiterated, verbatim, its summary rejection of the Successor Agency and Oversight Board's adjudications finding the DDA to be an Enforceable Obligation.[21] Specifically, in directing the Successor Agency and Oversight Board to "reconsider" their prior adjudications, DOF maintains, among other things, the DDA is not an Enforceable Obligation because performance of various terms therein requires the Successor Agency's execution of future "agreements" to carry out the Successor Agency's assigned/inherited duty to, among other things, acquire and transfer six parcels of real property.[22] The DOF further argues that a subpart of the Dissolution Act freezing an Original Agency's ability to conduct further business categorically prohibits a Successor Agency from executing new agreements, even where necessary to carry out pre-existing contractual commitments.[23]

Conspicuously, both DOF letters fail to cite legal authority supporting what appears to be a counter-adjudicatory finding (arguably not authorized by the Dissolution Act) that the DDA is not an Enforceable Obligation under principals of California contract law. DOF also ignores the Dissolution Act's lynchpin definition of an Enforceable Obligation:

> *"Any legally binding and enforceable agreement or contract that is not otherwise void as violating the debt limit or public policy."*[24]

Because of this glaring oversight, such legal analysis is set forth below. In summary, DOF's counter-adjudicatory finding is contrary to law because settled law holds:

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[18] Exh. 8 (ROPS submitted April 25, 2012).

[19] Exh. 9 (May 10, 2012 letter from the Department of Finance).

[20] Id.

[21] Exh. 10 (May 25, 2012 letter from the Department of Finance).

[22] Exh. 9 (May 10, 2012 letter from the Department of Finance).

[23] Exh. 9 (May 10, 2012 letter from the Department of Finance) (merely stating, without analysis, "HSC section 34171(d) lists enforceable obligation (EO) characteristics.").

[24] Exh. 2, Health and Safety Code § 34171(d)(E).

- Simply because future arrangements may be necessary to carry out the stated intent of two or more contracting parties does not make their agreement speculative, uncertain or otherwise unenforceable.

- Simply because performance may be conditioned on the occurrence of one or more future events including, for example, the availability of third party financing or one party's "reasonable" satisfaction with the other's performance, an otherwise reasonably definite agreement will still be enforced.

- An "agreement to agree" – *i.e.*, an agreement to negotiate and execute future agreements or documents needed to accomplish a previously stated contractual duty in good faith, including the future transfer of real property – does not make the underlying contract mandating such performance less binding or enforceable.

- DOF's reference to an arguably irrelevant subpart of the Dissolution Act notwithstanding, the Dissolution Act contemplates the ability of both Original and Successor Agencies to transfer title to "assets" after the Dissolution Act's effective date when appropriate to "[p]erform obligations required pursuant to any enforceable obligation."[25]

We understand Mr. DellaLonga, as Senior Project Manager/Administrative Officer of the Economic Development Department of the City of Garden Grove, sent an initial response to DOF providing clarification that the DDA meets the definition of an Enforceable Obligation.[26] In this response Mr. DellaLonga appropriately pointed out that the DDA "contain[s] obligations of the Successor Agency to acquire property needed for the development, as well as, to transfer the property to the Developer. The City of Garden Grove Successor Agency maintains that these obligations to acquire and/or transfer property were valid and binding prior to the effective date of ABx1 26, and therefore, should supersede the sections 34163(e) and (f)."[27] Notwithstanding, as stated above, we understand DOF continues to summarily reject the Successor Agency and Oversight Board's respective adjudications finding the DDA to be an Enforceable Obligation.

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[25] Exh. 2, Health and Safety Code § 34177(c).

[26] Exh. 11.

[27] Id.

II. Further Information Explicating Why the DDA is an Enforceable Obligation

We understand DOF has summarily rejected ROPS because of its admitted lack of adequate staffing to meaningfully review information generated by dozens of Successor Agencies and Oversight Boards up and down the State.[28] We further understand DOF has begun to promulgate rules purporting to govern the rights of private and governmental parties to seek administrative "review" of its independent (and, again, arguably unauthorized) adjudicatory findings. Finally, we also understand DOF has purported to retain continuing jurisdiction to review ROPS items beyond the statutory ten-day review period. Temporarily putting aside the question of whether DOF is acting improperly or in excess of its legislatively delegated powers, we write to provide additional substantive data to assist the Successor Agency and Oversight Board in their statutorily mandated reconsideration process.[29] It is our hope the Successor Agency and Oversight Board may find this information useful enough to convey to DOF in a final attempt to break the administrative logjam blocking the parties' ability to move forward with the DDA's time-critical performance.

