MEMORANDUM OF LAW

DATE: August 27, 1991

TO: Dave Vitkus, Deputy Director, Clean Water Program

FROM: City Attorney

SUBJECT: Implications of Senate Bill 198

This is to respond to questions raised in your memo of March 25, 1991, addressed to Chief Deputy City Attorney Ted Bromfield, regarding SB 198 (Chapter 1369) and its effect on the operations of the City's Clean Water Program. The bill amended and added provisions to the Insurance and Labor Codes (particularly the latter) which relate to occupational safety. Very generally, the amendments concern a requirement that employers establish a written injury prevention program, and that they provide training to employees relative to safe work practices. These amendments fit into the context of the previously existing provisions of the California Occupational Safety and Health Act of 1973 ("Act"). As such, they are part of the basic legislative scheme on the topic of occupational safety, which is the delegation of regulatory authority to the Occupational Safety and Health Standards Board--commonly known as CAL/OSHA. Upon this background you ask two questions about SB 198:

1. What, if any, are the responsibilities, duties, and liabilities to the City as an owner contracting with a contractor to perform construction work on City property?
2. Does the presence of City employees and consultants on a construction site impact or change the City's responsibilities or duties under the law, particularly if these persons witness violations of safety orders?

The following explanation will reply to both questions:

Initially, it should be noted that SB 198 does not itself enlarge the class of persons for which the City, as an employer, is answerable under the Act. That is, all liability under the amended Act is still premised on the existence of an employer-employee relationship. The City remains liable only insofar as it is an employer.

The definition of the term "employer" is given at Labor Code section 6304. That definition is stated as being identical to the one applicable to Workers' Compensation laws, being a cross-reference to Labor Code section 3300:

"Employer" means:

(a) The State and every State agency.

(b) Each county, city, district, and all public and quasi public corporations and public agencies therein.

(c) Every person including any public service corporation, which has any natural person in service.

(d) The legal representative of any deceased employer.

The definition of "employee" is given at Labor Code section 6304.1, which provides that the term "means every person who is required or directed by any employer to engage in any employment, or to go to work or be at any time in any place of employment."

These definitions alone are not sufficient to answer the question whether a contractor or its employees may in turn be considered employees of the City when the construction contract is the sole basis of the relationship. To answer this question, the factors of direction and control must be considered.

First, let us say that your concern for the City's liability under the Act is justified. Labor Code section 6304 was "intended to enlarge the meaning of the word 'employer' beyond its usual meaning in cases involving the safety of employment" Williams v. Pacific Gas & Electric Co., 181 Cal. App. 2d 691, 709 (1960).

> Where an owner of real property contracts to have work done on his property such property becomes a place 'where employment is carried on' and hence a place of employment under the definition of section 6302. Since the owner has 'custody and control' of his own property, he then has custody and control of a 'place of employment' and hence is an 'employer' within the definition of section 6304.

Id. at 708.

However, despite the foregoing principles, mere ownership of the property upon which the contract is being performed is not alone sufficient to establish that the owner is controlling the place of employment and that he is therefore an employer.

> An owner of premises who does nothing more with respect to the work of an independent contractor than exercise general supervision and control to bring about its satisfactory completion is not an employer within the meaning of the safety provisions of the Labor Code. It is not the responsibility of such an owner to assure compliance with all applicable safety provisions including those relating to the manner in which the independent contractor performs the operative details of the work.

Woolen v. Aerojet General Corp., 57 Cal. 2d 407, 413 (1962). See also, Van Arsdale v. Hollinger, 68 Cal. 2d 245 (1968); Jean v. Collins Construction Co., 215 Cal. App. 2d 410 (1963).

On the other hand, "it is settled that if a general contractor or owner not only exercises general supervision over a job in order to

achieve its satisfactory completion but also controls the premises or the instrumentality causing the injury, he is an employer within the meaning of this section Labor Code section 6304." Morgan v. Stubblefield, 6 Cal. 3d 606, 618 (1972).

Thus, to answer your questions about SB 198, the City will be susceptible to its provisions only if it assumes the role of employer by controlling the mode and manner of work on a construction site. Although the City retains ownership of a particular site, it will not be held to be a "Labor Code employer" if it exerts only general supervision to ensure completion of the work. The same may be said of the City's consultants, who as agents of the City might be generally supervising on a site. It is only when the City or its agents begin to direct the contractor on how to perform the work that problems of liability under occupational safety laws may arise.

We therefore advise that SB 198 will not materially alter the City's duties in its typical construction contracts. The City's current contracts provide that the contractor assumes possession and control of the site, and that the City's agents may enter the premises for general supervisory purposes. The City reclaims possession when the job is finished. As long as City agents are not directing the contractor on how to proceed with the work, but are only advising the contractor on what is intended in the way of a finished product, the City will not be found to be a "Labor Code employer."

As a concluding concern, if City agents witness violations of safety orders or regulations while performing general supervisory duties, such observations should be made known to the contractor's superintendent. Since the contractor is the employer, the fact of a perceived violation should be communicated as an observation only; the employer's duty to remedy the situation with a proper directive should not be assumed by City staff. The independent contractor thus will retain liability for the practices which concern its own employees, and the City will not project itself into the role of employer.

We hope this discussion has been helpful in answering your concerns. We would be pleased to answer any further questions you may have on this subject.

JOHN W. WITT, City Attorney
By
Frederick M. Ortlieb
Deputy City Attorney

FMO:skh:500(x043.2)
ML-91-66