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LAW ALERT

BOE CLARIFIES ITS POSITION ON PILOT AGREEMENTS ENTERED INTO BY LOW INCOME HOUSING DEVELOPERS

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The State Board of Equalization (the “BOE”) issued a memo on March 20, 2013 (the “BOE Memo”) which clarifies its position on eligibility for the “welfare” property tax exemption when low income housing developers have entered into Payment in Lieu of Taxes (“PILOT”) Agreements. Some cities have required low income housing developers to enter into a PILOT Agreement in connection with a new low income housing development to offset city expenses directly related to the new development, such as added fire and police protection and infrastructure improvements.

Previously, the BOE stated that a developer who entered into a PILOT Agreement could not make the certification, pursuant to Revenue and Taxation Code Section 214(g)(2)(B), that the savings due to the welfare exemption were used to maintain the affordability or reduce rents of the low income units (the “Welfare Exemption Certification”). The BOE’s prior position was that making of PILOT payments meant that savings were not being used to maintain affordability or lower rents.

Consequently, over the past year, a number of low income housing developers who entered into a PILOT Agreement, have faced the loss of the entire welfare exemption for their developments, payment of back taxes and penalties. These sanctions would significantly jeopardize the ability for these low income housing developments to continue to operate and serve low income households.

Now, the BOE Memo (as found on this [link](#)) explains that, because of the difficulty in tracking savings for a development on a dollar for dollar basis and BOE’s view that the welfare exemption should be construed in a manner that increases the development of low income housing, the Welfare Exemption Certification can be made in certain instances even when PILOT is paid. The BOE reasons that, as long as the development is charging rents that qualify for the welfare exemption pursuant to a regulatory agreement, and the developer has a reasonable belief that the PILOT payments are used to pay for services and infrastructure improvements which benefit the low income tenants, developers can in good faith make the Welfare Exemption Certification. The BOE Memo mentions that a County Assessor may request a developer to verify that the PILOT payments benefit the tenants. Thus, developers and cities would be well advised to document likely services and costs when considering the use of PILOT Agreements. In addition, some affordable housing funding sources do not allow payment of PILOT, so such payments may be considered an unreasonable development barrier.

For more information on the BOE Memo or the welfare exemption please contact Luis Rodriguez, Amy DeVaudreuil or any other Goldfarb & Lipman attorney at 510-836-6336.

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