DATE: October 20, 1986

TO: Tibor Varga, Senior Civil Engineer,
Engineering Planning Section, Water Utilities
Department
FROM: City Attorney
SUBJECT: Agreement with Flower Hill

On November 16, 1983 the City of San Diego entered into an agreement with collective entities designated as "Flower Hill" which guaranteed Flower Hill an additional sewer hookup capacity of 51 equivalent dwelling units in return for receiving all of Flower Hill's interest in two (2) reimbursement agreements. The agreement did contain a clause that if the sewer system could not be completed by December 31, 1985, the agreement would be "null and void."

The time has passed without completion and you now seek guidance on the enforceability of this agreement. Flower Hill asserts that "null and void" means voidable at the election of each party and no such election has been made. While null and void can be construed to mean voidable at the election of the party, Corbin, Contracts, Sec. 166 (1963); Fletcher v. United States, 303 F.Supp. 583, 586 (N.D. Ind. 1967), we need not base our advice on this basis.

On March 20, 1986 the Water Utilities Department received a communication from Flower Hill requesting an extension of the agreement and referencing some prior conversations with the utilities staff.

> This company ... agree(s) with the staff of the water utilities department that it is in the best interest of all parties that the agreement be reaffirmed at this time.
>
> Letter from Flower Hill
> dated March 20, 1986

This letter was directly followed by a handwritten note.

> Please prepare necessary agreements.
>
> Note from Milon Mills
> dated March 26, 1986

The note generated further correspondence to Flower Hill resulting in a reply.

> Enclosed please find the fully executed supplement to the agreement between Flower Hill and the City of San Diego as per your request.
>
> Letter from Flower Hill to
> Tibor Varga Emphasis added.

In light of these actions which would clearly lead a reasonable man to believe that the City would consent to the extension, we believe the contract could be enforced under the doctrine of promissory or equitable estoppel. That doctrine has been held in similar time extension cases to bar denial of the extension where oral representations could reasonably be relied upon.

> The vital principle is that he who by his language or conduct leads another to do what he would not otherwise have done shall not subject such person to loss or injury by disappointing the expectations upon which he acted. Such a change of position is sternly forbidden.
>
> Carpy v. Dowdell
> 115 Cal. 667, 687 (1897)
>
> And likewise, while it is settled in view of section 1698 of the Civil Code which provides that a written contract may be altered by a contract in writing, or by an executed oral agreement and not otherwise, . . . nevertheless, it is also true that the facts of a particular case may give rise to an equitable estoppel against the party who denies the verbal modification. In Panno v. Russo, 82 Cal.App.2d 408 186 P.2d 452, a case involving an oral extension of the time fixed in a written sales-contract for payment of the price by the buyer, the court
>
> reiterates the rule that section 1698 is subject to the exception that a party to the contract may be estopped by his conduct or representations from denying an oral modification.
>
> Wade v. Markwell & Co.
> 118 Cal.App.2d 410, 421 (1953)

In light of the above and applying the referenced instances of representations of an intended extension, we believe that enforcement could be compelled. Notwithstanding the fact that financial considerations have changed, we believe an amendment extending this agreement should be processed to reflect the previously relied upon representations.

JOHN W. WITT, City Attorney
By

Ted Bromfield
Chief Deputy City Attorney

TB:js:453.4(x043.2)
cc John P. Fowler,
Assistant City Manager
ML-86-125