

QUESTIONS CONCERNING AB 2

[Enacted as Chapter 319, Statutes of 2015, Effective January 1, 2016.
Adding Division 4 (commencing with Section 62000) to Title 6 of the Government Code]

[**Note:** AB 2 is a 40-page bill containing detailed and cross referenced provisions. ***The summary of its provisions and opinions below should not substitute for a detailed reading of the bill, and should not be taken as constituting legal advice or recommendations of any kind.***]

Legislative Intent: To authorize [a city or county, or city and county and/or special district entering into a joint powers agreement] creation of Community Revitalization and Investment Authorities [an “Authority”] to invest property tax increment [from consenting taxing entities other than schools] to relieve conditions of unemployment, reduce high crime rates, repair deteriorated or inadequate infrastructure, promote affordable housing, and improve conditions leading to increased employment opportunities. [brackets added]

1. Can a city or county use the Act?

If the city or county created a former redevelopment agency it is prohibited from forming an Authority unless the successor agency to the former redevelopment agency has (1) received a finding of completion from the Department of Finance, and (2) is not in active litigation against the State, and (3) has complied with all of the State Controller’s office regarding the transfer of former redevelopment assets. School districts and successor agencies are prohibited from establishing or participating in an Authority.

2. What tax increment revenues are available to the Authority under the Act?

The city or county creating the Authority can adopt a resolution authorizing its tax increment, in whole or in part, from the plan area to be allocated to the Authority. Other consenting entities (except schools) can adopt resolutions authorizing the Authority to receive all or part of their respective tax increment subject to conditions and limitations they may impose pursuant to an agreement between all consenting taxing entities.

Not less than twenty-five percent (25%) of all tax increment received by the Authority must be deposited in a low and moderate income housing fund and used for affordable housing purposes in a detailed prescribed manner required by the Act, including proportionately benefitting distinct categories of low and moderate income persons and households.

A taxing entity may modify or rescind its resolution subject to the continuation of its tax increment allocation to pay indebtedness and other obligations incurred by the Authority prior to the effective date of such modification or rescission.

3. Which cities or counties are likely to use AB 2?

It is hard to predict, since some cities have all or substantially all of their territory in former redevelopment project areas, and many cities and counties have distressed areas that were part of former redevelopment project areas. Any tax increment potentially available to the Authority from these areas will be subordinated to property tax allocations to successors to pay off enforceable obligations of the former redevelopment agency, before being available to the Authority.

4. How is an Authority created?

By resolution of a city or county creating an Authority governed by a five-member board, three members consisting of members of the creating legislative body and two public members who live or work within the plan area.

By a city, county, and special district (except schools), in any combination, creating an Authority under a joint powers agreement with a governing board consisting of a majority members from their legislative bodies and two public members who live or work in the plan area.

If the plan area is within a former military base, the governing board of the Authority shall include a member of the base closure commission.

The Authority is a separate public body, and is deemed an “agency” for purposes of the Constitutional provisions authorizing tax increment financing. The Authority has jurisdiction to adopt and implement a plan for a community revitalization and investment area (“plan area”)

Note that both the legislative body members, public members, and staff of the Authority will be subject to strict conflict of interest rules related to holding any interest in property in the plan area.

5. What qualifies a community revitalization and investment area (“plan area”)?

Eighty percent (80%) of the land calculated by census tracts must be characterized by both of the following conditions:

(a) an annual median household income that is less than 80% of the statewide median income; and

(b) three of the following four conditions:

i) nonseasonable unemployment that is at least 3% higher than the statewide median, as defined by a specified labor market report;

ii) crime rates that are 5% higher than the statewide median crime rate, as defined by a specified Department of Justice Report;

iii) deteriorated or inadequate infrastructure such as streets, sidewalks, water supply, sewer treatment or processing, and parks; or

iv) deteriorated commercial or residential structures.

There are no qualifying conditions for the remaining 20% of the land in the plan area. (see Question 10, below).

A plan area may also include, without regard to the above conditions, lands in a former military base which are principally characterized by deteriorated infrastructure or structures.

6.. Are their limits on the size of a plan area?

No, provided 80% of the land calculated by census tracts meets the conditions above.

7. Can a plan area consist of non-contiguous parcels?

No, unlike redevelopment projects and EIFDs..

8. Can two or more plan areas be merged?

No, unlike redevelopment projects.

9. Can a plan area include all or part of a former redevelopment project? Yes, however it may not make economic sense because the allocation of tax increment for a plan area will be subordinated to allocations of property taxes to a successor agency to pay enforceable obligations of the former redevelopment agency (such as for bonds, indebtedness, contractual obligations) for so long as those enforceable obligations are outstanding.

10. What other factors should be considered in drawing boundaries for a plan area?

In addition to the 25% set-aside for affordable housing, the project boundaries should can be established so that 20% of the project area (not subject to the qualifying conditions) has the potential to produce significant tax increment and other benefits, such as a new or expanded business, plant or large facility creating employment opportunities.

