Civil No. C070484
[Sacramento County Superior Court Case No. 34-2011-80000952]

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

City of Cerritos *et al.*,
Plaintiffs and Appellants;

v.

State of California *et al.*,
Defendants and Respondents;

ABC Unified School District,
Real Party in Interest.

APPEAL FROM A JUDGMENT OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF SACRAMENTO

Honorable Lloyd G. Connelly, Judge Presiding

APPLICATION OF THE LEAGUE OF CALIFORNIA CITIES TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF APPELLANTS

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APPLICATION FOR PERMISSION TO FILE BRIEF *AMICUS CURIAE*

To the Honorable Presiding Justice Vance W. Raye:

The League of California Cities, in accordance with Rule 8.200, subdivision (c), of the California Rules of Court, respectfully requests permission to file the accompanying *amicus curiae* brief in support of the Plaintiffs and Appellants in this action.

The League of California Cities (the "League") is an association of 469 California cities united in promoting the general welfare of cities and their residents. The League is advised by its Legal Advocacy Committee, which is composed of 24 city attorneys representing geographical divisions of the League from all parts of the state. The committee monitors appellate litigation affecting municipalities and identifies those cases, such as the matter at hand, that are of statewide significance.

The League and its member cities have a substantial interest in the outcome of this appeal, which seeks reversal of the trial court's order denying interim relief in a challenge to the validity of the June 2011 statute dissolving California's community redevelopment agencies. More than three-quarters of the League's member cities had formed redevelopment agencies to serve as agents of their communities' economic and physical development, and nearly all of those cities now are responsible for administering their redevelopment agencies' dissolution. On these

communities' behalf, the League wishes to assist this Court in understanding how continuing implementation of the challenged legislation affects the cities, counties, and housing authorities engaged in winding up the affairs of California's redevelopment agencies.

The League believes its perspective on this matter is worthy of the Court's consideration and will assist the Court in deciding this matter. The League's counsel has examined the briefs on file in this case and is familiar with the issues involved and the scope of their presentation and does not seek to duplicate that briefing. We believe there is a need for additional briefing on this issue, and hereby request that leave be granted to allow the filing of the accompanying *amicus curiae* brief.

No party or counsel for a party in this appeal authored any part of the accompanying *amicus curiae* brief. No person or entity other than the League and its attorneys in this matter made any monetary contribution to fund preparation of the brief.

DATED: February 13, 2013 GOLDFARB & LIPMAN LLP

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

The League of California Cities concurs with Plaintiffs and Appellants that Assembly Bill 26, 2011–2012 First Extraordinary Session ("ABx1 26," or the "Dissolution Act"), is unconstitutional. For this reason, the League urges this Court to reverse the trial court's order denying preliminary relief to Plaintiffs and Appellants, and to rule instead that Plaintiffs and Appellants have shown a likelihood of success on the merits of this action. To protect not only Plaintiffs but other local agencies and the State itself against irreparable injury before final resolution of this action, the League urges this Court as well to remand this matter to the trial court for consideration of appropriate interim relief.

In addition to dissolving redevelopment agencies, ABx1 26 prescribed a complex process for satisfying redevelopment agencies' outstanding liabilities and redistributing any residual assets. That process is under way, but is far from complete. In the vast majority of former redevelopment jurisdictions, cities are responsible for administering this process; and in every jurisdiction, Defendants and Respondents (the California Department of Finance and the California Controller) play significant supervisory roles. For this reason, if this Court determines that Plaintiffs and Appellants have shown a likelihood of success on the merits of their claim that ABx1 26 is either wholly or partially invalid, interim relief is not only feasible, but is critical to many of the League's members.

Interim relief preventing further redistribution of redevelopment assets will preserve those assets for later distribution if necessary, while preventing premature or unconstitutional distributions that will be difficult if not impossible to correct. In addition, interim relief may prevent arbitrary and inconsistent administrative decisions by the Department of Finance and the Controller. Finally, interim relief will prevent expenditure of scarce municipal, judicial, and administrative resources on this potentially unnecessary wind-up system. At this Court's direction, the trial court may grant interim relief that would prevent those irreparable harms should the courts eventually determine that ABx1 26 is wholly invalid, while preserving ABx1 26's alleged benefits to the State should the courts eventually determine that it is valid.

II. ARGUMENT

A preliminary injunction is appropriate where a plaintiff is likely to prevail at trial and failure to provide interim relief will cause irreparable harm. (*Barajas v. City of Anaheim* (1993) 15 Cal.App.4th 1808, 1813.) For the reasons stated in Plaintiffs' and Appellants' Opening and Reply Briefs, Plaintiffs and Appellants are likely to prevail on the merits of this action. Contrary to the representations made by the Department of Finance and the Controller in their Respondents' Brief, however, this appeal is not moot, because interim relief still may prevent significant irreparable harm to

Plaintiffs and to the League's members. The League urges this Court to direct such relief.