As stated above, the Dissolution Act defines "Enforceable Obligations" to include, among other things, "[a]ny legally binding and enforceable agreement or contract that is not otherwise void as violating the debt limit or public policy."[30] *Simply put, the DDA is a preexisting legally binding contract, thus by definition an Enforceable Obligation under California law.* Moreover, enforcement of the DDA is consistent with the express Legislative mandate in the Dissolution Act that, "[n]othing in this part shall be construed to interfere with a redevelopment agency's authority, pursuant to enforceable obligations as defined in this chapter, to (1) make payments due, (2) enforce existing covenants and obligations, or (3) perform its obligations."[31] It is further consistent with the Legislative mandate that:

> It is the intent of this part that pledges of revenues associated with enforceable obligations of the former redevelopment agencies are to be honored. It is intended that the cessation of any redevelopment agency shall not affect either the pledge, the legal existence of that pledge, or the stream of revenues available to

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[28] *See* letter of May 10, 2012, from the League of California Cities to Mark Hill as Program Budget Director of the Department of Finance, Exh. 12.

[29] In so doing, we do not concede DOF is acting appropriately. To the contrary, we contend DOF failed to timely initiate review of the EOPS and ROPS; hence, we believe a court of competent jurisdiction would likely find that the Successor Agency and Oversight's Board's earlier adjudicatory findings became final and beyond DOF's review power as a matter of law.

[30] Exh. 2, Health & Safety Code §§ 34167(d)(5), 34171(d)(1)(E); § 34171(d)(1).

[31] Exh. 2, Health & Safety Code § 34167(f).

meet the requirements of the pledge.[32]

Finally, it is consistent with the Legislative mandate:

> [T]hat nothing herein is intended to absolve the successor agency of payment or other obligations due or imposed pursuant to the enforceable obligations; and provided further, that nothing in the act adding this part is intended to be construed as an action or circumstance that may give rise to an event of default under any of the documents governing the enforceable obligations.[33]

The Parties' Intent Governs

On December 22, 2008, in a landmark decision emphasizing California's public policy favoring liberal enforcement of contracts, in *Patel v. Liebermensch*, (2008) 45 Cal.4th 344, the California Supreme Court held that an enforceable contract to sell real estate arises whenever the contract identifies the parties, the price, and a reasonably certain description of the property. If the parties do not agree on other so-called "non-essential" terms that might typically be included in a real estate transaction – such as closing date, title insurance, financing terms, due diligence periods and the like – California courts will supply such terms as are reasonable. *Patel* is thus sometimes known as the "Essential 3-P's" decision. In thus clarifying the law relative to the enforcement of real estate contracts, our Supreme Court emphasized the parties' intent controls.

The DDA's 3-Ps, And All Other Essential Terms, Are Clearly and Definitely Stated

Under California law, where terms are sufficiently definite for a court to ascertain the parties' obligations and to determine whether those obligations have been performed or breached, a contract will be enforced.[34] An obligation is enforceable where its provisions are sufficiently certain to make ascertainable the precise act that is to be done.[35] A binding contract is created wherever its essential terms are clearly enough stated to allow the parties to understand what each is required to do, the contract is supported by consideration,[36] and the parties agreed to

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[32] Exh. 2, Health & Safety Code § 34175(a).

[33] Exh. 2, Health & Safety Code § 34174(a).

[34] *Weddington Prods., Inc. v. Flick* (1998) 60 Cal.App.4th 793, 811; *Boyd v. Bevilacqua* (1966) 247 Cal.App.2d 272, 287; *Hennefer v. Butcher* (1986) 182 Cal.App.3d 492, 500-501; *Robinson & Wilson, Inc. v. Stone* (1973) 35 Cal.App.3d 396, 407.

[35] Cal. Civ. Code, § 3390, subd. (5) (requiring that specific performance is only available where the agreement has terms sufficiently certain to make the precise act to be done clearly ascertainable).

[36] Cal. Civ. Code § 1614 provides that "[a] written instrument is presumptive evidence of consideration." The DDA is, naturally, a written instrument, and provides presumptive evidence of consideration. Moreover, "[c]onsideration

the terms of the contract.[37] Accordingly, California law is generally predisposed to uphold contracts as enforceable.[38]

