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July 2, 2025

VIA ELECTRONIC MAIL

Mr. Bobby Wilkinson
Executive Director
Texas Department of Housing and Community Affairs
221 East 11th Street
Austin, TX 78711

RE: TD HCA Applicant# 25210 – Culebra Apartments ("the **Project**") - Appeal

Dear Mr. Wilkinson:

Our Firm represents TX Culebra Apartments, LP ("Culebra") ("**Applicant**"), the applicant of the above Project. We have been requested by Applicant to appeal the Texas Department of Housing and Community Affairs' ("**TDHCA**") decision to terminate Applicant's 2025 9% Competitive Housing Tax Credit application (the "**Application**") due to two consultants listed in the Application being recommended for debarment April 11, 2025, over a month after the Full Application Delivery Date of February 28, 2025.

BACKGROUND

In 2024, Applicant's principals began the arduous process to conceptualize a multifamily senior living affordable housing project. They began the quest for property, funding partners, and the myriad professionals to make the vision become reality.

After extensive envisioning, searching, negotiating, committing, and assembling a team to bring their vision to fruition, they submitted the Application on February 28, 2025, the Full Application Delivery Date.

On April 11, 2025, you, as the Executive Director of TDHCA ("ED"), determined that debarment is warranted for two of the consultants listed in the filed Application. However, the debarment recommendation has not yet been heard by the TDHCA Board of Directors for its consideration. The hearing is set for the monthly Board meeting on July 10, 2025.

June 25, 2025, arrives with an Application termination notice based on the application consultants being debarred. To determine whether the Application warrants termination on the basis stated in such notice, it requires the statutes governing multifamily housing tax credit applications and TDHCA's debarment statutes be fully analyzed to properly apply them to this unique scenario.

Shackelford, McKinley & Norton, LLP

Dallas Austin Fort Worth Houston New Orleans

Three questions must be addressed to reach a proper conclusion:

- (1) When does a recommended debarment by the ED under 10 TAC Section 2.401(k) become an actual debarment?
- (2) Who or what is an ineligible debarred person or entity under 10 TAC Section 11.202(1)(A)?
- (3) What does the statute mean by “new” Department financing and assistance opportunities regarding debarred persons under 10 TAC Section 2.401(m)?

STATUTORY BACKGROUND

(1) When does a recommended debarment under 10 TAC Section 2.401(k) by the ED become an actual debarment?

Debarment becomes effective once the Board has made the determination that debarment is appropriate based on the facts, and the Board issues the Final Order of Debarment. 10 TAC § 2.401(m).

The ED makes a recommendation that debarment is warranted. Following that, the party recommended for debarment has seven days to appeal the recommendation to the ED. 10 TAC § 1.7(e)(1). Following that appeal period, TDHCA evaluates the appeal and, if it denies the appeal, the debarment recommendation must be taken to the next Board meeting for which the matter can be properly posted. 10 TAC § 2.401(l). Under the Texas Open Records Act, TDHCA must publish the matter on the agenda and publish the materials 72 hours before the Board meeting.

If the Board agrees with the debarment recommendation, it can accept or change the terms. The final terms, as determined by the Board, are incorporated into a Final Order of Debarment. The recommended debarment becomes an actual debarment when the Board issues the Final Order of Debarment on the day it makes the decision.

(2) Who or what is an ineligible debarred person or entity under 10 TAC Section 11.202(1)(A)?

An ineligible debarred person or entity is an Applicant, a Guarantor, or a Developer who is not acting as a consultant without control.

Under 10 Tex. Admin. Code Section 11.202(1), “an Applicant *may* be considered ineligible *if* any of *the criteria* in subparagraphs (A) - (N) of this paragraph *apply to those identified on the organizational chart* for the Applicant, Developer and Guarantor. (*emphasis added*)

Who is Ineligible?

“An Applicant is ineligible if the Applicant, Developer, or Guarantor has been or is barred, suspended, or terminated from participation in a state or Federal program....” 10 Tex. Admin. Code Section 11.202(1)(A).

Who is a Developer?

A Developer is “any Person entering into a contractual relationship with the Owner to provide Developer Services with respect to the Development and receiving the right to earn a fee for such services and any other Person receiving any portion of a Developer Fee, whether by subcontract or otherwise, ***except if the Person is acting as a consultant with no Control.*** The Developer may or may not be a Related Party or Principal of the Owner.” 10 Tex. Admin. Code Section 11.1(d)(34). (*emphasis added*)

Who is a Person?