A. Implementation of ABx1 26 Has Serious, Immediate Consequences That Will Constitute Irreparable Harm if the Judiciary Ultimately Invalidates ABx1 26.

Dissolution of redevelopment agencies on February 1, 2012, and assumption by their "successor agencies" of the dissolved redevelopment agencies' assets and liabilities, was just one step in the overall process mandated by ABx1 26. Since February 1, 2012, each successor agency has had responsibility for carrying out its former redevelopment agency's obligations, such as by performing and enforcing contracts the agency had made before dissolving (Health & Saf. Code § 34177(a), (c)), and by maintaining the agency's real and personal property until such time as the successor agency can dispose of that property (*id.* § 34177(e)). In addition, successor agencies must "[r]emit unencumbered balances of redevelopment agency funds to the county auditor-controller for distribution to" other local agencies. (Health & Saf. Code § 34177(d).) These post-dissolution steps implementing ABx1 26 continue to pose threats of harm that will be both serious and irreparable if California's courts eventually invalidate the Dissolution Act.

1. The State Has Demanded That Redevelopment Successor Agencies With Outstanding Debts Transmit to Other Local Governments Tax Increment Received and Reserved for Those Debts.

In June 2012, the Legislature adopted Assembly Bill 1484, in part to establish protocols for implementing some aspects of ABx1 26. AB 1484 requires a two-phase "due diligence review" of each former redevelopment agency's and successor agency's financial position as of June 30, 2012, with the goal of identifying "unobligated balances available for transfer to taxing entities." (Health & Saf. Code § 34179.5(a).) This process is intended to implement the directive in ABx1 26 that successor agencies identify and disgorge "unencumbered balances of redevelopment agency funds" for benefit of other local taxing agencies. (*Id.* § 34177(d).)

a) The "Due Diligence Reviews" Required by AB 1484 are Ongoing.

AB 1484 required "a licensed accountant, approved by the county auditor-controller and with experience and expertise in local government accounting," to perform these reviews. (*Id.* § 34179.5(a).) The first phase, reviewing transactions involving the former redevelopment agency's Low and Moderate Income Housing Fund (the "LMIHF"), was due to be completed by the chosen accountant by October 1, 2012. (*Id.* § 34179.6(a).) The second phase, reviewing transactions involving the former redevelopment agency's other funds, was due to be completed by December 15, 2012. (*Id.*)

The statutes provide for public consideration of these reviews before each successor agency's "oversight board" (*id.* § 34179.6(b), (c)), and then for further review and possible override—without any further opportunity for public comment—by the Department of Finance (*id.* § 34179.6(d), (e)). The final result of each phase of this process is an order directing the successor agency to remit to its county auditor-controller the amount the Department of Finance has deemed "available for allocation to affected taxing entities," so that the county auditor-controller may in turn distribute these funds to other local agencies. (*Id.* § 34179.6(c)(6), (f).) The Department of Finance's statutory deadlines for these remittance orders are December 15, 2012, for the order relating to LMIHF funds and April 1, 2013, for the order relating to non-LMIHF funds. (*Id.* § 34179.6(d).)

b) These "Due Diligence Reviews" Relate Directly to Plaintiffs' Assertions of Unconstitutionality.

Features of ABx1 26 that Plaintiffs' complaint alleges to be unconstitutional are at the very heart of this redistribution process. Article 16, section 25.5(a)(7) of the California Constitution forbids the Legislature to enact any law requiring "a community redevelopment agency to pay, remit, loan, or otherwise transfer, directly or indirectly, taxes on *ad valorem* real property and tangible personal property allocated to the agency pursuant to Section 16 of Article XVI to or for the benefit of the State, any agency of the State, or any jurisdiction." For this reason—as the Supreme

Court noted—although the Legislature had authority to prevent redevelopment agencies from conducting new business and incurring new obligations, it did not have authority to require use of their existing assets to address other local agencies' budgetary shortfalls. (*California Redevelopment Assn. v. Matosantos* (2011) 53 Cal.4th 231, 261-62 ["Though the Legislature retains the broad power to dissolve redevelopment agencies, Proposition 22 strips it of the narrower power to insist on transfers to third parties of property tax revenue already allocated to redevelopment agencies, as it had done on numerous previous occasions."].) Yet the "due diligence review" process serves only this arguably unconstitutional objective.

