

LAW ALERT – REDEVELOPMENT

AB 1389 PASSTHROUGH REPORTS DUE OCTOBER 1ST

AUGUST 26, 2009

M David Kroot

John T. Nagle

Polly V. Marshall

Lynn Hutchins

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Rafael Yaquian

Josh Mukhopadhyay

Health and Safety Code section 33684 was added to the Community Redevelopment Law (the “CRL”) by AB 1389 on September 30, 2008. The statute required redevelopment agencies to submit a reconciliation report of all statutory passthrough payments for fiscal years 2003-04 through 2007-08 to their respective County Auditor’s Office on or before October 1, 2008 (due to the statute’s late enactment, County Auditors accepted the required reconciliation reports until November 1, 2008). **Section 33684, also mandates a similar submission of a similar reconciliation report by redevelopment agencies on or before October 1, 2009 to reconcile statutory passthrough payments due and paid for the 2008-2009 fiscal year.**

On February 1 of each year from 2009 to 2015, AB 1389 requires the State Controller to issue a report listing each agency that has not received its County Auditor’s concurrence on its statutory passthrough reconciliation report, and each agency that has unpaid statutory pass through liability. Agencies on the State Controller's report list are thereafter barred from several key activities, including adopting new redevelopment plans, adding territory to existing plans, incurring new debt, or entering into new contracts.

The AB 1389 reporting process has focused attention on unsettled disputes over the calculations of passthrough payment

requirements, issues attributed to the enactment of AB 1290 in 1993. Among the key disputes revived by AB 1389 are: (1) whether agencies or County Auditors should be calculating and making statutory passthrough payments to taxing entities; (2) whether supplemental property tax revenues received by an agency should be included in the determination of amounts owed for each reporting year under Health and Safety Code Section 33607.7; (3) whether or not ERAF should be considered an “affected tax entity” and therefore be entitled to a statutory passthrough payment; (4) whether an SB 211 amendment that triggers statutory passthrough payments voids a Section 33676 base year inflation election; (5) how to calculate statutory passthrough payments where housing fund deposits are required under sections of the CRL not specifically referenced in Section 33607.5; (6) how the distribution of passthrough payments required under 33607.7 for the second and third tiers of AB 1290 should be calculated; and (7) how a community’s share of statutory-passthrough payments should be treated if the community does not elect to receive its first tier payments, and for the second and third tiers of AB 1290.

Legislative efforts commenced to address some of the preceding issues, in the form of SB 530. That legislation, however, will likely not provide concrete answers to many of the questions that surfaced as a result of AB 1389 reconciliation reporting

requirements. AB 1389 also created a dispute resolution process between agencies and their County Auditors and may also have given the State Controller some authority to resolve disputes between agencies and their County Auditors. Nonetheless, as the State Controller's most recent AB 1389 Report states: "Neither the SCO nor any other state agency has provided instructions on how to resolve disputes." As a result, to date at least 174 disputes remain unresolved from the first round of AB 1389 reports.

Despite these apparent flaws, the potential penalties for noncompliance are severe. For this reason, agencies should be sure to submit AB 1389 reconciliation reports timely. **The AB 1389 reconciliation report for fiscal year 2008-2009 is due no later than October 1, 2009 and any outstanding statutory passthrough payments must be paid prior to February 1, 2010.** We encourage all of our redevelopment clients to start conversations with their county auditors early, in an effort to avoid or work through some of the ambiguities and potential conflicts described above.

The 2008-2009 reconciliation report form and instructions for completing the form will be available in late August or early September and accessible through the Controller's website at:

http://www.sco.ca.gov/ard_local_info_ab_1389.html

Finally, as you may know, the California Redevelopment Association has successfully challenged the \$350 million take of redevelopment tax increment related to AB 1389. The lawsuit does not excuse agencies from complying with the statute's reconciliation reporting requirements, or from making the required statutory passthrough payments prior to February 1, 2010.

For more information, or to discuss how we may be of assistance in working with county auditors to resolve outstanding disputes, please call Karen Tiedemann, Lynn Hutchins, Jack Nagle, Thomas H. Webber, Rafael Yaquian or any other attorney at Goldfarb & Lipman.

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