A Person is “[w]ithout limitation, any natural person, corporation, partnership, limited partnership, joint venture, limited liability company, trust, estate, association, cooperative, government, political subdivision, agency or instrumentality, or other organization or entity of any nature whatsoever, and shall include any group of Persons acting in concert toward a common goal, including the individual members of the group.” 10 Tex. Admin. Code Section 11.1(d)(91).

What is Control?

“Control (including the terms ‘Controlling,’ ‘Controlled by,’ and ‘under common Control with’) is the power, ability, or authority, acting alone or in concert with others, directly or indirectly, to manage, direct, superintend, restrict, regulate, govern, administer, or oversee. As used herein ‘acting in concert’ involves more than merely serving as a single member of a multi-member body. A member of a multi-member body is not acting in concert and therefore does not exercise control in that role, but may have other roles, such as executive officer positions, which involve actual or apparent authority to exercise control. Controlling entities of a partnership include the general partners, may include special limited partners when applicable, but not investor limited partners or special limited partners who do not possess other factors or attributes that give them Control. Persons with Control of a Development must be identified in the Application.” 10 Tex. Admin. Code Section 11.1(d)(29).

Who has Control?

Multiple persons may be deemed to have Control simultaneously. Controlling individuals and entities are set forth in subparagraphs (A) - (E)

(A) For for-profit corporations, any officer authorized by the board of directors, regardless of title, to act on behalf of the corporation, including, but not limited to, the president, vice president, secretary, treasurer, and all other executive officers, and each stock holder having a 50% or more interest in the corporation, and any individual who has Control with respect to such stockholder.

(B) Regarding nonprofits - intentionally omitted

(C) Regarding trusts - intentionally omitted

(D) For limited liability companies, all managers, managing members, members having a 50% or more interest in the limited liability company, any individual Controlling such members, or any officer authorized to act on behalf of the limited liability company.

(E) For partnerships, Principals include all **General Partners**, and Principals **with ownership interest** and special limited partners **with ownership interest** who also possess factors or attributes that give them Control. (*emphasis added*)

10 Tex. Admin. Code Section 11.1(d)(29).

(3) What does the statute mean by “new” Department financing and assistance opportunities regarding debarred persons under 10 TAC Section 2.401(m)?

“New” Department financing and assistance opportunities mean those arising, at the earliest, after a recommendation for debarment by the ED and during the period of debarment.

10 TAC § 2.401(m) states, “Until the Responsible Party's Debarment referral is fully resolved, the Responsible Party may not participate in **new** Department financing and assistance opportunities.”

The term “new” is not a defined term. When a statute does not define a term, we presume the Legislature intended for the term to have its ordinary meaning, which we determine by looking to a term’s common usage. In common usage, “new” is understood to mean, “Not existing before; made, introduced, or discovered recently or now for the first time.” (Oxford English Dictionary).

The concept of “new” necessarily requires relation to something already in existence or a point in time after which all things are “new.” The date the ED makes a recommendation for debarment is the earliest point in time and status change date, after which, Department financing and assistance opportunities are new.

APPLICATION OF THE STATUTES

The termination letter states that the Application “is ineligible for funding, as a debarred party may not participate in new Department financing and assistance opportunities until the debarment is fully resolved.” This reasoning conflates multiple concepts governed by statute. The first concept is when debarment begins, the second is what constitutes “new Department financing and assistant opportunities” and the third is who is an ineligible party included in a project team.

Has Debarment Begun?

Debarment has not begun. The Board has not heard the debarment recommendation matter and has not issued a Final Order of Debarment for Bill Fisher and Sonoma Housing Advisors, LLC, the (“Application Consultants”).

The basis for the debarment recommendation for the Application Consultants does not result in mandatory debarment, therefore, the Board is not required to agree with the TDHCA staff’s recommendation for debarment. The Application Consultants will not be debarred unless and until the Board enters a Final Order of Debarment with the terms of debarment.

When is an opportunity new?

The point in time after which all things are new is, at the earliest, when the ED makes a recommendation for debarment. The prohibition from participation applies until the recommended debarment is fully resolved by either being dismissed or the Board issuing a Final Order of Debarment. Therefore, *new* opportunities arise after April 11, 2025, when the ED sent the recommendation for debarment notice.

