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**CITY OF OAKLAND  
AGENDA REPORT**

TO: Office of the City Administrator  
ATTN: Deanna Santana  
FROM: Office of the City Attorney  
DATE: March 6, 2012

RE: **Report and Resolution Approving a Conflict of Interest Waiver for Shute Mihaly & Weinberger LLP ("SMW") Waiving Any Conflict Arising From SMW's Representation of Clients With Interests Adverse to the City of Oakland, Except For Any Client Whose Interests May Be Related to the Closure, Development and Reuse of Properties Within the Boundaries of the Former Oakland Army Base**

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**SUMMARY**

The City Attorney's Office requests that the City Council approve the conflict of interest waiver in the attached resolution on behalf of Shute Mihaly & Weinberger LLP ("SMW"). SMW has represented the Oakland Base Reuse Authority ("OBRA") and the Oakland Redevelopment Agency ("Agency") since 2001 in the legal work necessary to complete the transfer of property at the former Oakland Army Base from OBRA to the Agency, and in the development of the portions of the property that are subject to the restrictions of the Tidelands Trust of the State of California.

On June 25, 2006, the Agency assumed all of the rights and responsibilities of OBRA as OBRA's successor-in-interest. Since the transfer of Army Base property from OBRA to the Agency, OBRA staff required the assistance of SMW to complete certain matters at the Army Base relating to the State Lands Commission and the Bay Conservation and Development Commission, including an additional tidelands trust exchange affecting property owned by Caltrans, adjacent to the Agency's North Gateway Development Area. Until the Agency transferred its Army Base assets to the City, Agency staff consulted with SMW regarding future development plans for the Army Base, and specifically the uses for trust-impressed properties proposed by AMB/CCG that may require approval from the State Lands Commission. Recently, staff consulted with SMW regarding the wind-up of the Agency, and the City's new legal obligations toward trust-impressed properties within the Agency's portfolio.

In the Professional Services Agreement between the Agency and SMW, the Agency waived any conflict of interest that has arisen or could arise from SMW's prior, current or future representation of clients with interests adverse to the Agency, except for any client whose interests may be adverse to the Agency or the City of Oakland related to the closure, development and reuse of the Oakland Army Base. SMW currently represents clients whose interests are, or may become adverse to the City, in matters unrelated to the Army Base, and so to continue their work on Army Base matters, the City will need to adopt an equivalent waiver.

The City Attorney's Office is satisfied that SMW has adequate procedures in place to avoid any

ethical breaches. The waivers requested are consistent with the Rules of Professional Conduct.

## **FISCAL IMPACTS**

There are no fiscal impacts associated with this conflict waiver.

## **BACKGROUND**

SMW has represented OBRA and the Redevelopment Agency since 2001 with the complicated legal work and regulatory hurdles necessary to complete the tidelands trust exchange at the Army Base. The tidelands trust is a highly specialized area of law affecting current and former tide and submerged lands, such as the filled lands comprising the Army Base. The trust doctrine places significant restrictions on the use and development of such lands, limiting their redevelopment potential.

SMW's unique expertise in the area of California tidelands trust law, and its experience with statewide regulatory agencies such as the State Lands Commission and the Bay Conservation and Development Commission, were key to achieving a trust land exchange for the Army Base, and ensuring that the exchange took place simultaneously with the Army Base land transfer in August 2006. The exchange freed over 120 acres of land at the Army Base from trust restrictions.

On June 25, 2006, the Agency voted to assume all of the rights and responsibilities of OBRA as OBRA's successor-in-interest. Since the transfer of Army Base property was completed, OBRA staff has required the assistance of SMW to complete certain matters at the Army Base relating to requirements of the State Lands Commission and the Bay Conservation and Development Commission. For example, staff needs their advice regarding the changing development plans for the West Gateway portion of the Army Base that includes trust-impressed property, to ensure that such plans are trust-consistent.

## **KEY ISSUES AND IMPACTS**

### **1. Conflicts to Be Waived.**

While SMW has represented clients with interests adverse to the City in matters unrelated to the Army Base, SMW has not, and will not represent any party in a matter adverse to the City related to the closure, development and reuse of the Army Base.

When OBRA first hired the firm, SMW had represented clients with interests potentially adverse to the City or the Agency in matters unrelated to the Army Base. In the Professional Services Agreement between OBRA and SMW, OBRA waived any conflict of interest that has arisen or could arise from SMW's prior, current or future representation of clients with interests adverse to the Agency or the City of Oakland, except for any client whose interests may be adverse to OBRA, the Agency or the City related to the Oakland Army Base. In 2007, the Agency adopted an equivalent waiver. Because the Agency has transferred its Army Base assets to the City, a new

outside counsel contract is required between SMW and the City, and SMW's conflicts with the City are different than those with the Agency.

