MEMORANDUM OF LAW

DATE: October 2, 1991

TO: Mary Rea, Assistant Director, Risk Management Department

FROM: City Attorney

SUBJECT: City Liability For Work Performed By Independent Contractors

Recently supervisory and safety staff members from the Water Utilities Department have observed significant safety violations and hazardous workplace conditions at job sites where work is being performed by independent contractors on behalf of the City. You have asked what, if any, liability will accrue to the City for the acts or omissions of independent contractors. The hypotheticals you pose question the liability of the City for employees of the independent contractor, City employees and third parties. Questions of City liability in the wide variety of situations you pose are extremely technical and cannot be answered in a vacuum or without additional information. Liability will vary according to the specific facts of each case. This memorandum should, therefore, be viewed only as a basic outline. Individual questions should be posed on a case by case basis.

There is no common law governmental tort liability in California and a public entity is not liable for any act or omission of itself, a public employee or any other person unless otherwise provided by statute. Gibson v. City of Pasadena, 83 Cal. App. 3d 651 (1978). The basis of statutory liability for public entities for the tortious acts or omissions of independent contractors is found in Government Code section 815.4. It reads:

> A public entity is liable for injury proximately caused by a tortious act or omission of an independent contractor of the public entity to the same extent that the public entity would be subject to such liability if it were a private person. Nothing in this section subjects a public entity to liability for the act or omission of an independent contractor if the public entity would not have been liable for the injury had the act or omission been that of an employee of the public entity.

The general rule is that an employer of an independent contractor is not liable for the negligence of the contractor or its employees. Widman

v. Rossmoor Sanitation, Inc., 19 Cal. App. 3d 734, 743 (1971). However, the exceptions are so numerous and they have so far eroded the general rule that it can now be said that the rule is "general" only in the sense that it is applied where no good reason is found for departing from it. Van Arsdale v. Hollinger, 68 Cal. 2d 245, 252 (1968). Initially, exceptions to the rule where an employer was held legally responsible for the death or injury of an independent contractor's employee were limited to situations in which the employer had some active participation. For example:

> (1) Where the employee was injured by some condition of the owner's premises over which the owner retained control and where the owner's duties to the employee were those owing to a business invitee; (2) where the owner furnished the equipment, or was obligated by contract to do so, and the equipment proved to be defective, causing injury to the employee; (3) where the owner actively interfered with or arbitrarily assumed to direct the employees as to the manner and method of performing the work; and (4) where the work being accomplished when the accident occurred constituted a nuisance.

Widman at 744.

Now, however, one of the most frequently cited exceptions to the general rule of non-liability of the employer of an independent contractor, and the exception that best reflects your hypothetical situations, is known as the "peculiar risk doctrine:"

> California has adopted the doctrine as expressed in sections 413 and 416 of the Restatement Second of the Law of Torts (hereafter Restatement). Section 416 states: 'One who employs an independent contractor to do work which the employer should recognize as likely to create during its progress a peculiar risk of physical harm to others unless special precautions are taken, is subject to liability for physical harm caused to them by the failure of the contractor to exercise reasonable care to take such precautions, even though the employer has provided for such precautions in the contract or otherwise.' Section 413 imposes direct liability on the employer when he has made no provisions in the contract or otherwise for the taking of required precautions.

Castro v. State of California, 114 Cal. App. 3d 503, 510 (1981).

Under the "peculiar risk" doctrine, the City need only have knowledge of a hazard or defect to incur liability. In your memorandum you list as examples a number of safety violations which have already been observed by City personnel. It is interesting to note that many of these same issues have already been addressed by the courts and have been found to fall within the parameters of the "peculiar risk" doctrine. The following were collected and summarized in Griesel v. Dart Industries, Inc., 23 Cal. 3d 578, 586 (1979):

> The risk of being struck by an automobile while eradicating traffic lines on a busy street (Van Arsdale v. Hollinger, supra, 68 Cal.2d at p. 254), the risk of being run over by dump trucks backing up during road construction work (Anderson v. L.C. Smith Constr. Co. (1969) 276 Cal.App.2d 436, 445-446 81 Cal.Rptr. 73), the risk of explosion while painting the inside of a tank with a volatile paint (Woolen v. Aerojet General Corp., supra, 57 Cal.2d at p. 410 20 Cal.Rptr. 12, 369 P.2d 708; McDonald v. City of Oakland (1965) 233 Cal.App.2d 672, 677-678 43 Cal.Rptr. 799), the risk of falling while working on a 10-foot high wall (Morehouse v. Taubman (1970) 5 Cal.App.3d 548, 557-558 85 Cal.Rptr. 308), or on a 20-foot high bridge (Fonseca v. County of Orange (1972) Cal.App.3d 361, 365-366 104 Cal.Rptr. 566), the risk of electrocution while operating a crane near high voltage wires during bridge construction work (Walker v. Capistrano Saddle Club (1970) 12 Cal.App.3d 894, 900 90 Cal.Rptr. 912), and the risk of a cave-in while working in a 14-foot deep trench (Widman v. Rossmoor Sanitation, Inc. (1971) 19 Cal.App.3d 734, 744-747 97 Cal.Rptr. 52).

