



1400 K Street, Suite 400 • Sacramento, California 95814  
Phone: 916.658.8200 Fax: 916.658.8240  
www.cacities.org

## City Attorneys' Department, Post-Redevelopment Working Group

### Subgroup 1: Successor Agency & Oversight Board

#### Questions & Answers

**GENERAL DISCLAIMER:** This document represents an attempt to interpret the requirements of AB x1 26 as modified by the California Supreme Court in *California Redevelopment Association v. Matosantos*. This document does not constitute legal advice. Given the significant ambiguities in AB x1 26, it is important to consult with legal counsel regarding any issues discussed in this document. Statements made in this document reflect the consensus or recommendation of the subgroup that drafted this document in consultation with the members of the entire Working Group. No statement in this document should be attributed to any individual member of the subgroup or the Working Group. Where appropriate, this document discusses the interpretation, recommendations, and advice of other entities, such of the Department of Finance and the county auditor-controllers. These discussions do not necessarily represent an endorsement or agreement with the interpretation, recommendation, or advice, but are being provided solely as further information. This document represents an analysis as of the date set forth in the footer below. This document will be updated as needed to reflect legislative changes, and new information received by the Working Group. If you have questions or comments regarding this document, please direct them to Patrick Whitnell, General Counsel for the League of California Cities, at [pwhitnell@cacities.org](mailto:pwhitnell@cacities.org).

#### Q&A Number 1:

Q: What is a successor agency?

A: A successor agency is an entity that is designated by AB x1 26 to serve as the successor to the dissolved redevelopment agency.<sup>1</sup> In that capacity, the successor agency has all authority, rights, powers, duties and obligations previously vested with the former redevelopment agencies that were not repealed by ABX1 26.<sup>2</sup> The successor agency is charged, generally, with carrying out the enforceable obligations of the former redevelopment agency, repaying outstanding debts of the former redevelopment agency, and disposing of the former redevelopment agency's non-housing property and assets. The city, county, or city and county that authorized the creation of the redevelopment

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<sup>1</sup>Health & Safety Code §34173(a). Unless otherwise specified, all statutory references in this Q&A are to the Health & Safety Code.

<sup>2</sup> §34173(b).

agency is the successor agency, unless that entity affirmatively decided by resolution not to serve as the successor agency.<sup>3</sup> If the creating entity chose not to act as the successor agency, any other city, county or special district within the same county had the option to elect to become the successor agency by submitting a resolution to the county auditor controller. The first agency to submit such a resolution became the successor agency. In those jurisdictions where no local agency elected to serve as a successor agency, a “designated local authority” was formed by operation of law to serve as the successor agency, and the Governor appointed three residents of the county where the redevelopment agency was located to serve as the governing board of the designated local authority.

## **Q&A Number 2:**

**Q:** What is an oversight board?

**A:** Each successor agency has an oversight board. The oversight board is a seven member board established by AB x1 26 to oversee the successor agency in its efforts to wind down the former redevelopment agency’s operations. Certain successor agency actions are subject to oversight board approval, including the Recognized Obligation Payment Schedule (“ROPS”).<sup>4</sup> The oversight board is also required to direct the successor agency to carry out specific tasks, including the disposal of former redevelopment agency assets and properties, the transfer of affordable housing responsibilities to the entity that assumes those responsibilities, and the termination or renegotiation of outstanding agreements, if that would be in the best interests of the taxing entities. Oversight boards have a fiduciary responsibility to holders of enforceable obligations and the taxing entities that benefit from the distribution of property tax and other revenues.<sup>5</sup>

Oversight board members are appointed by governmental entities located in the city, county or city and county that created the former redevelopment agency, including, the county board of supervisors, the mayor of the city, the largest special district (determined by property tax share), the county superintendent of education or county board of education, and the Chancellor of California Community Colleges. The oversight board also includes one member of the public appointed by the county board of supervisors and one member representing the employees of the former redevelopment agency appointed by the mayor from the recognized employee organization representing the largest number of former redevelopment agency employees employed by the successor agency at that time.<sup>6</sup> The Governor may appoint an oversight board member to fill any oversight board member position that has not been filled or any oversight board member position that remains vacant for more than 60 days. (Health and Safety Code § 34179(b).) Each oversight board member shall serve at the pleasure of the entity that appointed such member.<sup>7</sup>

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<sup>3</sup> §34171(j); 34173.