SMW has disclosed the following past and present clients with matters in or adjacent to Oakland: Friends of Knowland Park and the California Native Plant Society in *Friends of Knowland Park et al. v City of Oakland*, (Alameda Super. Ct. Case No. RG11-586554), a matter relating to the Oakland Zoo, in which the interests of the clients are adverse to those of the City; and East Bay Regional Park District ("EBRPD") in connection with a proposal by Peralta Oaks Partners, LLC for a K-12 school located at 2955 Peralta Oaks Court, and in connection with a proposal for a Medical Cannabis Dispensary at 4709 Tidewater Avenue. In each of these matters, the interests of EBRPD are or may become adverse to those of the City.

SMW also represents the City of Alameda, the Alameda Community Improvement Commission, and the Alameda Reuse and Redevelopment Agency on various land use matters; and they represent the cities of Livermore and Pleasanton in connection with the Altamont Landfill and the Altamont Landfill Environmental Mitigation Fee. While these clients do not present current conflicts, the City's interests may become adverse to those clients in the future.

SMW has represented clients in past matters with interests adverse to the City, and who may wish to retain SMW in future matters in which their interests are adverse to those of the City, including the Oakland Heritage Alliance in connection with historic preservation litigation against the City of Oakland; the Jack London Neighborhood Association in connection with various land use and development issues; the East Bay Community Law Center in connection with the City's proposed condominium conversion ordinance; and the Friends of Fruitvale Gardens in connection with the proposed Yu home at Fruitvale and Wrenn.

The City Attorney's Office is satisfied that these matters do not conflict with SMW's work at the former Oakland Army Base.

## 2. SMW's Highly Specialized Experience.

SMW is one of the few firms statewide to have experience in dealing with the State Lands Commission (SLC), and with the complicated legal work and regulatory hurdles necessary to complete the tidelands trust exchanges at the Army Base. This includes experience with the public trust, hazardous materials, CEQA and related issues in the specialized context of military base conversion. Such experience was key to achieving a trust land exchange for the Army Base, and ensuring that the exchange took place simultaneously with the Army Base land transfer in August 2006.

Bill White of SMW is one of a few attorneys in the Bay Area who specialize in tidelands trust exchange matters, and who has vast experience with the SLC. Mr. White also negotiated and drafted the Oakland Army Base Exchange Agreement, as well as the enabling legislation, and portions of the City-Port MOA that provided for the transfer of the Army Base property among those parties. He also participated in drafting the purchase and sale agreement with Caltrans that obligates Caltrans to cooperate with the trust exchange for which SMW's services are needed. He has been advising Agency staff in recent years on an ongoing basis as to its ongoing obligations as a

trustee of the property impressed with the Tidelands Trust. He is currently advising staff about the wind-up of the Redevelopment Agency and the transfer of its trust obligations to the City.

Because Mr. White is intimately familiar with the history of negotiations with the State Lands Commission and Caltrans, and with the meaning and effect of the resulting agreements, his expertise is essential to the work required at the Army Base.

SMW's unique expertise in the area of California tidelands trust law, and its experience with statewide regulatory agencies such as the State Lands Commission and the Bay Conservation and Development Commission, were key to achieving a trust land exchange for the Army Base, and ensuring that the exchange took place simultaneously with the Army Base land transfer in August 2006. The exchange freed over 120 acres of land at the Army Base from trust restrictions.

### **SUSTAINABLE OPPORTUNITIES**

*Economic:* The proposed conflict waiver offers no economic opportunities.

*Environmental:* The proposed conflict waiver offers no environmental opportunities.

*Social Equity:* The proposed conflict waiver offers no social equity opportunities.

### **DISABILITY AND SENIOR ACCESS**

The proposed conflict waiver has no direct implications for disability and senior access.

### **ACTION REQUESTED OF THE CITY COUNCIL**

The City Attorney's Office recommends that the City Council approve the attached resolution granting the requested waiver of the enumerated conflicts of interest for SMW. This conflict waiver will not allow SMW to represent any client whose interests may be adverse to the City of Oakland related to the closure, development and reuse of the Oakland Army Base.

