



# CITY OF MILPITAS

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October 11, 2012

To Milpitas Oversight Board:

The City of Milpitas, acting as the Successor Agency ("Successor Agency") to the former Milpitas Redevelopment Agency ("RDA") as well as on its own behalf, and the Milpitas Housing Authority have reviewed the "Due Diligence Review for Low and Moderate Income Housing Funds" (the "LMIHF DDR") prepared by Macias Gini & O'Connell LLP for the Santa Clara County Finance Agency. Although the LMIHF DDR is accurate in many respects, the City and Housing Authority have identified several discrepancies between the LMIHF DDR and the Successor Agency's and Housing Authority's records, and at least two errors of law. These comments are respectfully submitted to the Oversight Board to ensure that its determination under section 34179.6(c) of the Health and Safety Code reflects the facts regarding RDA, Successor Agency, and Housing Authority transactions and complies with all applicable laws.

The response provided herein does not waive the right of the Successor Agency, the Housing Authority, and the City later to provide additional information or statements as part of the review process. The Successor Agency, the Housing Authority, and the City retain the right to raise new information or positions or to provide additional documentation, as required.

## GENERAL RESPONSE

1. The City's, the Successor Agency's, and the Housing Authority's review of the LMIHF DDR is ongoing. These responses and objections are made without prejudice to, and are not a waiver of, the City's, the Successor Agency's, and the Housing Authority's right to rely on other facts, documents, responses or information in the LMIHF DDR review process or at a later proceeding.
2. By making the accompanying responses and objections, the City, the Successor Agency, and the Housing Authority do not waive, and hereby expressly reserve, their right to assert any and all objections as to the LMIHF DDR findings and statements in this review, or in any other proceedings, on any and all grounds including, but not limited to, jurisdiction, scope, competency, relevancy, and materiality. Further, the City, the Successor Agency, and the Housing Authority make the responses herein without in any way implying that they consider all of the LMIHF findings and statements to be legally valid or to be within the scope of the County auditor-controller's or the Oversight Board's statutory authority.
3. The City, the Successor Agency, and the Housing Authority reserve the right to supplement, clarify, revise, or correct any or all of the responses and statements herein, and to assert additional information, in one or more subsequent supplemental response(s).

## SPECIFIC RESPONSES

### 1. Finding 2: Deferred Repayments to LMIHF

Before dissolving, the RDA advanced a total of \$8,925,178 from its LMIHF to its Capital Projects Fund. On the theory that the Successor Agency cannot maintain an "intrafund" loan, the LMIHF DDR purports

to direct the Successor Agency to disregard this advance, and to treat this \$8,925,178 as having been repaid. This directive violates the Health and Safety Code.

Specifically, Health and Safety Code section 34171(d)(1)(G) provides specifically that “[a]mounts borrowed from, or payments owing to, the Low and Moderate Income Housing Fund of a redevelopment agency” are “enforceable obligations.” Repayment of these amounts is governed by Health and Safety Code section 34191.4(b), and sums received in repayment will be “housing assets” that the Successor Agency will transmit to the Housing Authority in accordance with Health and Safety Code section 34176(e)(6). For this reason, the Successor Agency intends to maintain its record of this advance, so that it may in the future seek the Oversight Board’s approval of a repayment schedule.

The Successor Agency asks the Oversight Board not to accept this recommendation at this time, and instead to reserve consideration of this issue for a future meeting when the Oversight Board can consider it on advice of counsel.

## **2. Finding 2A: Listing of Housing Assets Transferred to Housing Successor**

The listing of real property “housing assets” provided as Attachment C to the LMIHF DDR is partially inaccurate. The list includes an affordable home at 642 Claridad Loop, valued for accounting purposes at \$374,253. As the list itself notes, however, the Housing Authority sold this property (in accordance with its intended use as owner-occupied affordable housing) in August 2011, for a contract sales price of \$250,000. The Housing Authority’s net proceeds after closing costs were \$241,456, which the Housing Authority transmitted to the RDA and which were among the \$6,582,557 to which the Successor Agency succeeded on February 1, 2012. Accordingly, although the LMIHF DDR is accurate in stating that this asset moved from the RDA to the Housing Authority between January 1, 2011, and January 31, 2012, it is inaccurate in implying that LMIHF assets as of January 31, 2012, included both this home and the cash derived from its sale.

Health and Safety Code section 34179.5(c) requires the LMIHF DDR to identify the “total value” of the LMIHF as of June 30, 2012, including “[a]n itemized statement of the values of any assets that are not cash or cash equivalents.” Attachment C of the LMIHF DDR gives the value of improved and unimproved land derived from the LMIHF as of June 30, 2012, as \$15,773,900. With the correction noted here, the correct value of these assets as of June 30, 2012, is \$15,399,647.