<sup>4</sup> A complete list of actions subject to oversight board approval is found at §34180.

<sup>5</sup> §34179(i).

<sup>6</sup> §34179(a).

<sup>7</sup> §34179(g).

The Department of Finance (DOF) may review any oversight board action. Oversight board actions are not effective for three business days, pending a request for review by DOF.<sup>8</sup>

### Q&A Number 3:

Q: Who does the oversight board represent?

A: Although the members of the oversight board are appointed by the various interested parties as discussed above and serve at the pleasure of their appointing authority, the oversight board has a fiduciary responsibility to holders of enforceable obligations and the taxing entities that benefit from the distribution of property tax and other revenues.<sup>9</sup>

### Q&A Number 4

Q: Is a successor agency a separate and independent legal entity?

A: There is some difference of opinion among attorneys on whether or not, assuming that the city or county that created the redevelopment agency assumes the role of successor agency, the successor agency is a separate legal entity from the city or county. ABx1 26 defines “successor agency” to mean “the county, city, or city and county that authorized the creation of each redevelopment agency or another entity as provided in Section 34173.” ABx1 26 does not specifically declare that the successor agency is an independent public entity, or a “public body, corporate and politic,” as was the case for redevelopment agencies.<sup>10</sup> Given that the definition of “successor agency” means the city or county that authorized the redevelopment agency’s creation, many redevelopment and city attorneys have advised that the successor agency is not a separate legal entity, but that the city or county has been designated as the successor agency, and then carries out the responsibilities under ABx1 26 in that capacity.

On the other hand, many attorneys note that other provisions of ABx1 26 do imply that the successor agency is a separate entity. For example, the law declares that the successor agency is a public agency for purposes of the Meyers-Milias-Brown Act, and the successor agency shall become the employer of the employees of the former redevelopment agency.<sup>11</sup> Further, the successor agency is permitted to enter into agreements with the city or county that created the redevelopment agency, which would suggest that the successor agency is a legal entity separate and apart from city or county.<sup>12</sup> As a result of these conflicting provisions, there is not a definitive answer to this question.<sup>13</sup>

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<sup>8</sup> §34179(h).

<sup>9</sup> §34179(i).

<sup>10</sup> See §33100.

<sup>11</sup> §34190(c), (e).

<sup>12</sup> §34178(a).

<sup>13</sup> AB 1585 (Perez), pending in the Senate, proposes to clarify that the successor agency is a separate legal and political entity from the city or county.

### Q&A Number 5:

Q: Which special district is entitled to appoint a member to the Oversight Board?

A: Section 34179(a)(3) states that one member of the oversight board is appointed by “the largest special district, by property tax share, with territory in the territorial jurisdiction of the former redevelopment agency, which is of the type of special district that is eligible to receive property tax revenues pursuant to Section 34188.” ABx1 26 does not specifically define “special district,” but since the special district is selected based on “property tax share,” many cities have assumed that the special districts are as defined in Revenue & Taxation Code §95(m), which defines “special districts” for purposes of determining property tax allocations.<sup>14</sup> ABx1 26 does not clearly explain how to determine which special district has the largest property tax share. This could be interpreted as the special district that receives the most property tax generally, whether or not that property tax comes from within the jurisdiction of the redevelopment agency. It could also be interpreted to mean the special district with the largest share of property tax within the city where the redevelopment agency is located. However, it appears that in most counties the special district selected has been the one that has received the largest property tax share *from within existing redevelopment project areas*. This approach makes logical sense, in that it allows the special district that receives the most property tax from the project area to represent the interests of special districts on the oversight board.<sup>15</sup>

### Q&A Number 6:

Q: Who may serve as the employee representative to the oversight board if there are (a) no redevelopment agency employees and/or (b) no bargaining unit representing redevelopment agency or city employees?