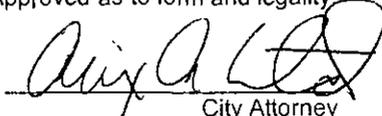
Respectfully submitted,

  
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**BARBARA J. PARKER**  
City Attorney

Assigned Attorney:  
Alix Rosenthal

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OAKLAND  
2012 FEB 23 PM 4:58

Approved as to form and legality:

  
City Attorney

## OAKLAND CITY COUNCIL

RESOLUTION NO. \_\_\_\_\_ C.M.S.

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A RESOLUTION APPROVING A CONFLICT OF INTEREST WAIVER FOR SHUTE MIHALY & WEINBERGER LLP ("SMW") WAIVING ANY CONFLICT ARISING FROM SMW'S REPRESENTATION OF CLIENTS WITH INTERESTS ADVERSE TO THE CITY OF OAKLAND, EXCEPT FOR ANY CLIENT WHOSE INTERESTS MAY BE RELATED TO THE CLOSURE, DEVELOPMENT AND REUSE OF PROPERTIES WITHIN THE BOUNDARIES OF THE FORMER OAKLAND ARMY BASE

**WHEREAS**, Shute, Mihaly & Weinberger LLP ("SMW") has represented the Oakland Base Reuse Authority ("OBRA") and the Oakland Redevelopment Agency ("Agency") since 2001 in the legal work necessary to complete the transfer of property at the former Oakland Army Base from OBRA to the Redevelopment Agency of the City of Oakland ("Agency") and the Port of Oakland; and

**WHEREAS**, SMW's unique expertise in the area of the California tidelands trust laws, and its experience with statewide regulatory agencies, were key to ensuring that the Army Base tidelands trust exchange took place simultaneously with the Army Base land transfer in August 2006; and

**WHEREAS**, Since the transfer of Army Base property from OBRA to the Agency, Agency staff has required, and City staff continues to require, the assistance of SMW to complete certain matters at the Army Base relating to the State Lands Commission and the Bay Conservation and Development Commission; and

**WHEREAS**, In the professional services agreement between the Agency and SMW, the Agency waived any conflict of interest that has arisen or could arise from SMW's prior, current or future representation of clients with interests adverse to the Agency or the City of Oakland, except for any client whose interests may be adverse to OBRA, the Agency or the City of Oakland related to the closure, development and reuse of the Oakland Army Base; and

**WHEREAS**, the assets of the Agency, including the real property at the Oakland Army Base, have transferred to the City as of February 1, 2012; and

**WHEREAS**, because the City now owns the Army Base property, the City will need to adopt a similar conflict waiver in order for SMW's work on the Army Base to continue;

**WHEREAS**, the City Attorney's Office recommends that the City waive any conflict of interest that has arisen or could arise from SMW's prior, current or future representation of clients with interests adverse to the Agency or the City of Oakland, except for any client whose interests may be adverse to the Agency or the City of Oakland related to the closure, development and reuse of the Oakland Army Base, as described in the attached Exhibit 1; **NOW, THEREFORE, BE IT**

**RESOLVED**, That the City of Oakland hereby waives any conflict of interest that has arisen or could arise from SMW's prior, current or future representation of clients with interests adverse to the Oakland Redevelopment Agency or the City of Oakland, except for any client whose interests may be adverse to the Agency or the City of Oakland related to the closure, development and reuse of the Oakland Army Base, and adopts the form of waiver in the attached Exhibit 1.

IN SESSION, OAKLAND, CALIFORNIA, March 6, 2012

**PASSED BY THE FOLLOWING VOTE:**

**AYES - KERNIGHAN, NADEL, DE LA FUENTE, BROOKS, BRUNNER, KAPLAN, SCHAAF AND PRESIDENT REID**

**NOES -**

**ABSENT -**

**ABSTENTION -**

**ATTEST:** \_\_\_\_\_  
**LATONDA SIMMONS**  
City Clerk  
of the City of Oakland

**Exhibit 1**  
**Form of Waiver**

Consultant has represented the Oakland Redevelopment Agency ("Agency") (and prior to that, the Oakland Base Reuse Authority ("OBRA")) for many years in connection with Oakland Army Base matters. Those entities were informed of Consultant's representation of other past, present, or future clients with interests potential adverse to the City, and agreed to waive any potential conflicts of interest arising from such representation (except in connection with matters pertaining to the Oakland Army Base).

The City acknowledges that Consultant presently represents the Friends of Knowland Park and the California Native Plant Society in *Friends of Knowland Park et al. v City of Oakland*, (Alameda Super. Ct. Case No. RG11-586554), a matter relating to the Oakland Zoo, in which the interests of the clients are adverse to those of the City ("Zoo matter").