A redevelopment agency's LMIHF was not simply a discretionary fund for housing activities; it was a fund required by the Community Redevelopment Law, consisting of 20% (in most cases) of the redevelopment agency's allocation of tax increment. (Health & Saf. Code §§ 33334.2, 33334.3, 33334.6.) The Dissolution Act, however, neither requires nor authorizes a successor agency to add funds to the former redevelopment agency's LMIHF. (*See id.* §§ 34177, 34177.3.) Accordingly, most if not all funds held by each successor agency as of June 30, 2012, in its former redevelopment agency's LMIHF were tax increment funds received by the former redevelopment agency before dissolution. Likewise, although a former redevelopment agency may have held funds other than

tax increment when it dissolved (such as funds borrowed or granted from other public agencies or private parties, or revenues received as rent or interest) the majority of non-LMIHF funds under review in the "due diligence" process also are tax increment funds received by the redevelopment agency before its dissolution.

If Plaintiffs' challenge to ABx1 26 is sound—as the League believes it is—any requirement that successor agencies with outstanding liabilities transmit accumulated tax increment to other local government agencies is unconstitutional. Moreover, any requirement that county auditor-controllers distribute these former redevelopment agency funds among other taxing agencies using the "waterfall" system in Health and Safety Code section 34188 is also, arguably, unconstitutional. Resolution of these issues should occur before, not after, remittance and distribution of these funds.

c) The "Due Diligence Reviews" Threaten Further Irreparable Harm.

The potential harm of permitting this remittance and distribution system to proceed pending resolution of Plaintiffs' constitutional challenge to ABx1 26 is significant. Even for successor agencies where no dispute exists regarding the nature or extent of their ongoing "obligations," recovery or reallocation of tax increment funds disbursed to other taxing agencies will be difficult or impossible in the future. More importantly, however, significant disputes exist in many jurisdictions as to what

"obligations" a successor agency has assumed from the former redevelopment agency and as to how the successor agency, its oversight board, and the Department of Finance should determine whether funds are necessary to fulfill an "obligation" or are, by contrast, "available for allocation to affected taxing entities."

In making its determinations regarding "unobligated" balances from former redevelopment agencies' LMIHFs, for example, the Department of Finance has in many cases rejected the determinations of both the successor agency's auditor and the oversight board that housing funds were "obligated," and ordered remittance of those funds to county auditor-controllers. (*See*, *e.g.*, Letter, December 26, 2012 [League Request for Judicial Notice ("RJN"), Exh. A] ["adjusting" remittance order for Santa Ana Successor Agency from $0 to $54.2 million].) These determinations threaten successor agencies' ability to carry out former redevelopment agencies' contractual commitments—and statutory obligations—to create affordable housing. (*See*, *e.g.*, Petition for Writ of Mandate [League RJN, Exh. B] [alleging that $1.2 million demanded as LMIHF remittance from Duarte Successor Agency is necessary to fulfill contractual obligation to affordable housing developer].) They also threaten to impair contract rights held by private parties who expect successor agencies to perform former redevelopment agencies' contracts, and who had no opportunity to participate in the Department's decision-making regarding whether or not

to permit successor agencies to retain funds with which to do so. (*See*, *e.g.*, Complaint for Declaratory and Injunctive Relief [League RJN, Exh. C] [alleging that demand for LMIHF remittance from Orange Successor Agency unconstitutionally impairs nonprofit developer's contractual rights]; *see also* Health & Saf. Code § 34176(e) [authorizing "[t]he successor agency and the entity or entities that created the former redevelopment agency," but not their private contract partners, to "request to meet and confer" with DOF].)

As a result, the LMIHF "due diligence reviews" expose not only successor agencies but the State itself to suits for damages from these private parties. Similar disputes undoubtedly will occur with respect to the second phase of review, involving funds derived from sources other than the low- and moderate-income housing fund. Because the low- and moderate-income housing fund typically represented only 20% of redevelopment agency funding, however (*see* Health & Saf. Code § 33334.2), disputes regarding the "other funds" review are likely to be far more numerous and more complex.

Resolution of these disputes will be costly in both administrative and judicial terms, yet will be unnecessary if ABx1 26 proves unconstitutional. Interim relief suspending implementation of ABx1 26 would prevent further waste of administrative and judicial resources on this complex process. Interim relief also may prevent damages to private parties that are

better prevented than compensated, such as lost investments and opportunities. For these reasons, the League asks this Court to address Plaintiffs' appeal, and to decide that Plaintiffs' likelihood of success on the merits justifies an order granting interim relief.

