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GEORGE DEUKMEJIAN
Attorney General

OPINION	:	No. 79-902
	:	
of	:	<u>January 10, 1980</u>
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GEORGE DEUKMEJIAN	:	
Attorney General	:	
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Rodney Lilyquist, Jr.	:	
Deputy Attorney General	:	
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SUBJECT: TRUSTEE DELEGATION PROVISIONS—Trustee delegation provisions of Health and Safety Code sections 33645, 33658, and 33675 do not conflict with article XI, section 11 of the California Constitution. Time deposits of less than \$100,000 by a trustee of funds irrevocably pledged by a redevelopment agency for payment of principal and interest to bondholders do not constitute time deposits of a “governmental unit” within meaning of Regulation Q, 12 C.F.R. § 217.7(d).

The Honorable William R. Leonard, Assemblyman for the 67th District, has requested an opinion on the following questions:

1. Do the trustee delegation provisions of Health and Safety Code sections 33645, 33658, and 33675 conflict with article XI, section 11, of the California Constitution?

2. Do time deposits of less than \$100,000 by a trustee of funds irrevocably pledged by a redevelopment agency for the payment of principal and interest to bondholders constitute time deposits of a “governmental unit” within the meaning of Regulation Q, 12 C.F.R. § 2177(d)?

CONCLUSIONS

1. The trustee delegation provisions of Health and Safety Code sections 33645, 33658, and 33675 do not conflict with article XI, section 11 of the California Constitution.

2. Time deposits of less than \$100,000 by a trustee of funds irrevocably pledged by a redevelopment agency for the payment of principal and interest to bondholders do not constitute time deposits of a “governmental unit” within the meaning of Regulation Q, 12 C.F.R. § 217.7(d).

ANALYSIS

Under the Community Redevelopment Law (Health and Safety Code §§ 33000-33738),¹ the governing body of a community may prepare, adopt, and implement a redevelopment plan for the elimination of blighted areas within the community. (*Redevelopment Agency v. Malaki* (1963) 216 Cal. App. 2d 480,482; *Redevelopment Agency v. Cooper* (1954) 122 Cal. App. 2d 777, 800–802; *Jacobs & Levine, Redevelopment: Making Misused & Disused Land Available and Usable* (1957) 8 Hastings L.J. 241, 250–253.)

A redevelopment project is normally funded by what is known as “tax increment financing.” Bonds are issued by the redevelopment agency to cover the costs of redevelopment. The principal and interest on the bonds is then paid from a portion of all property taxes collected in the project area, without the imposition of a higher tax rate. As the assessed valuation of taxable property in the project area increases due to its redevelopment, the taxes levied on such property that normally would go to the appropriate taxing agency are divided between the taxing agency and the redevelopment agency. The taxing agency receives the same amount of money it would have received based upon the assessed valuation existing at the time the project was approved, while the additional money resulting from the rise in assessed valuation goes to the redevelopment agency for repayment of the project’s indebtedness. (Cal. Const., Art. XVI, § 16; § 33670; *Redevelopment Agency v. Cooper* (1968) 267 Cal. App. 2d 70, 72–73; 27 Ops. Cal. Atty. Gen. 352, 353–354 (1965).)

¹ All unidentified statutory references hereinafter are to the Health and Safety Code.

The first question presented for analysis concerns the authority of a redevelopment agency to appoint a trustee to perform certain duties with regard to the repayment of the agency's bonds. The second question deals with the characterization of the funds held by a trustee on behalf of an agency's bondholders.

A. Trustee Appointments

The Legislature has enacted three statutes dealing with the appointment of a trustee by a redevelopment agency and the trustee's duties on behalf of the agency's bondholders. The primary statute is section 33658, which states:

“An agency may:

“(a) Vest in a trustee or the holders of bonds or any proportion of them the right to enforce the payment of the bands or any covenants securing or relating to the bonds.

“(b) Vest in a trustee the right, in the event of a default by the agency, to take possession of all or part of any redevelopment project, to collect the rents and revenues arising from it and to dispose of such money pursuant to the agreement of the agency with the trustee.

“(c) Provide for the powers and duties of a trustee and limit his liabilities.

“(d) Provide the terms and conditions upon which the trustee or the holders of bonds or any proportion of them may enforce any covenant or rights securing or relating to the bonds.”