The City further acknowledges that Consultant presently represents the East Bay Regional Park District ("EBRPD") in connection with a proposal by Peralta Oaks Partners, LLC for a K-12 school located at 2955 Peralta Oaks Court, and in connection with a proposal for a Medical Cannabis Dispensary at 4709 Tidewater Avenue. In each of these matters, the interests of EBRPD are or may become adverse to those of the City.

The City further acknowledges that Consultant's representation of existing clients may involve present or future matters in which the City's interests are or may become adverse to those of the clients, including, but not limited to:

- The City of Alameda, the Alameda Community improvement Commission, and the Alameda Reuse and Redevelopment Agency on various land use matters including but not limited to development of the Naval Air Station Alameda and the Fleet Industrial Supply Center;
- The Cities of Livermore and Pleasanton in connection with the Altamont Landfill and the Altamont Landfill Environmental Mitigation Fee;

The City further acknowledges that Consultant has represented clients in past matters with interests adverse to the City, and who may wish to retain Consultant in future matters in which their interests are adverse to those of the City, including but not limited to the following:

- The Oakland Heritage Alliance in connection with historic preservation litigation against the City of Oakland;
- The Jack London Neighborhood Association in connection with various land use and development issues;
- The East Bay Community Law Center in connection with the City's proposed condominium conversion ordinance; and
- The Friends of Fruitvale Gardens in connection with the proposed Yu home at Fruitvale and Wrenn.

Notwithstanding the foregoing, it is desirable to the City that, following the dissolution of the Agency and the transfer of responsibility to the City as the Agency's successor, Consultant continue to be retained to work on Oakland Army Base matters because of Consultant's long experience with such matters and its expertise in connection with the public trust, hazardous materials, CEQA and related issues in the specialized context of military base conversion.

Consultant is not aware of and does not believe it has received any confidential communication from OBRA, Agency or the City in the Oakland Army Base matter that would be relevant to any of the above-mentioned matters. The above-mentioned matters are unrelated to the Oakland Army Base matter and are unlikely to result in Consultant obtaining any confidential information from the City relevant to Consultant's representation of its other clients in those matters.

However, the City's succession to Agency's professional services agreement with Consultant will put Consultant in a position of representing two clients whose interests are adverse (in the case of the Zoo matter) or potentially adverse (in the case of the other existing or potential future matters). This situation gives rise to the possibility of divided loyalty on the part of Consultant.

The City hereby gives its informed written consent to Consultant's simultaneous representation of the City and of the Consultant's past, present or future clients whose interests are or may be adverse to the City, including without limitation clients in connection with the above-mentioned matters, and agrees not to assert any conflict of interest or otherwise seek to disqualify Consultant from representing such clients in such matters, notwithstanding any existing adversity or any adversity that may develop in the future; provided however that the City does not give such consent with respect to Consultant's representation of a client in a matter pertaining to the Oakland Army Base.

The City waives any conflict of interest that has arisen or may arise from Consultant's prior, current or future representation of clients with interests adverse to the City of Oakland in connection therewith, including, but not limited to, the submission of comments on planning and environmental documents, presenting opposition in any form to planning and environmental documents, agreements with third parties and legislation, the filing of any administrative or judicial action of any kind challenging decisions made and actions taken and any other matters other than those pertaining to the Oakland Army Base; provided, however, that this waiver does not extend to representation of any client whose interests may be adverse to the City related to the closure, development and reuse of the Oakland Army Base, and Consultant agrees not to engage such representation adverse to the City as set forth herein which includes, but is not limited to the submission of comments on planning and environmental documents, presenting opposition in any form to planning and environmental documents, agreements with third parties and legislation, the filing of any administrative or judicial action of any kind challenging decisions made and actions taken and any other matters or actions pertaining to the Oakland Army Base.

As noted above, Consultant's representation of parties adverse to the City of Oakland is not likely to intersect with its representation of the City on matters pertaining to the Oakland Army Base. However, if Consultant anticipates that its representation of any party may conflict with its work on behalf of the City in connection with the Oakland Army Base, or that Consultant has received or will receive confidential information that from the City that could give rise to a conflict, Consultant will notify the City Attorney at the earliest opportunity.

Consultant has advised City that it may wish to seek the advice of independent counsel regarding the import of this consent and waiver.

The parties understand and agree that, notwithstanding this consent and waiver, the City may retain separate counsel in connection with the Oakland Army Base matter at any time.

Except as provided above, nothing here is intended to, nor waives, any applicable federal, state or local conflict of interest law or regulation.