A: Section 34179(a)(7) requires that one member of the oversight board be appointed by the mayor or chair of the board of supervisors “from the recognized employee organization representing the largest number of former redevelopment agency employees employed by the successor agency at that time” to represent the employees of the former redevelopment agency. Most redevelopment agencies throughout the state did not have

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<sup>14</sup> The definition of special districts in Rev. & Tax. Code §95(m) includes a county services area, a maintenance district or area, an improvement district or improvement zone, or any other zone or area formed for the purpose of designating an area within which a property tax will be levied to pay for a service or improvement benefiting that area, and explicitly *excludes* cities, counties, school districts, or community college districts.

<sup>15</sup> Although the statutory language is not entirely clear, the determination of the largest property tax share for special districts should likely be calculated based on property taxes allocated prior to any allocations to the Educational Revenue Augmentation Fund (ERAF). Section 34179(a)(3) specifies that the special district representative must come from a district that is eligible to receive property tax revenues pursuant to Section 34188. Section 34188, in turn, declares that “[p]roperty tax shares of local agencies shall be determined based on property tax allocation laws in effect on the date of distribution, without the revenue exchange amounts allocated pursuant to Section 97.68 and the property taxes allocated pursuant to Section 97.70 of the Revenue and Taxation Code [the sections that provide for ERAF allocations].” If the percentage division of property taxes is calculated without regard to ERAF, then it makes sense to also determine the special district representative based on the same methodology. The relative shares of property taxes can, in some instances, be different before and after allocation to ERAF, so the special district representative may be different based on the manner of calculation.

their own employees. City employees would, in most cases, spend a portion of their time administering the redevelopment program, and the redevelopment agency would pay the City for the proportionate costs of those employees, based on the amount of time spent by the employees on redevelopment activities. In addition, in some cities the employees that worked on redevelopment matters were not part of a recognized employee organization.

In either of those cases, it will be impossible for the mayor to make an appointment in compliance with the letter of the law. Nonetheless, Section 34179(a) clearly intends to include a member on the oversight board to represent the interests of the employees that worked for the redevelopment agency. In those cases where literal compliance with the appointment requirements will be impossible, the mayor should be given some latitude to make an appointment that is consistent with the intent of the law, and his or her appointment should be given some deference. However, the mayor should make an effort to comply with the appointment requirements as closely as possible. For example, if the redevelopment program had been implemented by city employees, and those city employees were part of an employee organization, the appointment should be made from the employees that are members of that employee organization. If the employees that worked on redevelopment matters were not represented by an employee organization, the appointment should be made from those employees that worked on redevelopment matters. Ultimately, however, the mayor is responsible for this appointment and the oversight board should respect his or her decision on how best to fill this position in a manner consistent with the intent of the law.

**Q&A Number 7:**

**Q:** Are there any noticing requirements for oversight board meetings?

**A:** The oversight board is a public entity subject to the Brown Act, and therefore must post its meeting agendas not less than 72 hours in advance of the meeting.<sup>16</sup> Furthermore, all notices required for any oversight board actions must be posted on the website of the successor agency or the oversight board.<sup>17</sup> The successor agency must also post a copy of the approved ROPS on its website.<sup>18</sup>

**Q&A Number 8:**

**Q:** Are oversight board members required to take an oath of office, and if so who shall administer the oath?

**A:** Unless otherwise provided, all public officers filling any offices created by laws for the of each county, city, city and county, district and authority (including departments, divisions, bureaus, boards, commissions, agencies, or instrumentalities) must take the oath of office set forth in Section 3 Article XX of the California Constitution.<sup>19</sup> The oversight board members are “officers” within the definition set forth in state law and

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<sup>16</sup> §34179(e).

<sup>17</sup> §34179(f).

<sup>18</sup> §34177(l)(2)(C).

<sup>19</sup> Cal. Const. art. XX, §3; Gov’t Code §§1001, 1360.

should take the oath of office. As a practical matter, any local government officer can administer the oath.<sup>20</sup> For example, a member of the City Clerk's office who attends the oversight board meeting, may administer the oath. However, if the clerk or one of his or her deputies is unavailable then any person authorized under State law may administer the oath to the oversight board members.