Additionally section 33645 provides in part:

“The resolution, trust indenture, or mortgage shall provide that tax increment funds allocated to an agency pursuant to, Section 33670 shall not be payable to a trustee on account of any issued bonds when sufficient funds have been placed with the trustee to redeem all outstanding bonds of the issue.”

The third statute is subdivision (e) of section 33675, which states in part:

“Payment to a trustee under a band resolution or indenture of any kind or payments to a public agency in connection with payments by such public agency pursuant to a lease or bond issue shall not be disputed in any action

under this section.”

Accordingly, the Legislature has authorized the appointment of a trustee by a redevelopment agency to perform various duties. (§ 33658, subd. (c).) Primarily, the trustee receives the tax allocation revenues sufficient to pay the principal and interest on the bonds. (See §§ 33645, 33675 subd. (e).) Normally these revenues have been “irrevocably pledged” by the agency for such purpose. (See Cal. Const., Art. XVI, § 16, subd. (b); § 33642.)

A trust relationship, as in the questions presented here, is created by a “trustor” giving property to a “trustee” to be used for the benefit of a third party, the “beneficiary.” (Civ. Code § 2718.) The trustee must act in accordance with the trust provisions, holding legal title to the property subject to an equitable obligation to use the property on behalf of the beneficiary. (Civ. Code §§ 2228, 2267, Rest 2d Trusts, §§ 2, 170 (1), pp. 6, 364; 7 Witkin, Summary of Cal. Law (8th ed. 1974), pp. 5368, 5418; see also *Gonsalves v. Hodgson* (1951) 38 Cal. 2d 91, 98; *Strauss v. Superior Court* (1950) 36 Cal. 2d 396, 402, *Estate of Feraud* (1979) 92 Cal. App. 3d 717, 723.) As a “fiduciary,” a trustee owes a duty of loyalty, fidelity, and good faith to the beneficiary. (Civ. Code § 228; Rest. 2d Trusts, § 170(1), p. 364; *Greenbaum v. State Bar* (1976) 15 Cal. 3d 893, 904; 2 Scott, The Law of Trusts (3d ed. 1967), pp. 1297–1298.) However, a trustee may at times act as an agent for another party who has an interest adverse to that of the beneficiary. (Civ. Code, § 1120.)

Here, we have been asked to assume that a redevelopment agency has entered into a trust relationship for the benefit of the bondholders, with tax revenue proceeds being placed in a special trust fund to which the trustee has vested title. The issue, then, is whether such a relationship, permitted under sections 33645, 33658 and 33675, contravenes section 11 of article XI of the Constitution, which states:

“(a) The Legislature may not delegate to a private person or body power to make, control, appropriate, supervise or interfere with county or municipal corporation improvements, money, or property, or to levy taxes or assessments, or perform municipal functions.

“(b) The Legislature may, however, provide for the deposit of public moneys in any bank in this state or in any savings and loan association in this state and for the payment of interest, principal and redemption premiums of public bonds and other evidences of public indebtedness by banks within or without this state. It may also provide for investment of public moneys in securities and the registration of bonds and other evidence of indebtedness by private persons or bodies, within or without this state, acting as trustees or fiscal agents.” (Emphasis added.)

It would not appear that the statutory enactments are in conflict with the plain language of the constitutional provision, since it is the redevelopment agency and not the Legislature that delegates responsibility under the statutory scheme. Three California Supreme Court cases, however, suggest a contrary conclusion and form the basis of the opinion request.

Preliminarily, we note that statutory enactments are to be harmonized, if reasonably possible, with all constitutional provisions. (*Associated Home Builders Etc., Inc. v. City of Livermore* (1976) 18 Cal. 3d 582, 596; *In re Kay* (1970) 1 Cal. 3d 930, 942; *Dittus v. Cranston* (1959) 53 Cal. 2d 284, 286.)

Section 11 of article XI of the Constitution was initially section 13 of the same article and provided:

“The Legislature shall not delegate to any special commission, private corporation, company, association, or individual, any power to make, control, appropriate, supervise, or in any way interfere with any county, city, town, or municipal improvement, money, property, or effects, whether held in trust or otherwise, or to levy taxes or assessments, or perform any municipal functions whatever.”

