Conflict Waiver:

Representation of the County of Fresno and the FCTA regarding TOD Agreement for Pedestrian/Bike Improvements on Chestnut Avenue from Shields Avenue to Clinton Avenue Project

It has been proposed that the County of Fresno (County) enter into a contract with the Fresno Transportation Authority (FCTA) for funding for Pedestrian/Bike Improvements on Chestnut Avenue from Shields Avenue to Clinton Avenue Project pursuant to the Measure C subprogram entitled "Transit Oriented Infrastructure for In-fill" ("TOD").

As you know, the Office of Fresno County Counsel provides legal services to the County, and also has been asked to represent FCTA with regard to the drafting and review of said contract. One of our office's deputy county counsels already provides legal representation to the County in all matters, and would represent it in this contract negotiation as well. Another deputy county counsel will be assigned to assist FCTA in the drafting and review of the contract. Accordingly, we are required to inform you regarding the proposal that our Office provide such "dual representation" in this particular instance, and to obtain your informed written consent.

RULES OF PROFESSIONAL CONDUCT

Rule 1.7 of the California Rules of Professional Conduct provides, in pertinent part:

(a) A lawyer shall not, without informed written consent from each client and compliance with paragraph (d), represent a client if the representation is directly adverse to another client in the same or a separate matter.

(b) A lawyer shall not, without informed written consent from each affected client and compliance with paragraph (d), represent a client if there is a significant risk the lawyer's representation of the client will be materially limited by the lawyer's responsibilities to or relationships with another client, a former client or a third person, or by the lawyer's own interests.

(c) Even when a significant risk requiring a lawyer to comply with paragraph (b) is not present, a lawyer shall not represent a client without written disclosure of the relationship to the client and compliance with paragraph (d) where:

  (1) the lawyer has, or knows that another lawyer in the lawyer's firm has, a legal, business, financial, professional, or personal relationship with or responsibility to a party or witness in the same matter; or

  (2) the lawyer knows or reasonably should know that another party's lawyer is a spouse, parent, child, or sibling of the lawyer, lives with the lawyer, is a client of the lawyer or another lawyer in the lawyer's firm, or has an intimate personal relationship with the lawyer.

(d) Representation is permitted under this rule only if the lawyer complies with paragraphs (a), (b), and (c), and:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
(2) the representation is not prohibited by law; and
(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal.

CONSEQUENCES OF THE REPRESENTATION

We are obliged, under the rule cited above, to inform you of any actual or reasonably foreseeable adverse effects of this representation. It is possible that conflicts between the FCTA and County may develop into disputes. This scenario could have potentially problematic results in regard to our representation of the County, specific examples of which are:

- Someone may argue that we would be tempted to favor the interests of one client over the other.
- Our exercise of independent judgment to the FCTA may be impaired or clouded by our pre-existing relationship with County.
- We may not be able to present the appropriate position, claims or defenses for one client in order to avoid taking adverse positions to the other client.
- We may be restricted from forcefully advocating a client's position for fear of alienating the other client.
- We may be forced to withdraw from representing either or both clients because of disputes or further conflicts of interest which could increase either or both clients' attorney's fees and costs.
- There may be an appearance of impropriety in our representation of both clients simultaneously.

Our Office believes that we can adequately mitigate any risks of these consequences, especially since this is for such a discrete task. 1) We will have two different attorneys in our Office represent each side of the contract; 2) neither attorney will have access to the other's files or documents as regards this contract; and 3) the two attorneys will not discuss the matter with each other, except at an arm's length with permission from the clients, and 4) each attorney will report to different superiors with any issues that arise. Moreover, this is simply a contract for the provision of funding for a roads project, specifically, the Pedestrian/Bike Improvements on Chestnut Avenue from Shields Avenue to Clinton Avenue Project and the parties have a preexisting governmental relationship, with a County Supervisor and several mayors also serving as part of the membership of each party's governing board. Under these circumstances, the parties do not appear to be adverse with respect to this transaction. As regards reviewing the subject contract, the attorney representing FCTA will report to Chief Deputy Brian Melikian, and the attorney representing the County will report to the County Counsel.

YOUR CONSENT

If you wish to have our Office to represent the County in this matter, we will need to have the Board of Supervisors authorize you to sign this consent letter. It is understood that this consent will not prevent County Counsel from representing the County now or in the future, and will not waive any protection that you may have with regard to attorney-client communications with our Office in this matter. Those communications will remain confidential and will not be disclosed to any third party without your consent. The files will be kept separate and there will be no communication regarding the respective representations except as among those persons solely working for that entity.

If there is any material change in the circumstances described above, or we become aware of new information that requires a new consent from the parties, you will be notified of that fact immediately, and in such event our continued representation will be subject to the informed written consent of both involved parties in connection therewith.

Your execution of this consent letter will constitute an acknowledgment of full disclosure in compliance with the requirements of Section 1.7 of the California Rules of Professional Conduct previously quoted above.

ACCEPTED AND APPROVED

Ernest "Buddy" Mendes, Chairperson of the Board
Fresno County Board of Supervisors

ATTEST:
BERNICE E. SEIDEL
Clerk of the Board of Supervisors
County of Fresno, State of California
By _____ Deputy