**Q&A Number 9:**

Q: Are the oversight board members and/or successor agency members required to receive AB 1234 training?

A: Oversight board members are not required to attend AB 1234 ethics training based on their membership on the oversight board. AB 1234 requires that any local agency official who receives any type of compensation or reimbursement for performance of official duties must take required ethics training.<sup>21</sup> However, AB x1 26 explicitly states that oversight board members are not entitled to any compensation or reimbursement for their service on the oversight board. (§34179(c).)

**Q&A Number 10:**

Q: Are there any potential Government Code section 1090 conflict issues for oversight board members to consider?

A: The Post-Redevelopment Working Group, in consultation with the City Attorneys' Department's FPPC Committee are reviewing this issues. This question will be the subject of a future Question & Answer.

**Q&A Number 11:**

Q: Who may provide legal representation to the oversight board?

A: There is no specific requirement that the oversight board have its own legal counsel. Most city attorneys are, as part of their services to the city, serving as counsel to the successor agency. In this role they are advising cities in the preparation of their ROPS, how to proceed in implementing existing enforceable obligations, and related issues. As discussed above, the oversight board has approval authority over a variety of successor agency actions, including the ROPS and disposal of former redevelopment agency property. The oversight board may in some cases want to take actions that will possibly benefit the taxing entities, but are directly contrary to the successor agency's interests. If the city attorney chooses to advise both successor agency and oversight board, he or she will be caught in the middle of this conflict. California Rule of Professional Conduct 3-0310 prohibits simultaneous representation of adverse interest in the same matter. This conflict cannot be waived by the clients, even with informed written consent.

This potential conflict situation has been handled in different ways. Many city attorneys

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<sup>20</sup> Gov't Code § 1362.

<sup>21</sup> Government Code §§53234(c), 53235(a).

have made clear to the oversight board that they only represent the successor agency, and not the oversight board. Other city attorney's have informed the oversight boards that as legal counsel to the successor agency, they will provide services to the oversight board to the extent that a conflict does not arise. In the event of an actual conflict, or if the oversight board otherwise requests separate legal counsel regarding a particular issue, separate legal counsel will be retained. Additionally, the various oversight board members have the option of seeking advice from the legal counsel of the body that appointed each of them, to assist in making decisions related to their responsibilities as oversight board members.

The law is silent as to whether the costs of separate legal counsel for the oversight board should be considered an administrative cost of the successor agency, an enforceable obligation listed on the ROPS, or some other cost payable from some other source. Some jurisdictions have taken the position that if the oversight board chooses to obtain its own legal counsel it should list that expense as a separate line item on the ROPS and pay the separate counsel out of the property taxes received by the successor agency. Others have chosen to include the costs of oversight board legal counsel as part of the successor agency's administrative budget, or may plan to do so in the event that separate legal counsel is needed.<sup>22</sup> ABx1 26 does not provide a clear answer to this question, and a variety of approaches may be appropriate, based on the size of jurisdiction, complexity of the wind down process, and other issues.

#### **Q&A Number 12:**

**Q:** What are the roles of the oversight board and successor agency in implementing existing redevelopment agreements?

**A:** The successor agency is the successor in interest to the redevelopment agency and assumes responsibility for administering all contracts leases and other assets of the redevelopment agency.<sup>23</sup> In this role, the successor agency is required to continue making payments due for enforceable obligations, and perform obligations required pursuant to enforceable obligations.<sup>24</sup> The successor agency also oversees development of properties pursuant to enforceable obligations until contracted work has been completed or those contractual obligations can be transferred to other parties.<sup>25</sup>

ABx1 26 declares that the oversight board, in turn, has the authority to direct the successor agency to cease performance in connection with and to terminate all existing agreements that do not qualify as enforceable obligations; terminate agreements with any other public entity in the county if the oversight board thinks it will be in the best interest of the taxing entities; and terminate or renegotiate contracts with third parties if that

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<sup>22</sup> § 34179(c) but see, also, § 34177(j)(1) which seems to limit the administrative budget to "successor agency administrative costs." Note that the allowance amount "shall exclude any administrative costs that can be paid from bond proceeds or from sources other than property tax."

