

MEMORANDUM

Milpitas Economic Development Corporation

To: Board of Directors – Milpitas Economic Development Corporation
From: Michael J. Ogaz, General Counsel
Subject: **Authorize the EDC President to execute a Stand Still Agreement with the Milpitas Oversight Board**
Date: February 19, 2013

Background: The wind down of the former Redevelopment Agency is supervised by the Oversight Board for the City of Milpitas according to State law. Distribution of former RDA assets is a component of the Oversight Board duties. The State of California has claimed that assets of the Economic Development Corporation should be transferred by the EDC so that they can be distributed to the County and other taxing entities. The EDC and City of Milpitas disagree with that view, claiming that the EDC, as a separate non-profit public benefit corporation, is fully entitled to retain its assets because they were legally acquired at the time of transfer in 2011.

In light of the opposing viewpoints, it was suggested by Counsel of the Oversight Board that the City, the EDC and the City as Successor Agency to the former Redevelopment Agency enter into an agreement with the Oversight Board to suspend new EDC expenditures until a decision is made by the courts or other decision maker as to whether the EDC is entitled to keep the assets it now possesses. Alternatively, the Oversight Board has threatened to seek an injunction prohibiting the EDC from depleting its assets.

Staff recommends approval of the Stand Still Agreement as a compromise avoiding the expense of litigation. Many court decisions, including one that will result from a lawsuit filed by Morgan Hill regarding the validity of its EDC, will provide judicial determinations on the validity of ABX1-26 and AB 1484. Those laws include questionable provisions which make transfers to the EDC that were legal at the time they were made, retroactively illegal.

Fiscal Impact: None.

Recommendation: It is recommended that the EDC Board authorize the EDC President to execute a Stand Still Agreement on behalf of the EDC. A copy of the proposed Stand Still Agreement is attached.

**AGREEMENT BETWEEN THE CITY OF MILPITAS,
THE SUCCESSOR AGENCY TO THE CITY OF MILPITAS
AND THE MILPITAS ECONOMIC DEVELOPMENT CORPORATION
REGARDING PRESERVATION OF ASSETS PER OVERSIGHT BOARD REQUEST**

This Agreement is entered into this ___ day of ___, 2013, by and between the Milpitas Economic Development Corporation, a non-profit public benefit corporation (the “MEDC”), the City of Milpitas (the “City”), and the Successor Agency to the Milpitas Redevelopment Agency (the “Successor Agency”) at the request of its Oversight Board.

Recitals

A. The California Legislature in 2011 enacted ABx1 26 and in 2012 enacted AB 1484 (collectively AB x1 26 and AB 1484 are referred to herein as the “Dissolution Act”) which required the dissolution of all redevelopment agencies as of February 1, 2012, and set forth certain procedures governing the dissolution process.

B. The Dissolution Act required the establishment of successor agencies to the former redevelopment agencies, as well as the establishment of oversight boards to oversee and monitor certain actions of the successor agencies. Pursuant to the Dissolution Act, the City of Milpitas is the designated successor agency (“Successor Agency”) to the former Milpitas Redevelopment Agency (the “Agency”). The Successor Agency is a separate legal entity from the City.

C. The MEDC was created on March 7, 2011, by the City pursuant to the California Nonprofit Public Benefit Corporation Law.

D. The State Controller’s Asset Transfer Review found that the Agency transferred to the MEDC approximately Fifty Million, One hundred Sixty-one Thousand, Seven Hundred Sixty-three Dollars (\$50,161,763) in assets (“Working Capital”), as identified in Exhibit A, and incorporated herein by reference.

E. The State Controller’s Asset Transfer Review found that the Agency also transferred, by resolution, certain capital assets and properties held for resale (“Real Property”) to the City, valued at approximately Ninety-six, Nine Hundred Forty-six Thousand, Eight Hundred Thirty-seven Dollars (\$96,946,837), as identified in Exhibit A, and incorporated herein by reference.

F. The Successor Agency has been notified by the State Controller that it believes the asset transfers made by the Agency to MEDC and to the City were invalid and that the assets should be returned to the Successor Agency. Neither the MEDC, nor the City, have complied with the State Controller’s order to return these assets. The MEDC contends that it is a separate legal entity formed in accordance with state law, and that the transfer of assets to it was completed in accordance with law and that the notice sent by the State Controller is incorrect as a matter of law.

G. Pursuant to the Dissolution Act, the Oversight Board to Milpitas Successor Agency (the “Oversight Board”) has certain monitoring and oversight functions over the activities of the

Successor Agency. In response to the State Controller's Asset Transfer review, and in order to protect the fiduciary interests of the affected taxing entities and the holders of enforceable obligations, the Oversight Board requested the Successor Agency enter into this Agreement to preserve assets transferred by the Agency to MEDC and the City, in accordance with the terms and conditions set forth herein.

H. The Successor Agency, the MEDC, the City, and the Oversight Board desire to enter into this Agreement as an expression of their intent to work together cooperatively and in good faith.

Agreements

Section 1. Incorporation of Recitals. All of the recitals above are true and correct and are hereby incorporated into this Agreement.

Section 2. MEDC Obligations. By signing this Agreement, the MEDC attests that it has disclosed and provided copies of all existing MEDC contracts, including all contracts for services, as listed in Exhibit B. The MEDC will work cooperatively with the Oversight Board to provide the documents sought through its Public Records Act request.

Section 3. Tolling Provision. Any statute of limitations applicable to the transfer or expenditure of assets held by the MEDC shall be tolled and extended through the term of this Agreement to allow the Oversight Board, or the taxing entities it represents, to pursue all potential remedies upon the termination of this Agreement.

Section 4. Preservation of Assets.