2. The State Has Refused Property Tax Funding for Obligations That Existed When Redevelopment Agencies Dissolved.

To pay the cost of fulfilling or performing obligations that successor agencies assumed from former redevelopment agencies, the Dissolution Act sets forth a prioritized list of funding sources: (1) the former redevelopment agency's LMIHF; (2) bond proceeds; (3) reserve balances derived from sources other than LMIHF or bonds; (4) the successor agency's "administrative cost allowance" (*see* Health & Saf. Code § 34171(b)); and (5) the successor agency's "Redevelopment Property Tax Trust Fund," or "RPTTF," which consists of property tax revenue collected after February 1, 2012 (*see id.* § 34170.5(b)). (*Id.* § 34177(*l*)(1).) To draw on the RPTTF, the Dissolution Act requires a successor agency to obtain approval both from its local oversight board and from the Department of Finance. (*Id.* §§ 34177(*l*), (m), 34183(a)(2).) Like the process for determining successor agencies' "unobligated balances," this system for distributing property tax to successor agencies has created disputes that have the potential to cause significant harm if the judiciary ultimately invalidates the Dissolution Act.

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a) The State Has Refused Property Tax Funding for Bond Obligations and for In-Progress Public Works.

For example, in several instances the Department of Finance has refused to permit successor agencies to receive funds from the RPTTF with which to pay debt service on bonds or equivalent debt instruments. (*See*, *e.g.*, Complaint for Declaratory Relief and Injunction [League RJN, Exh. D] [challenging refusal to allocate RPTTF to Pasadena Successor Agency for payment of bond debt service].) The Department of Finance also has refused to permit successor agencies to receive funds from the RPTTF with which to carry out redevelopment agencies' pre-dissolution commitments to contribute funding to complex, multi-jurisdictional public works projects. (*See*, *e.g.*, Petition for Writ of Mandate [League RJN, Exh. E] [challenging refusal to allocate RPTTF to Petaluma Successor Agency for improvements along State Highway 101].) These decisions threaten bond defaults; and in the case of some public works projects that were well under way before redevelopment agencies dissolved, they threaten as well to strand infrastructure investments made by the State of California itself.

b) The State Has Refused Funding for Affordable Housing.

Likewise, the Community Redevelopment Law required redevelopment agencies to undertake a variety of activities "for the purposes of increasing, improving, and preserving the community's supply of low- and moderate-income housing available at affordable housing cost." (Health & Saf. Code § 33334.2; *see also id.* §§ 33334.3, 33334.4, 33334.6, 33413.) Redevelopment agencies had authority to use their funds to subsidize construction of affordable housing, for example (*id.* § 33334.2(e)), and many agencies had made commitments to subsidize such construction that they had not yet fulfilled when they dissolved in accordance with ABx1 26. (*See*, *e.g.*, Verified Petition for Writ of Mandate [League RJN, Exh. F] [challenging refusal to allocate RPTTF to Oxnard Successor Agency to fulfill loan commitment to affordable housing developer].) Redevelopment agencies also had the obligation to ensure, through monitoring, that housing they had subsidized remained affordable for up to 55 years (Health & Saf. Code § 33334.3(f)); in many cases, this required affordability term is likely to continue far beyond the time necessary for the redevelopment successor agency to wind up the former redevelopment agency's other business.

In both contexts, however, the Department of Finance has determined that redevelopment successor agencies should not receive

funding from RPTTF for such housing-related obligations. (*See*, *e.g.*, Petition for Writ of Mandate [League RJN, Exh. G] [challenging refusal to allocate RPTTF to fulfill loan commitments to affordable housing developers and for cost of monitoring compliance with affordable housing regulatory agreements].) The Department's instructions to successor agencies for preparing RPTTF funding requests for the period between July 1 and December 31, 2013, state flatly, for example, that the public agency that has succeeded to the former redevelopment agency's housing-related obligations in accordance with Health and Safety Code section 34176 "is responsible for its own operations and administrative costs"; the instructions state further that the Department considers those costs, while possibly eligible for funding from reserved bond proceeds if such funds exist, ineligible for funding from the RPTTF. (*See* ROPS 13-14A Instructions [League RJN, Exh. H].) In addition, for the period between January 1 and June 30, 2013, the Department of Finance denied funding to numerous redevelopment successor agencies with which to pay for completion of housing projects commenced by former redevelopment agencies or for ongoing monitoring and enforcement of affordable housing regulatory agreements that the Community Redevelopment Law required. (*See*, *e.g.*, Letter, December 18, 2012 [League RJN, Exh. I] [refusing to allocate RPTTF to Oakland Successor Agency to cover the $9.5 million cost of continuing housing activities commenced by the former

redevelopment agency].) These decisions, like the decisions on the LMIHF DDR, already have provoked litigation (*see*, *e.g.*, League RJN, Exhs. F, G), and more is sure to come.[1]

c) These Decisions Implementing the Dissolution Act's RPTTF Funding System Threaten Irreparable Injury.