<sup>23</sup> §34175(b).

<sup>24</sup> §34177(a), (c).

<sup>25</sup> §34177(i).

would be in the best interest of the taxing entities.<sup>26</sup>

The successor agency staff may continue to implement existing agreements of the former redevelopment agency that are not yet completed without going back to the oversight board for approval of those existing contracts. If an existing agreement needs to be amended in a manner that requires any additional financial commitment from property taxes or successor agency assets, oversight board approval will be required. The law does not specifically address whether other non-financial amendments of existing contracts must be approved by the oversight board, but given the oversight's board's overarching role in the dissolution process, it will often be advisable to obtain its approval. The decision on whether non-financial amendments should go to the oversight board should be made on a case by case basis. Further, the oversight board may make a request to review existing agreements and direct the successor agency to attempt to negotiate or terminate them. Successor agency staff should work with the oversight board to analyze and fully consider the ramifications of such demands. Lastly, if there are existing agreements for the conveyance of property (such as a disposition and development agreement), as a practical matter the successor agency may need to request that the oversight board affirm that the disposal of property pursuant to such agreement is consistent with the property disposal requirements of Section 34181(a). Many title insurance companies are presently uncomfortable issuing policies unless the oversight board affirms the transaction. Therefore oversight board approval may be a necessary step to alleviate any title concerns.

### **Q&A Number 13:**

**Q:** To what extent is the liability of the Successor Agency and/or the Oversight Board limited by AB x1 26?

**A:** AB x1 26 declares that the successor agency's liability is limited to the extent of the property tax revenues that it receives through the ROPS process and the value of assets transferred to the successor agency by the former redevelopment agency. (§34173(e).) Further, the oversight board members themselves have personal immunity from suit for actions taken within the scope of their responsibility as board members. (§34179(d).) Notwithstanding the protections set forth in the bill, some cities have expressed concerns that the limitations on liability of the successor agency could be preempted by federal law. For example, if the successor agency is liable for the clean up of contaminated property under CERCLA, it is unclear whether the limitations on AB x1 26 will protect the successor agency from such liability. Further, while the oversight board members have personal immunity for the actions in furtherance of their responsibilities as oversight board members, the oversight board as an entity has a fiduciary duty to the taxing entities and holder of enforceable obligations, and the individual members are also subject to conflict of interest laws, including the Political Reform Act and Government Code section 1090.

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<sup>26</sup> §34181(c)-(e).

## **Conflict of Interest Related Questions: Request to FPPC for Advice**

In addition to the questions listed above, there are numerous questions that have been asked with respect to ABx1 26 and compliance with the Political Reform Act. Rather than speculate as to the proper application of the Political Reform Act to the ABx1 26 framework, the League of California Cities submitted a request for advice to the Fair Political Practices Commission on April 11, 2012. The FPPC issued its response on April 25, 2012, and it can be found at [www.cacities.org/redevelopment](http://www.cacities.org/redevelopment). The FPPC letter responds to the following questions:

### Conflict of Interest Code

1. Who adopts the conflict of interest codes for the successor agency and the oversight board?
2. Who are the code reviewing bodies for the successor agency and the oversight board?
3. Should the cities and counties that adopted separate conflict of interest codes for their redevelopment agencies repeal those codes?

### Statement of Economic Interests (Form 700)

1. Do 87200 filers appointed to the oversight board have to file an assuming office statement? If not, will they be required to file an amendment to their Form 700 to include the board position?
2. Do designated employees employed by the successor agency or appointed to the oversight board have to file an assuming office statement? If not, will they be required to file an amendment to include their employment or their Board position? What is the timing of any required filing or amendment?
3. Who is the filing officer? If only an amendment is required, is the filing officer the agency in which the board member filed the original statement? Who is the filing officer for statements filed by the governing board of a designated local authority?
4. Do members of the public appointed to a designated local authority or an oversight board have an obligation to file a Form 700? If so, who is deemed the filing officer?
5. What is the assuming office date for oversight board members?

### Jurisdiction

1. What is the jurisdiction of the oversight board?

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