The history leading to the adoption of section 13 in 1878 has been described as follows:

“In the years preceding the adoption of section 13, the Legislature frequently intervened in local affairs through acts, for example, directing cities to pay the claims of designated individuals, issue bonds without voter approval, and levy taxes and spend money for various purposes. In addition, the Legislature appointed commissions free of local control with power over municipal indebtedness and taxation. Nonfiscal forms of interference also vexed the municipalities. Commissions created by the state legislature were given control of the fire department and other public works like streets and parks. The courts were slow to afford relief from such interference. During the Constitutional Convention of 1878 indignation at these highhanded legislative practices was vehemently expressed. Section 13 was the solution produced by the Convention for these abuses.” (Fns. omitted.) (Comment, *San Francisco Bay: Regional Regulation For its Protection And Development* (1967) 55 Cal. L. Rev. 728, 760–761.)

The purpose of section 13 was thus to prevent the California Legislature from interfering in the municipal affairs of local entities. (*People ex rel Younger v. County of*

El Dorado (1971) 5 Cal. 3d 480, 500; *In re Pfabler* (1906) 150 Cal. 71, 87; *People v. Hoge* (1880) 55 Cal. 612, 618; Comment, *supra*, 55 Cal. L. Rev. 728, 761; Peppin, *Municipal Home Rule in California IV* (1946) 34 Cal. L. Rev. 644, 682–684.)

Accordingly, where the elected representatives of the local entity controlled the appointment of the special commission, private corporation, company, association, or individual, even though under the authorization of the Legislature, section 13 was found to be inapplicable. (*City of Whittier v. Dixon* (1944) 24 Cal. 2d 664, 667; *The Housing Authority v. Dockweiler* (1939) 14 Cal. 2d 437, 463; *Butterworth v. Boyd* (1938) 12 Cal. 2d 140, 149; *City of San Jose v. Railroad Commission* (1917) 175 Cal. 284, 288; *In re Pfabler*, *supra*, 150 Cal. 71, 87; *Davies v. City of Los Angeles* (1890) 86 Cal. 37, 49; *Wilson v. Board of Supervisors* (1957) 154 Cal. App. 2d 101, 110–111; *Mesmer v. Board Etc.*, (1913) 23 Cal. App. 578, 580; Comment, *supra*, 55 Cal. L. Rev. 728, 760, n. 153; Peppin, *supra*, 34 Cal. L. Rev. 644, 678, 682, 684–687.)

Three cases hold to the contrary, *Yarrrell v. City of Los Angeles* (1891) 87 Cal. 603, 607; *City of Los Angeles v. Teed* (1896) 112 Cal. 319, 329–330; and *Merchants Bank v. Escondido Irr. Dist.* (1904) 144 Cal. 329, 333–334. As one commentator has stated, “The *Yarnell*, *Teed* and *Escondido* cases can no longer be regarded as authoritative interpretations of section 13,” *Yarnell* “is palpably unsound and wholly ignores the purpose of section 13,” *Teed* “is an excellent example of how one had precedent will beget others,” and *Escondido* is manifestly contrary to “many authorities.” (Peppin, *supra*, 34 Cal. L. Rev. 644, 687–789.) Although the three cases apparently caused the adoption of what is presently subdivision (b) of section 11 of article XI, we cannot ignore the underlying purposes of the article, much less its plain language, and thus choose to follow the vast majority of cases interpreting its meaning.

When section 13 was replaced by section 11 in 1974, the Constitution Revision Commission’s comment on the proposed change was as follows:

This proposed section prohibits delegation by the Legislature of certain powers over local matters. It restates the substance of related existing provisions without change in meaning except the proposal only prohibits delegations to private persons or bodies whereas the existing provision extends to ‘special commissions.’” (Cal. Const. Revision Com., Proposed Revision of the California Constitution (1968) p. 65; see also *People ex rel. Younger v. County of El Dorado*, *supra*, 5 Cal. 3d 480, 500, fn. 22.)

Additionally, the analysis by the legislative analyst stated in the voter’s pamphlet that Proposition 8 (which included the replacement of section 13 by section 11) “deletes obsolete provisions, clarifies wording, eliminates excess verbiage, and establishes a logical

order for the article's provisions." (Ballot Pamp., Gen. Elec. (Nov. 5, 1974), p. 30.)