For instance, in *Ersa Grae Corp. v. Fluor Corp.*, (1991) 1 Cal.App.4th 613, 623, Division 1 of the Second District Court of Appeal (Los Angeles) found the terms of large scale real estate development contract sufficiently definite to enforce where the contract stated one party, Ersa Grae, agreed to provide funding within a defined period after the satisfaction of certain conditions; the other, Fluor, agreed to select and pay for the services of all third-parties needed to supervise and carry out the necessary construction work; and, upon completion, Fluor agreed to transfer its interests in the completed project and underlying land lease to a consortium in exchange for £1 million.[39] In rejecting Fluor's claim that the contract was unenforceable because it contemplated the parties' negotiation and execution of future agreements necessary to carry out their intent (*e.g.*, the parties' required negotiation and execution of their contemplated future agreement to convey the fully developed property subject to a long-term land lease),[40] *Ersa Grae* explained:

> The fact that an agreement contemplates subsequent documentation does not invalidate the agreement if the parties have agreed to its existing terms. (See *Clark v. Fiedler* (1941) 44 Cal.App.2d 838, 847 [""Any other rule would always permit a party who has entered a contract like this ... to violate it, whenever the understanding was that it should be reduced to another written form, by simply suggesting other and additional terms and conditions. If this were the rule the contract would never be completed in cases where, by changes in the market, or other events occurring subsequent to the written negotiations, it became the interest of either party to adopt that course in order to escape or evade obligations incurred in the ordinary course of commercial business.'"]. See also, *Smissaert v. Chiodo* (1958) 163 Cal.App.2d 827, 830.[41]

The legally enforceable contract in *Ersa Grae* is thus strikingly similar to the DDA. Here, the Original Agency agreed to provide initial funding and execute documents to needed

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may be an act, forbearance, change in legal relations, or a promise." 1 Witkin, Summary of California Law (10th ed. 2005) CONTRACTS, § 202.

[37] Judicial Council of California Advisory Committee on Civil Jury Instructions 302, Contract Formation – Essential Factual Elements.

[38] See, e.g., *Patel v. Liebermensch* (2008) 45 Cal.4th 344, 369-70 (quoting and citing *McIllmoil v. Frawley Motor Co.* (1923) 190 Cal. 546).

[39] (1991) 1 Cal.App.4th 613, 623.

[40] *Ersa Grae Corp.*, 1 Cal.App.4th at 623.

[41] Id. at n. 3 (citations in original).

transfer the six parcel assemblage within a specified period following the satisfaction of certain conditions.[42] GGMXD, Inc., as assignee of GGMXD, LLC, agreed to arrange substantial additional funding and provide all services needed to carry out the construction of the agreed upon water park.[43] Following issuance of an occupancy permit, the Original Agency agreed to provide funding for a portion of the Project's overall development cost, as well as to provide funding concurrently with the construction of a parking structure.[44]

Ersa Grae is just one of dozens of published cases holding contracts of this type fully enforceable. See, *e.g.*, *Bleecher v. Conte* (1981) 29 Cal.3d 345, 354-55 [the law does not bar specific performance of a land sales contract in which a city's future approval of certain development plans is made a condition precedent to completion of the agreement]; *Larwin-Southern California, Inc. v. JGB Investment Co.* (1979) 101 Cal.App.3d 626, 638 [the mere presence of a satisfaction clause in a contract does not result in that contract's nullity]; *Mattei v. Hopper* (1958) 51 Cal.2d 119 [land sale contracts containing satisfaction clauses are generally enforceable, except where such clauses render a party's obligation to perform illusory]. Here, DOF does not advance the unsustainable claim that anything in the DDA renders either party's duty to perform illusory.

Black letter law further holds that "[a] contract's material terms (such as subject matter, price, payment terms, and duration) must be 'sufficiently definite' so that each party can be 'reasonably certain' about what it is promising to do or how it is to perform."[45] Here, the subject matter of the DDA is unambiguous and includes a detailed description of the Project and how it is to be developed.[46] The consideration, or price, is indeed set forth in considerable detail.[47] Payment terms are also established.[48] Finally, the duration of the DDA is set forth explicitly set forth in the Schedule of Performance.[49] The material terms accordingly have been agreed upon and established in a binding and enforceable manner.

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[42] *See, e.g.*, DDA § 408 (Covenant Consideration), Exh. 1 (providing specifically for the Agency to pay $5 million to the Developer concurrently with the commencement of construction of the parking structure, and $42 million thirty days after the later of date of the opening of the hotel or the date of the Certificate of Occupancy for the hotel).

[43] *See, e.g.*, DDA § 302 (Construction Drawings and Related Documents), Exh. 1 (providing that the Developer submit within the time frame set by the Schedule of Performance certain construction plans for Agency review).

[44] *See* n. 39.

[45] *Dyer v. Bilaal* (D.C. 2009) 983 A.2d 349, 356.

[46] *See generally* Exh. 1.

[47] *See, e.g.*, Exh. 1 at § 408.