One redevelopment lesson was that predominantly residential projects do not produce enough tax increment to pay the costs of the project, including the 20% set-aside for affordable housing, and that tax increment generated by commercial and industrial developments was essential to maximize the tax increment revenues, including the 20% housing set-aside.

11. What are the powers of the Authority? The plan can provide for the Authority to exercise most of the powers of a former redevelopment agency, including broad financing authority and eminent domain, to implement the plan. However, the presence on a 5-member Authority Board two members who work or live in the plan area could make it difficult to obtain the 2/3 vote required to institute eminent domain actions.

[See Exhibit 1]

12. What provisions must the plan contain?

If the plan contemplates tax increment financing, it must contain detailed and time sensitive provisions. [See Exhibit 2]

13. What are the plan adoption procedures?

In addition to CEQA requirements, the Authority must consider the adoption of the plan at three public hearings at least 30 days apart with published notice as specified. After the third public hearing, the Authority shall either:

(a) terminate proceedings if there is a majority protest by over 50% of the combined number of property owners and residents in the plan area who are at least 18 years of age;

(b) call an election within 90 days (which may be by mail in ballot) if protests are filed by between 25 and 50% of the combined number of property owners and residents in the plan area who are at least 18 years of age;

(c) if there is less than a 25% protest under (a) or (b), adopt the plan by ordinance.

If the election results in a majority vote of property owners and residents against the adoption of the plan, the Authority shall take no action to implement the plan and shall not propose a new or revised plan for at least one year following the date of the election.

14. What annual reviews and reports are required?

The plan must be reviewed at least annually and the Authority shall make any amendments necessary or appropriate, subject to following the plan adoption procedures.

There shall be an annual fiscal audit paid from the revenues of the Authority.

An annual report shall be adopted on or before June 30 of each year following a public hearing containing:

(a) a detailed description of projects undertaken, and a comparison of progress expected compared to actual progress,

(b) a chart comparing actual revenues and expenses, including administrative costs, of the Authority to budgeted revenues and expenses,

(c) the amount of tax increment received,

(d) the amount of revenues expended for low-and moderate-income housing,

(e) the status of completion of the Authority's projects.

Every ten years the Authority shall conduct a protest hearing. If there is a majority protest of over 50 percent of the property owners and residents, the Authority shall cease implementing the plan; if there is a protest between the 25 and 50 percent, the Authority shall call an election.

Every five years beginning in the calendar year in which the Authority has been allocated a cumulative total of one million dollars for its low-and moderate income housing program, the Authority shall conduct an audit in accordance with Controller Guidelines. If the audit indicates non-compliance with the plan's affordable housing provisions, the Authority shall submit a plan to achieve compliance as soon as possible but in not less than two years, subject to substantial monetary penalties.

15. Is there any advantage to using AB 2 even without tax increment or a modest level of tax increment?

Potential advantages may include:

- (a) the ability to enter into public/private partnerships to promote development and provide infrastructure and other benefits in the plan area, provided there are alternate sources of funding for low-and moderate income housing;
- (b) non-monetary assistance to developers (such as site clearance, remediation and assembly, using eminent domain where necessary);
- (c) alternative financing and revenue sources from public works funds, and grants and tax credits under federal and state programs.

16. What are potential public risks in implementing AB 2?

The plan is based on economic assumptions of revenues, is very specific as to projects and time sensitive. Potential public risks include:

- (a) administrative costs (including consultants if necessary) for initial investigations, creating an Authority, establishing plan boundaries, and preparing and adopting a plan (including costs of any elections);
- (b) on-going costs of implementation of the plan (and consultants if necessary) before revenues are available, including the long lag time for tax increment to be generated from new development [note, AB 2 provides that property owners and residents shall be third-party beneficiaries of any repayments of loans(?)];
- (c) economic and market conditions impeding development and receipt of revenues;
- (d) periodic reviews leading to changes in the plan;
- (e) withdrawal or modification of tax increment participation by consenting taxing entities;
- (f) periodic audits, particularly of the low-moderate- income housing obligations, showing non-compliance and leading to stopping implementation of other parts of the plan and imposing monetary sanctions;
- (g) termination of the plan by vote of the land owners and residents following a ten-year review;
- (h) failed expectations.

17. What are potential private risks in participating in a plan area?

Potential developers, investors, lenders and bond buyers will evaluate risks of participating in a project, including risks of:

(a) the ability of the Authority to implement and complete the plan for the plan area, as their investment will be based on conditions in the plan area and the expectation that the plan will be successfully implemented;

(b) the market and financing risks, including economic cycles [note that bond buyers will look how tax increment generation is spread across the plan area, and if it is concentrated in one or a few developments, it will see that as a risk factor];

(c) the risks of changes in the plan or termination of the plan.

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EXHIBIT 1
GOVERNMENT CODE SECTION 62002
POWERS OF AUTHORITY

Added by Assembly Bill No. 2, Chapter 319
Approved by the Governor September 22, 2015

62002.