The Application is not a new opportunity. It was filed February 28, 2025, well before the ED’s debarment recommendation on April 11, 2025. In fact, the project concept began months before the Application was filed. The Application was in existence and already filed, working its way through TDHCA’s process, when the ED determined debarment was warranted.

Are the Application Consultants Ineligible Entities if Debarred?

The Application Consultants are not ineligible entities even if they are debarred at the July 10, 2025, Board meeting. The termination letter states that the Application is ineligible for funding due to a debarred party participating. However, that interpretation of ineligibility is

superficial. The Application Consultants are not the Applicant or Guarantor. They are not Developers either because they are *acting as consultants with no Control*.

Instead, the Application Consultants to the Developer are persons who do not have control because neither is a manager, a member, a general partner, or an owner in the Applicant, Developer, or Guarantor. Therefore, the Application Consultants are not ineligible parties *in this role as consultants without control* due to debarment even if the Board issues a Final Order of Debarment.

The Application Consultants' participation in the project does not disqualify the Application because they are not ineligible entities.

IMPLICATIONS

The rules do not discuss the logistics of a debarment recommendation arising after an application is filed and it is easy to say a debarred party is an ineligible entity. However, the impact on an application should reasonably be based on what was known at the time of the Application. This aligns with the debarment rules in which debarred parties are expected to complete their existing projects in process. Defining what is "new" based on the ED's recommendation of debarment (at the earliest) is consistent with the existing approach to tie breaker points pursuant to 10 TAC §11.7(2) where the determination is made based on *what was known at the time the application was submitted*.

Basing the Application termination on a debarment that has not occurred creates problems. If the Board does not debar the Application Consultants, the Application will have been improperly terminated. There is no mechanism to restore the Application's status due to an erroneous termination after the appeal period ends. This possible scenario shows the fallacy of terminating an Application, that is timely filed before a recommended debarment arises, before a Final Order of Debarment is issued.

If the debarment had occurred prior to filing the Application, the Applicant could have changed Application Consultants. Applicants may change their architect, engineer, attorney and any other professional on the application after filing because compelling individuals to perform work is enslavement. Applicants must remove an individual listed in an application if the person dies. Architects and engineers are typically consultants without control working for the Developer. This is similar to talking to several architects and attorneys during the lengthy process to compile and ready an application for filing. An applicant and developer are talking to multiple service providers to ensure they find the best party to do the work. It is reasonable to later determine that a professional does not have an aligned vision with the applicant, the two discontinue working together, and the Developer must find a replacement. There is no statute or TDHCA rule requiring termination of an application if a consultant listed in the application dies. Only a change of parties with Control requires consent from TDHCA. 10 TAC § 10.405, 10 TAC § 11.1(d)(34).

Here, the Application Consultants are consultants (like an architect, attorney, engineer, or application consultant) that can be removed by the Applicant without changing the Application, regardless of whether they are debarred. Further, they are not ineligible entities if debarred because they are consultants without control working for the Developer.

ALTERNATIVES TO TERMINATION

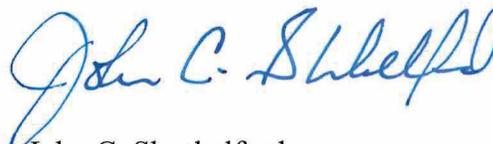
Understanding that the goal of the prohibition of debarred parties participating in projects for financial gain is to deter bad behavior, it is reasonable for TDHCA to require that the consultants no longer participate in the Project and do not receive a fee out of the government funding.

In the Application as submitted, the consultants at issue are Application Consultants so their work was substantially complete by February 28, 2025, when the Application was submitted. The Applicant can easily remove the Application Consultants without disturbing the project. Due to the Application Consultants not having control and not being part of the organization chart, their removal is not a material change to the Application.

Where a recommended debarment would make a consultant on an application ineligible, an amendment could be used to exclude the ineligible party without materially changing the application. The change to the Application would be to remove the consultant and their fees. The change does not impact other parts of the Application.

In closing, we respectfully request that you reinstate the Application. We greatly appreciate your careful consideration of this appeal. This is a unique issue and is not foreseeable to an Applicant working with consultants that have no prior sanctions that would suggest their involvement could become problematic. If you determine that the request does not merit granting it, then Applicant hereby requests that your decision be appealed to the Board and that this letter be made the basis for the appeal of your decision for consideration at the July Board meeting.

Very truly yours,



John C. Shackelford

cc: Beau Eccles, Esq. (*via email*)
Cody Campbell (*via email*)
Lisa Fisher (*via email*)