## **3. Finding 5: Unencumbered LMIHF Cash “Available” For Distribution**

The LMIHF DDR notes correctly that the Successor Agency had no LMIHF assets as of June 30, 2012. Despite this note, the LMIHF DDR concludes that the Successor Agency should have had \$6,582,557, and that it should remit this amount with interest to the County Auditor-Controller. This conclusion contradicts the Health and Safety Code, as would any Oversight Board order based on it.

In the first place, as of January 31, 2012, \$2,989 of this \$6,582,557 was required for accrued payroll costs relating to City employees performing housing-related services for the RDA. The State Controller has recognized this encumbrance. (See SCO Asset Transfer Review, at 13.) Having used these funds to pay for this cost, which the RDA incurred before dissolving, the Successor Agency cannot now remit them to the County Auditor-Controller.

In the second place and more generally, the LMIHF DDR does not follow Health and Safety Code section 34179.6 in calculating the “net balances available” for payment to the County Auditor-Controller. Health and Safety Code section 34179.5(c) directs the DDR reviewer to determine the LMIHF balance on June 30, 2012, and to add the “value of any cash or cash equivalents transferred after January 1, 2011, through June 30, 2012, by the redevelopment agency or the successor agency to any other public agency or private party . . . if an enforceable obligation to make that transfer did not exist.” (Health & Safety Code, § 34179.5(c)(3), (c)(6).) “Transferred,” for this purpose “means the transmission of money to another party

that is not in payment for goods or services or an investment.” (Id., § 34179.5(b)(3).) The DDR notes specifically (Finding 2B) that no such transfers of LMIHF-derived funds occurred after February 1, 2012.

The LMIHF DDR states expressly, in its Finding for Procedure 4, that no comprehensive analysis of the Successor Agency’s financial transactions has yet occurred. Instead, the LMIHF DDR relies improperly on the Successor Agency’s Recognized Obligation Payment Schedule (“ROPS”) for the January–June 2012 period to conclude that the Successor Agency should not have spent any of its LMIHF-derived funds. Health and Safety Code section 34179.5, however, makes no reference at all to the ROPS. In particular, although the statute effectively directs calculation of “net available balances” as if payments that were neither made for goods or services nor made to fulfill “enforceable obligations” never occurred, it does not direct that this calculation should disregard payments that were for goods or services or to fulfill “enforceable obligations” simply because those payments occurred from funding sources different from the funding sources identified on a ROPS.

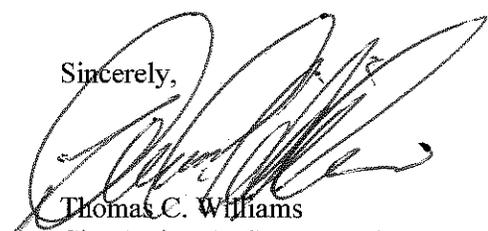
The Successor Agency used the \$6,582,557 it received from the RDA to pay for goods and services. As noted above, the Successor Agency used \$2,989 of these funds to pay for labor services the RDA had received from the City before dissolving. The Successor Agency also used the remaining \$6,579,568 to pay for goods and services identified on the Successor Agency’s January–June 2012 ROPS. Because the LMIHF DDR does not identify or account for these payments, its conclusion that the Successor Agency should have \$6,582,557 “available” to remit to the County Auditor–Controller is in error. The Successor Agency’s “net available balance” of LMIHF-derived funds is in fact \$0.

Finally, no statutory basis exists for the demand (which appears both in the County Controller–Treasurer’s cover letter and in the LMIHF DDR itself) that the Successor Agency include “interest” with any remittance to the County Auditor–Controller. To the contrary, “net available balances” under the statute do not include “interest.” (Health & Saf. Code, 34179.5(c)(6).) The only reference to “interest” in Health and Safety Code sections 34179.5 and 34179.6 is in Health and Safety Code section 34179.6(h)(1)(B), providing for inclusion of interest if the Department of Finance or the County Auditor–Controller succeed in recovering from a private party funds spent or “transferred” in the absence of an enforceable obligation. For this reason, even if the Successor Agency had any “net available balance,” the Health and Safety Code would permit an order for remittance of no more than that sum.

## CONCLUSION

For these reasons, we respectfully request that the Oversight Board decline to make any finding regarding treatment of the \$8,925,178 LMIHF advance at this time. We request further that the Oversight Board determine that the value of non-cash property assets in the LMIHF as of June 30, 2012, was \$15,399,647; that the value of loans receivable was \$29,775,734; and that the “net available balance” was and is \$0.

Sincerely,



Thomas C. Williams

City Acting As Successor Agency and  
Milpitas Housing Authority