February 5, 1992

REPORT TO THE HONORABLE
MAYOR AND CITY COUNCIL

THREE-PARTY AGREEMENTS FOR THE PREPARATION OF ENVIRONMENTAL IMPACT REPORTS

This report responds to a question from the Council regarding the legality and feasibility of using three-party agreements for the preparation of environmental impact reports (EIRs) for private projects. The question arose because of certain interpretations by the Fair Political Practices Commission (FPPC) of the Political Reform Act which would limit using three-party agreements for private projects.

Typically, a three-party agreement to prepare an EIR would be structured as a joint agreement between a developer-applicant, a consultant and the City. The developer would hire and pay the consultant and the City would supervise the preparation of the EIR by the consultant. This allows the City to focus on the substantive preparation of the EIR without being responsible for contract administration and related personnel costs and duties.

Three-party agreements are authorized under Section 15084 of the Guidelines to the California Environmental Quality Act (CEQA) (Public Resources Code section 2100 et seq.). Section 15084 also authorizes preparation of EIRs by or under contract to the agency, by another public or private agency, or by the applicant who then furnishes the EIR to the City for its independent review.

From a strict contract law viewpoint, three-party agreements are legal. Under FPPC interpretations of Government Code sections 87100 and 87103, however, because the consultant is supervised by the City and paid by the developer, the consultant becomes a "public official" and the developer becomes a "source of income" to that consultant. Consequently, the consultant as a "public official" is prohibited from doing any work on a project for which it receives income from a "source of income" other than the City. Penalties and sanctions could be imposed by the FPPC upon the consultant under this interpretation. Consequently, though legal, the feasibility of practically using a three-party agreement to prepare an EIR is questionable.

The FPPC is proposing regulations that alleviate these concerns, so long as the public agency independently selects the consultant and administers the contract for the preparation of the EIR. (Proposed section 18704.6, FPPC Regulations, 2 Cal. Code of Regs.) Further, the City is allowed to charge the developer for the EIR document preparation without that payment constituting a "source of income" to the consultant

as a result of recent amendments to Government Code section 87103.6. However, the net effect is that the City is directly contracting with the consultant to prepare the EIR.

As noted, other options available to the City also include the preparation of the EIR by the applicant for submission to the City for independent review or revision. This is permissible under both section 15084 of the CEQA Guidelines and the recent case of Friends of La Vina v. County of Los Angeles, 232 Cal. App.3d.1446 (1991). This is also consistent with existing practice.

Regardless of the option chosen, the public agency is ultimately responsible for determining that the EIR is objective, accurate and complete. The FPPC interpretations affecting three-party agreements may effectively preclude their use as an option. If those interpretations are changed or legislation is adopted to alter this result, we can advise you further.

Respectfully submitted,

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