(a) MEDC agrees that it shall: (i) not transfer, encumber, sell or convey any of the Real Property conveyed to it by the Agency or purchased with Working Capital, including personal property, fixtures and appurtenances; (ii) not transfer any Working Capital or interest on Working Capital to the City or any other party except as authorized under subsection (v) below; (iii) refrain from incurring any new financial obligations, including but not limited to new contracts or amendments to existing contracts for the transfer, encumbrance, or conveyance of Real Property, or contracts for services, including administrative services by City staff or other staff; (iv) refrain from exercising any option under any contract for the purchase of property; (v) satisfy only its outstanding obligations on contracts listed in Exhibit B, including the "Assignment and Assumption of Purchase and Sale Agreement" between the MEDC and the Agency, dated March 7, 2011, for the Mission West Properties ("Mission West Agreement").

(b) The City agrees that it shall: (i) not transfer, encumber, sell or convey any of the Real Property or Working Capital conveyed to it by the Agency, as listed on Exhibit A, including personal property, fixtures, and appurtenances; (ii) reimburse the Successor Agency, from its general fund, for any MEDC payments on the contracts listed in Exhibit B if a final, unappealed administrative or judicial determination holds that the transfer of assets to MEDC and/or the City was invalid or the obligation should not have been paid from MEDC funds, except for the "Assignment and Assumption of Purchase and Sale Agreement" between the MEDC and the Agency, dated March 7, 2011, for the Mission West Properties ("Mission West Agreement"). This provision shall survive the termination of this Agreement.

(c) In consideration of the commitments made by the City and MEDC, the Oversight Board shall not, during the term of this Agreement, intervene, delay, direct the Successor Agency to bring, or otherwise participate in, a court action seeking an injunction against further spending by the MEDC.

~~(d) The Successor Agency shall set aside \$130,000 for the payment of legal and administrative expenses, and shall prioritize such payments, consistent with the resolutions previously adopted by the Oversight Board. The Successor Agency shall pay these expenses under protest, and if there is a change in the Department of Finance's position or a contrary judicial or administrative determination, this item will be revisited to allow for the reimbursement of the Successor Agency.~~

Section 5. Activity and Expenditure Reports. MEDC and the City agree to provide to the Oversight Board monthly written "Activity and Expenditure Reports" reflecting all of MEDC's and the City's activities and expenditures related to the transferred assets since the closing date of the previous report.

Section 6. Termination. The Parties agree that this agreement may be terminated by any Party upon 30 days written notice to the following persons:

NOTICE TO CITY OR SUCCESSOR AGENCY:

Tom Williams, City Manager, City of Milpitas
Executive Director, Successor Agency to the City of Milpitas RDA
455 E. Calaveras Blvd.
Milpitas, CA 95035

NOTICE TO THE OVERSIGHT BOARD:

Milpitas Oversight Board Clerk, c/o County of Santa Clara
Office of the County Executive
Attn: Administrative Services Manager
70 West Hedding Street, 11th Floor
San Jose, CA 95110

NOTICE TO Milpitas Economic Development Corporation

[name], President
Economic Development Corporation
455 E. Calaveras Blvd.
Milpitas, CA 95035

Section 7. Return of Assets. In the event there is a final, unappealed administrative determination or judgment by a court of competent jurisdiction that determines that the transfer of assets to MEDC and/or the City was invalid, and/or is subject to the "clawback" provisions of the Dissolution Act, the MEDC must return such assets to the Successor Agency in accord with such judgment or determination. This provision shall survive the termination of this Agreement.

Section 8. Term of Agreement. This Agreement shall take effect upon the date upon which the approval of the Agreement by the Oversight Board by resolution is deemed effective, pursuant to the provisions of Health and Safety Code section 34179(h), and shall terminate upon the earlier of either the return of all Real Property and Working Capital by the City and the MEDC to the Successor Agency, or upon such time as there is a final judgment by a court of competent jurisdiction, unless terminated earlier pursuant to Section 6, above.

Section 9. No Admission. Nothing in this Agreement shall be construed as an admission, acknowledgment, or waiver by any party or the Oversight Board in any proceeding. The Oversight Board does not admit that the transfer of assets to the MEDC or the City, or that any City or MEDC expenditure of those assets, including the contracts listed in Exhibit B, are valid, and reserves all rights to contest the foregoing in the future. The City and MEDC reserve all claims to the validity of those contracts. This provision shall survive the termination of this Agreement.

Section 10. Authorization. The parties acknowledge that each, upon approval of its respective governing board and the Department of Finance, is authorized to enter into this Agreement.

Section 11. Consent and Acknowledgment of Oversight Board. The Oversight Board, by Resolution No. _____ (the "Oversight Board Resolution") has reviewed and agrees with the terms of this Agreement, and has approved the execution of the Agreement by the Successor Agency. A true and correct copy of the Oversight Board Resolution is attached hereto as Exhibit C and incorporated herein by reference.

IN WITNESS WHEREOF, the parties have executed this Agreement as of the date first above written.

MILPITAS ECONOMIC DEVELOPMENT CORPORATION

By: _____
Name
Title:

CITY OF MILPITAS

By: _____
Name
Title:

SUCCESSOR AGENCY TO MILPITAS REDEVELOPMENT AGENCY

By: _____

Name:
Title:

As Requested and Approved by:

**OVERSIGHT BOARD OF THE SUCCESSOR AGENCY TO MILPITAS
REDEVELOPMENT AGENCY**

By: _____
Name:

Title: Oversight Board Chairperson

EXHIBIT A

List of EDC Contracts and Acquisition of Land

[Insert Attachment 2 provided by City Attorney 12/11/12]

Exhibit B

List of Transferred Assets

Exhibit C

Oversight Board Resolution