Interim relief could minimize the risk that successor agencies will default on bonds or, by failing to provide necessary and committed funding, cause major regional public works projects or affordable housing developments to stall or fail. At the same time, well-crafted interim relief could preserve the benefits to other taxing agencies of the Dissolution Act's restrictions on redevelopment-related spending, should those restrictions survive this action. To minimize the administrative and judicial cost of resolving disputes that may become moot upon invalidation of the Dissolution Act, the League urges this Court to give the trial court an opportunity to consider interim relief.

B. Unless This Court Reverses the Trial Court's Ruling, the Trial Court Will Not Grant Interim Relief to Prevent These Harms.

These ongoing wind-up steps—and disputes—illustrate that the issue of Plaintiffs' likelihood of success on the merits of their claims is not at all moot. Even though some of the interim relief Plaintiffs originally requested

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[1] As of the date of this brief, the League was aware of more than 55 pending and resolved as-applied challenges to decisions by the Department of Finance implementing the Dissolution Act.

no longer is available, the trial court's erroneous conclusion that Plaintiffs have little likelihood of success on the merits of their case also would cause the trial court to deny any renewed motion for interim relief tailored to the wind-up activities that currently are in process. Only if this Court addresses this issue, reversing the trial court's ruling, will the trial court consider any further request for interim relief tailored to the harms that continue to occur, and that continue to threaten the utility of the relief that trial court ultimately might grant in this action. The League joins Plaintiffs in urging the Court to reverse the trial court's order denying Plaintiffs' motion for a preliminary injunction.

C. With Further Briefing Regarding the Balancing of Potential Harms, the Trial Court May Craft Appropriate Interim Relief.

The precise relief Plaintiffs requested in their motion to the trial court—an injunction preventing the dissolution of redevelopment agencies and their replacement by successor agencies—is no longer possible. Moreover, although Plaintiffs propose to this Court that this Court or the trial court could enter an order restoring redevelopment agencies' existence, such an order might prove impractical. This Court may, however, remand this action to the trial court so that the trial court may consider in the first instance how to craft interim relief that will achieve a just balancing of the parties' respective interests pending resolution of this action.

Such relief likely would permit redevelopment successor agencies to carry out redevelopment agencies' existing obligations, while continuing to limit their power to create new obligations. Effective interim relief likely also would suspend the Department of Finance's authority to demand remittance of "unencumbered balances" from either the LMIHF or from a successor agency's other funds, and suspend as well the Department's authority to impose penalties for failure to comply with demands it already has issued. Finally, effective interim relief likely would require county auditor-controllers to hold, rather than to distribute, funds that would go to one taxing entity under the Dissolution Act as written, but to a different entity if Plaintiffs prevail.

Because the League cannot predict with certainty the circumstances that will exist if and when this Court remands this action to the trial court, the League cannot make definitive recommendations to this Court regarding the appropriate scope and nature of interim relief. Upon remand, however, the League is available to continue its assistance as *amicus* in the trial court, should such assistance prove valuable in weighing the potential harms to affected agencies and to the public of either granting or denying relief. In addition, the League currently is the Petitioner in another suit that is pending in the trial court and that may result in an order temporarily or permanently suspending or enjoining further implementation of the Dissolution Act. (*See* Verified Petition for Writ of Mandate [League RJN,

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Exh. J].) Hearing in that action is set for April 2013, and if necessary the trial court may coordinate further orders in the two cases to achieve appropriate relief.

III. CONCLUSION

The League respectfully requests that this Court reverse the order of the trial court. In addition, to prevent irreparable injury not only to California's cities but also to its other local taxing agencies, its judiciary, and to the State, the League asks this Court to remand this matter to the trial court with directions to consider whether and how to enjoin further implementation of the Dissolution Act until final resolution of this lawsuit.

DATED: February 13, 2013 GOLDFARB & LIPMAN LLP

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CERTIFICATE OF CONFORMITY

In accordance with California Rules of Court, Rule 8.204(c)(1), I certify under penalty of perjury that the Brief of Amicus Curiae League of California Cities in the case of *City of Cerritos et al. v. State of California et al.* does not exceed 14,000 words, including footnotes. According to the word count function on the word processing program I used, this brief contains 3,572 words.

Executed on February 13, 2013, at Oakland, California.

JULIET E. COX

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