



**Contra
Costa
County**

To: Board of Supervisors
From: Sharon L. Anderson, County Counsel
Date: February 9, 2016

Subject: APPROVAL OF REQUESTS FOR ATTORNEY CONFLICT WAIVERS UNDER CERTAIN CIRCUMSTANCES

RECOMMENDATION(S):

AUTHORIZE the County Counsel, or her designee, to consent to potential conflicts of interest that arise from the County being represented by Goldfarb & Lipman LLP in connection with the following affordable housing transactions: Tabora Gardens (in Antioch) and East Bluff Apartments (in Pinole).

AUTHORIZE the County Counsel, or her designee, to consent to future potential conflicts of interest in situations when an attorney provides services to the County in connection with the development, renovation or refinancing of affordable housing and another party to the transaction is a former or existing client of the attorney.

FISCAL IMPACT:

There is no financial impact.

BACKGROUND:

Affordable housing is a specialized area of law practiced by a limited number of attorneys. The local affordable housing development community is also small. As a result, participants in local affordable housing projects tend to know one another and to work together in

☒ APPROVE

☐ OTHER

☒ RECOMMENDATION OF CNTY
ADMINISTRATOR

☐ RECOMMENDATION OF BOARD
COMMITTEE

Action of Board On: **02/09/2016** ☒ APPROVED AS RECOMMENDED ☐ OTHER

Clerks Notes:

VOTE OF SUPERVISORS

AYE: Candace Andersen, District II Supervisor
Mary N. Piepho, District III Supervisor
Karen Mitchoff, District IV Supervisor
Federal D. Glover, District V Supervisor

ABSENT: John Gioia, District I Supervisor

I hereby certify that this is a true and correct copy of an action taken and entered on the minutes of the Board of Supervisors on the date shown.

ATTESTED: February 9, 2016

David Twa, County Administrator and Clerk of the Board of Supervisors

Contact: Kathleen Andrus, Deputy
County Counsel, (925) 335-1800

By: June McHuen, Deputy

varying capacities over time. For that reason, it is not uncommon for the firm representing the County on a particular affordable housing project to have an existing or prior relationship with the non-profit developer working on a project or the city in which the project is sited. When that happens, there is the potential for a conflict of interest and, in accordance with the rules of profession conduct established by the State Bar of California, the firm must obtain the informed written consent of the County and the current or former client before it can represent the County.

BACKGROUND: (CONT'D)

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When evaluating a request from outside counsel that the County waive potential conflicts of interest in the circumstance described above, a number of factors are considered. Of primary importance is the nature of the transaction and the potential risk associated with the law firm's relationship with the other party. Because all the parties in an affordable housing transaction have the same ultimate goal – making affordable housing available in a responsible manner – affordable housing transactions tend to be less adversarial and more cooperative than many other transactions. For that reason, and given the limited number of legal resources available to the County in this specialized field, and the fact that outside counsel's work is reviewed by attorneys in the County Counsel's Office, waiver of a potential conflict does not create risk for the County.

It is important to note that there is a distinction between a *potential* conflict of interest, and an *actual* conflict of interest. A potential conflict exists in a situation where an attorney represents Client A in a matter that involves Client B but the representation provided to the two clients is unrelated. An example of this situation is where the County is making a loan to a non-profit that is affiliated with an existing client of the County's attorney, but the attorney is representing only the County in the loan transaction – not the borrower or the affiliate. Because there is little, if any, risk to the County in consenting to the waiver of a potential conflict of interest, the County routinely grants its consent to such waivers on the recommendation of the County Counsel. An actual conflict, on the other hand, occurs when an attorney provides representation to two clients in a related matter. In the case of an actual conflict of interest, the attorney would have to either (i) obtain the informed written consent of both parties to the actual conflict, or (ii) cease representing both parties. In situations where a potential conflict becomes an actual conflict, the consent given when the conflict was only potential would no longer apply. The attorney would have to obtain the written consent of both parties to the actual conflict or cease representing both parties.

This board order authorizes County Counsel to consent to *potential* conflicts of interest, not *actual* conflicts of interest. And only when the potential conflict arises as a result of an attorney providing services to the County in connection with the development, renovation or refinancing of affordable housing and another party to the transaction is a former or existing client of the attorney. Delegating authority to the County Counsel, or her designee, to acknowledge and consent to such potential conflicts will enable the County to respond to such requests in a more timely manner, thus minimizing any delay in the drafting of relevant documents.

Attached are three letters from Goldfarb & Lipman LLP (Goldfarb) that request that the County acknowledge and waive the potential conflicts that exist in two different affordable housing transactions. The first project is referred to as "Tabora Gardens." Completion of this project will result in the construction of an 85-unit apartment complex

for seniors at 3557 Tabora Drive in Antioch. The second project is known as "East Bluff Apartments." Completion of this project involves the rehabilitation of a 144-unit multifamily affordable housing development at 1813 Marlesta Court in Pinole.

Tabora Gardens

In this transaction, the County is lending HOME, HOPWA, NSP1 and Summer Lake Trust funds to a limited partnership affiliate of Satellite Affordable Housing Associates (SAHA). The combined total value of the loans is \$6 million. Two of the attached letters relate to this project. One describes Goldfarb's existing relationship with SAHA. In this transaction, SAHA will be represented by separate legal counsel. The other letter describes Goldfarb's existing relationship with the City of Antioch. The City has already lent money to this project and is expected to lend more. It is likely that the loans made by the City and the loans made by the County will all be repayable from excess cash flow generated by the development. If so, the City and the County will enter into an intercreditor agreement that addresses how the cash flow is to be shared and the priority of the liens that secure the loans. Goldfarb did not represent the City when it made the loans. If Goldfarb is asked to represent the City in the documentation of an intercreditor agreement, Goldfarb will be required to obtain both the City and the County's informed written consent. (A separate consent from the one contemplated here.)

East Bluff Apartments

In this transaction, the County is lending approximately \$2 million of CDBG funds to a limited partnership affiliate of Eden Housing Inc. (Eden). Goldfarb has an existing relationship with Eden. Eden will be represented by separate legal counsel in this transaction.

CONSEQUENCE OF NEGATIVE ACTION:

If the County does not consent to the potential conflicts that arise as a result of Goldfarb representing the County in both the Tabora Gardens and East Bluff Apartments projects, Goldfarb would not be able to represent the County, or anyone else, in connection with these transactions. The result would likely be increased costs for the County and a delay in the completion of both transactions.

If the authority to consent to potential conflicts of interest that arise when an attorney is providing services to the County in the context of affordable housing is not delegated to the County Counsel or her designee, requests for affordable housing-related "conflict waivers" will continue to be presented to the Board of Supervisors for approval, potentially delaying the start of the necessary legal services.

ATTACHMENTS

Conflict Waiver - Attachment A
Conflict Waiver - Attachment B
Conflict Waiver - Attachment C