[48] Id.

[49] Exh. 1 (DDA, see Exhibit D, Schedule of Performance); Exh. 13, letter of Enforced Delay dated January 31, 2012, attaching amended Schedule of Performance.

Finally, the DOF's May 10 and May 25 letters ignore the difference between the parties' execution of documents needed to carry out pre-existing contractual commitments and the negotiation of entirely new agreements. An "agreement to agree" – *i.e.*, an agreement to negotiate and sign future agreements or legal documents required to effectuate the purpose and intent of a pre-existing contractual obligation – is fully enforceable in California. *Copeland v. Baskin Robbins U.S.A.* (2002) 96 Cal.App.4th 1251, 1260 ["[W]hen the parties are under a contractual compulsion to negotiate ... the covenant of good faith and fair dealing attach[es], as it does in every contract. In the latter situation the implied covenant of good faith and fair dealing has the salutary effect of creating a disincentive for acting in bad faith in contract negotiations."] Hence, DOF's suggestion there is no enforceable duty to negotiate the terms of legal documents needed to carry out the parties' otherwise clearly stated deal in good faith is simply contrary to law.

Even If "Detail" Terms Are Omitted, Contracts Are Enforceable

As explained above, the courts have specifically enforced agreements that have not expressly contained all of the terms agreed upon. For instance, in *Goodwest Rubber Corp. v. Muñoz* (1985) 170 Cal.App.3d 919, 921, reversing a judgment denying specific performance when the contract called for payment at "market value," the court stated:

> The modern trend of the law is to favor the enforcement of contracts, to lean against their unenforceability because of uncertainty, and to carry out the intentions of the parties if this can feasibly be done. Neither law nor equity requires that every term and condition of an agreement be set forth in the contract.[50]

Case law holds that where "detail" or non-essential terms of a contract are to be agreed in the future, the contract remains enforceable.[51] While certain ministerial arrangements may remain outstanding, the material terms of the DDA are in place; hence, the DDA is enforceable.

DOF's Reliance on § 34163(b) Ignores, Among Other Things, §§ 34169, 34174(a), and 34177(c).

DOF argues that the DDA is not an Enforceable Obligation because substantive performance, including a "[t]ransfer, assign[ment], vest[ing], or delegat[ion of] any of [the Original Agency's] assets, funds ... ownership interests" must occur in the future.[52] In advancing this argument, DOF cites only one section of the Dissolution Act - § 34163 – specifying what the *original* redevelopment agencies are no longer empowered to do. Such a

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[50] Id.

[51] *City of Los Angeles v. Superior Court* (1959) 51 Cal.2d 423, 433.

[52] Exh. 9 (May 10, 2012 letter from the Department of Finance).

myopic interpretation is unsustainable. DOF's reliance on § 34163 as authority for the proposition that Successor Agencies are not empowered to make such a "[t]ransfer[s], assign[ments], vest[ings], or delegat[ions of] any of [the Original Agency's] assets, funds ... ownership interests" contradicts the broader legislative mandate that "[n]othing in [the part of the Dissolution Act containing § 34163] shall be construed to interfere with a redevelopment agency's authority, pursuant to enforceable obligations as defined in this chapter, to (1) make payments due, (2) enforce existing covenants and obligations, and *(3) perform its obligations*".[53] It also ignores the companion section of the Dissolution Act requiring the State Controller to review post-January 1, 2011 asset transfers to determine whether "the government agency that received the assets is *not contractually committed to a third party for the expenditure of encumbrance of those assets* ....".[54] Quite simply, there would be no reason for such Controller review if the Legislature meant to ban post-January 1, 2011 asset transfers in compliance with pre-existing third-party contractual obligations.

In other words, it would appear DOF is reading § 34163 out of context to advance the Governor's presumed directive that DOF maximize recapture of former redevelopment agency properties and revenues, even if it means ignoring or contorting the above-quoted contrary legislative directives.

Suffice it to say, the legislature was obviously mindful it could not legislate an unconstitutional impairment of existing contracts. Notwithstanding, as the Dissolution Act is presently being "applied," arguably that is precisely what DOF is now attempting to do.

III. Conclusion

In conclusion, we request that you take the information submitted in and with this letter as substantial and irrefutable support that the DDA is an Enforceable Obligation, which the Oversight Board has a statutorily mandated fiduciary duty to honor.

Respectfully Submitted,

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[53] Exh. 2, Health & Safety Code § 34167(f) (emphasis added). See also, Health & Safety Code §§ 34169, 34174(a), 34177(c).

[54] Exh. 2, Health & Safety Code § 34167.5 (emphasis added).