City of Benson
City Council Communication

Regular Meeting **July 27, 2015**

To: Mayor and Council Agenda Item # 4

From: William D. Stephens, City Manager

Subject:

Discussion and possible action concerning a “Conflict Waiver” regarding representation of the City by Kutak Rock and Mesch, Clark & Rothschild arising out of the referral of Kutak Rock and the agreement between the City of Benson and El Dorado Holdings Inc for reimbursement of fees

Discussion:

The City Attorney, Mr. Paul Loucks has recommended this waiver be agreed upon to address and eliminate any possible or perceived conflict of interest between the City of Benson, Kutak Rock, Bond Attorney, and El Dorado Holdings Inc.

Staff Recommendation:

Council Pleasure

MESCH, CLARK & ROTHSCHILD P.C.
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Our File No. 20044-0001

July 22, 2015

Hon. Mayor and Council
City of Benson
120 W. 6th Street
Benson AZ 85602

RE Letter Agreement Between El Dorado Holdings and City

Dear Mayor King and Council:

At the July 27 meeting, the Mayor and Council will be reviewing a proposed letter agreement between the developer of the Villages at Vigneto and the City under which the developer agrees to pay the City's costs of reviewing an application to form a Community Facilities District. Included within the costs that will be paid by the developer are the legal fees of *both* Kutak Rock and Mesch Clark & Rothschild. This letter is written to you both to advise you of the conflict-of-interest this type of arrangement creates and to request a waiver of that conflict.

The Arizona Supreme Court has created a list of ethical rules which pervade the practice of law. Included within its rules is a requirement that lawyers

> not accept compensation for representing a client from one other than the client unless:
>
> (1) the client gives informed consent;
>
> (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and
>
> (3) information relating to representation of a client is protected [from the third-party paying the compensation].

Ariz. R. Supreme Court 42, ER 1.8(f). While we are confident that the Mayor and Council appreciate the inherent conflict in this situation and wish to proceed (as it was directed by Mayor and Council), as your lawyers that it is our duty to apprise

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John K. Mesch (1922-2005) • Tom R. Clark (1944-2001)

you that the fee arrangement implicates this rule and that you be allowed to affirm whether you wish to proceed.

Mayor and Council are also aware (but it should be formalized) that the firm of Kutak Rock was recommended to the City by the developer. While this referral does not in and of itself constitute a conflict of interest on Kutak Rock's part, we also wish to formalize an acknowledgment and waiver on this basis.

There can be a perception that someone who is paying for services may feel 'entitled' to receive at least information on the progress of the representation. This ethical rule, however, is designed to remind a lawyer receiving compensation from a third party not only that the third party is not the client but that the lawyer has an obligation to maintain the client's information confidential from the party paying the bill. Both law firms affected by this issue have proposed that the appearance of impropriety be reduced by requiring that the developer pay the money to the City instead of directly to the developer, but we also both believe that the underlying issue still exists. Although this conflict is inherent, both law firms that this arrangement affects not only recognize it but have dealt with it before and are confident that they can maintain their respective duties to the City. Both law firms are confident that they can put the City's interests ahead of the developer's interests and indeed ahead of their own interests. Both avow that they will maintain the City's confidentiality, especially as against the developer who additionally is the party with whom the City is negotiating the formation of the District. You should also know that neither law firm will have the ability under the governing ethical rules to advise the developer in any matter – even an unrelated matter, without first informing the City of the matter and presenting a similar request for a conflict waiver.

We will engage in this transaction against the developer if and only if the City provides its informed consent, acknowledged by your signature below. The City has the right to seek independent counsel to review this waiver. We are each committed to uphold our obligations to the City. If you have any questions or concerns, please do not hesitate to contact me.

Sincerely,

Paul A. Loucks
For Mesch, Clark & Rothschild, PC

Ken Guckenberger
Kutak Rock LLP

WAIVER OF CONFLICT

I am authorized to and do memorialize the City's wavier of any conflict of interest associated with representation by Mesch, Clark & Rothschild, P.C., and Kutak Rock, LLP, arising out of either the fact that the developer of the Villages at Vigneto referred Kutak Rock to the City or that the developer will ultimately be paying the lawyers' fees for all work they perform reviewing the developer's application to form a Community Facilities District. The City's Mayor and Council have been informed of the issues associated with the potential conflict of interest, both by the content of this letter and by the facts and circumstances surrounding the contemplated transaction with the developer.

By: _____ Date:_____