An authority may do all of the following:

- (a) Provide funding to rehabilitate, repair, upgrade, or construct infrastructure.
- (b) Provide for low- and moderate-income housing in accordance with Part 2 (commencing with Section 62100).
- (c) Remedy or remove a release of hazardous substances pursuant to the Polanco Redevelopment Act (Article 12.5 (commencing with Section 33459) of Part 1 of Chapter 4 of Division 24) or Chapter 6.10 (commencing with Section 25403) of Division 20 of the Health and Safety Code.
- (d) Provide for seismic retrofits of existing buildings in accordance with all applicable laws and regulations.
- (e) Acquire and transfer real property in accordance with Part 3 (commencing with Section 62200). The authority shall retain controls and establish restrictions or covenants running with the land sold or leased for private use for such periods of time and under such conditions as are provided in the plan. The establishment of such controls is a public purpose under the provisions of this part.
- (f) Issue bonds in conformity with Article 4.5 (commencing with Section 53506) and Article 5 (commencing with Section 53510) of Chapter 3 of Part 1 of Division 2 of Title 5.
- (g) Borrow money, receive grants, or accept financial or other assistance or investment from the state or the federal government or any other public agency or private lending institution for any project or within its area of operation, and may comply with any conditions of the loan or grant. An authority may qualify for funding as a disadvantaged community pursuant to Section 79505.5 of the Water Code or as defined by Section 56033.5. An authority may also enter into an agreement with a qualified community development entity, as defined by Section 45D(c) of the Internal Revenue Code, to coordinate investments of funds derived from the New Markets Tax Credit with those of the authority in instances where coordination offers opportunities for greater efficiency of investments to improve conditions described in subdivisions (d) and (e) within the territorial jurisdiction of the authority.
- (h) Adopt a community revitalization and investment plan pursuant to Sections 62003 and 62004.
- (i) Make loans or grants for owners or tenants to improve, rehabilitate, or retrofit buildings or structures within the plan area.
- (j) Construct foundations, platforms, and other like structural forms necessary for the provision or utilization of air rights sites for buildings to be used for residential, commercial industrial, or other uses contemplated by the revitalization plan.
- (k) Provide direct assistance to businesses within the plan area in connection with new or existing facilities for industrial or manufacturing uses, except as specified in this division.

EXHIBIT 2
GOVERNMENT CODE SECTION 62003
CONTENTS OF PLAN

Added by Assembly Bill No. 2, Chapter 319
Approved by the Governor September 22, 2015

62003.

An authority shall adopt a community revitalization and investment plan that may include a provision for the receipt of tax increment funds generated within the area according to Section 62005, provided the plan includes each of the following elements:

- (a) A statement of the principal goals and objectives of the plan including territory to be covered by the plan.
- (b) A description of the deteriorated or inadequate infrastructure within the area and a program for construction of adequate infrastructure or repair or upgrading of existing infrastructure.
- (c) A housing program that describes how the authority will comply with Part 2 (commencing with Section 62100). The program shall include the following information:
 - (1) The amount available in the Low and Moderate Income Housing Fund and the estimated amounts that will be deposited in the fund during each of the next five years.
 - (2) Estimates of the number of new, rehabilitated, or price restricted residential units to be assisted during each of the five years and estimates of the expenditures of moneys from the Low and Moderate Income Housing Fund during each of the five years.
 - (3) A description of how the program will implement the requirements for expenditures of funds in the Low and Moderate Income Housing Fund over a 10-year period for various groups as required by Chapter 2 (commencing with Section 62115) of Part 2.
 - (4) Estimates of the number of units, if any, developed by the authority for very low, low-, and moderate-income households during the next five years.
- (d) A program to remedy or remove a release of hazardous substances, if applicable.
- (e) A program to provide funding for or otherwise facilitate the economic revitalization of the area.
- (f) A fiscal analysis setting forth the projected receipt of revenue and projected expenses over a five-year planning horizon, including the potential issuance of bonds backed by tax increment during the term of the plan. Bonds shall be issued in conformity with Article 4.5 (commencing with Section 53506) and Article 5 (commencing with Section 53510) of Chapter 3 of Part 1 of Division 2 of Title 5. An authority shall not spend revenue for any purpose that is not identified as part of a program described in subdivisions (b), (c), (d), and (e).
- (g) Time limits that may not exceed the following:
 - (1) Thirty years for establishing loans, advances and indebtedness.
 - (2) Forty-five years for the repayment of all of the authority's debts and obligations, and fulfilling all of the authority's housing obligations. The plan shall specify that an authority shall dissolve as a legal entity in no more than 45 years, and no further taxes shall be allocated to the authority pursuant to Section 62005. Nothing in this paragraph shall be interpreted to prohibit an authority from refinancing outstanding debt solely to reduce interest costs.
- (h) A determination that the community revitalization investment area complies with the conditions described in subdivision (d) or (e) of Section 62001.