Consequently, we view present section 11 in the same manner as the majority of cases have interpreted section 13 with regard to the intention of the provisions and construction of its language.

Sections 33645, 33658, and 33675 do not *delegate* to a trustee the "power to make, control, appropriate, supervise or interfere with" a redevelopment agency's "improvements, money, or property" as proscribed by section 11 of article XL. The statutes *allow the local agency to select* such an arrangement, among others, in the exercise of its sound discretion. The purpose of avoiding the Legislature's dominance over local matters is thus not violated, and the statutes comply with the express terms of the constitutional provision.

The conclusion to the first question, therefore, is that the trust delegation provisions of sections 33645, 33658, and 33675 do not conflict with article XI, section 11 of the Constitution.

B. Regulation Q Requirements

Pursuant to its authority under section 19(j) of the Federal Reserve Act (12 U.S.C. § 371b) to prescribe rules governing the payment of interest on deposits by member banks, the Federal Reserve Board of Governors has promulgated Regulation Q (12 C.F.R. § 217), as amended.

Currently, Regulation Q restricts the maximum rate of interest payable by member banks on time deposits of less than \$100,000 to between 5% and 7³/₄%, depending on maturity period, except in certain limited circumstances, including

"... funds deposited to the credit of, or in which the entire beneficial interest is held by, the United States, any State of the United States, or any county, municipality or political subdivision thereof, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, American Samoa, Guam, or political subdivision thereof, at a rate in excess of 8 percent." (Emphasis added) (12 C.F.R. § 217.7(d), amended June 7, 1979 44 Fed. Reg. 32649.)

Hence, the Board of Governors allows a higher rate of interest for the deposit of funds of governmental units.² We must determine whether funds irrevocably pledged by a

² A redevelopment agency is a subdivision of the state, created by the Legislature, a county, or a city. (§§ 33003–33004, 33007, 33100–33101, 33122.)

redevelopment agency for the payment of principal and interest on its bonds and placed with a trustee for the benefit of the bondholders may nevertheless be deposited under Regulation Q as “governmental unit time deposits.”³

Under general trust law, as we have mentioned, trust property is not considered the property of the trustor, but is held by the trustee on behalf of the beneficiary.

It is, of course, the redevelopment agency that would primarily benefit from deposit of the funds at a higher interest rate. The agency is obligated to pay the principal and interest on the bonds and would otherwise be required to funnel additional moneys into the special trust fund; these funds would no longer be available for construction of the redevelopment project. As a practical matter, then, both the agency and bondholders would have a desire to receive the maximum amount of interest on the deposits, and the agency would primarily benefit from the higher interest rate.

Since a trustee, however, holds title to the funds only on behalf of the beneficiary bondholders and is obligated to act solely on behalf of the bondholders with regard to these irrevocably pledged funds, we cannot say that the funds may be deposited by the trustee as “governmental unit time deposits” under Regulation Q.

We note that a trustee would nevertheless be required to obtain the maximum rate of return for the bondholders consistent with the terms of the trust agreement; the applicable interest rates under Regulation Q may be paid only if there are no other investments paying a higher rate of return that a reasonably prudent trustee would be authorized to make. (See *Cheyenne-Arapaho Tribes of Okl. v. United States* (Ct. Cl. 1975) 512 F.2d 1390, 1394–1396; *Manchester Band of Pomo Indians, Inc. v. United States* (N.D. Cal. 1973) 363 F. Supp. 1238, 1244–1247.)

Our conclusion on the second question, therefore, is that deposits of less than \$100,000 by a trustee of funds irrevocably pledged by a redevelopment agency for the payment of principal and interest to bondholders would not constitute “governmental unit time deposits” within the meaning of Regulation Q, 12 C.F.R. § 217.7(d).

³ The trustee may also have other agency funds with regard to which it acts as fiscal agent. Under normal principles of agency rather than trust principles, such funds would be characterized as being “deposited to the credit of or in which the entire beneficial interest is held by” the redevelopment agency. (Civ. Code, §§ 2295, 2330; Rest. 2d Agency. § 403. p. 246; *Savage v. Mayer* (1949) 33 Cal. 2d 548, 551; 1 Witkin, *supra*, 814.)