In each of these cases liability was imputed to the employer of the independent contractor for failure to employ specific safety standards. Thus, in instances where the state has promulgated specific safety standards for a given type of work or condition, one can assume that the state has recognized a "peculiar risk" in the job thus regulated. Given the City's knowledge of safety violations very similar to those listed, it is reasonable to expect the City must take affirmative steps to rectify the situation if it is to avoid liability.

The distinction you make regarding injuries to City employees, independent contractor employees or members of the public does not affect the City's potential liability. For example, in Cappa v. Oscar C.

Holmes, Inc., 25 Cal. App. 3d 978 (1972) a sixteen (16) year old boy, not an employee of the City or the independent contractor, was awarded damages from both defendants for the independent contractor's failure to provide hand and foot railings as required by the Department of Industrial Relations. Note that the statute says the public entity will be liable "to the same extent it would be liable if it were a private person." Liability will be established on a case by case basis. It is the nature of the facts that determines liability, not the employment status of the parties.

In addition to the "peculiar risk" doctrine, the City may also incur liability for the acts of independent contractors under the mandatory duties imposed by Government Code section 835. It reads:

> Section 835.When public entity liable for injury caused by dangerous condition of property
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> Except as provided by statute, a public entity is liable for injury caused by a dangerous condition of its property if the plaintiff establishes that the property was in a dangerous condition at the time of the injury, that the injury was proximately caused by the dangerous condition, that the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred, and that either:
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> (a) A negligent or wrongful act or omission of an employee of the public entity within the scope of his employment created the dangerous condition; or
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> (b) The public entity had actual or constructive notice of the dangerous condition under Section 835.2 a sufficient time prior to the injury to have taken measures to protect against the dangerous condition.

In the hypotheticals you pose, you indicate the City has actual knowledge of the dangerous conditions. Thus, under Government Code section 835 when read in conjunction with the Government Code section 815.4 the City would be liable for known dangerous conditions caused by the acts or omissions of independent contractors.

Additionally, absent actual notice, the Courts have said: "Constructive notice may be imputed if it can be shown that an obvious danger existed for an adequate period of time before the accident to have permitted the public entity, in the exercise of due care, to discover and remedy the situation." Carson v. Facilities Development Co., 36 Cal. 3d 830, 842 (1984).

For example in Straughter v. State of California, 89 Cal. App. 3d 102

(1979):

> A jury returned a verdict in favor of the plaintiff, impliedly finding that the defendant public entity had constructive notice of the existence of ice on a highway. The Court of Appeal upheld the jury's finding and the judgment, even though the defendant's witnesses had testified that they had not seen ice on the highway prior to the accident, and expert testimony indicated that the icy conditions had begun developing less than four hours before the accident.

Carson at 843.

A second, even more attenuated, imputation of constructive notice can be found in the case of Stanford v. City of Ontario, 6 Cal. 3d 870 (1972). In Stanford the City was not the employer of the independent contractor. The City had merely issued a permit for the construction to be performed and a private citizen engaged the services of the independent contractor. Nevertheless, in overturning a judgement of nonsuit against the City, the Court said at page 882:

> Section 835.2, as stated earlier in this opinion, requires a plaintiff seeking to establish constructive notice, to prove that the condition (1) existed for "such a period of time" and (2) "was of such an obvious nature," "that the public entity, in the exercise of due care, should have discovered the condition and its dangerous character." The Legislative Committee Comment (Senate) further amplifies the requirements of constructive notice in section 835.2 as follows: 'Under subdivision (b) the plaintiff has the burden of proving that the public entity had constructive notice. In addition, the subdivision makes clear that evidence is admissible to show (1) what would constitute a reasonable inspection system, and (2) what inspection system was used by the public entity. The admission of this evidence is necessary so that the issue of whether or not a public entity had constructive notice will turn on whether a reasonable inspection system would have disclosed the existence of the condition. Once notice has been established, section 835, subdivision (b) imposes the additional burden of showing that the public entity received the constructive

> notice 'a sufficient time prior to the injury to have taken measures to protect against the dangerous condition.' (Emphasis in original.)

The Court went on to say:

> There is sufficient evidence in the record to support a finding by a jury that a reasonable inspection would have disclosed the existence of the unshored and unsloped excavation; that there would have been adequate time to take preventive measures; and that the City had constructive notice of the dangerous condition upon its property.

Carson at 884.

It is evident from reading the myriad of cases on both the peculiar risk doctrine and the mandatory duty issue that the Courts are willing to impute liability in a wide variety of attenuated circumstances. Thus, we recommend that construction contracts include language which indicates the City expects its independent contractors to comply with all state and locally mandated safety programs, as well as any applicable industry standards. Such language will put contractors on notice of City expectations. It will not, however, absolve the City of liability. As the Van Arsdale, court said "the City is liable for the failure of the independent contractor to take special precautions even though it has provided in its contract for the taking of the precautions." Nevertheless, the inclusion of such language may allow the City to halt work when it perceives flagrant violations of safety standards. Additionally, we recommend that contractors who repeatedly ignore OSHA or industry standards, not be allowed to participate in City contracts until they have demonstrated a willingness to fully comply with regulatory safety standards.

You have also asked if the City would have rights of subrogation against a contractor should the City incur liability as a result of acts or omissions by the contractor. Broadly defined, subrogation is the substitution of one person for another. Thus, if the City had subrogation rights against the contractor, the contractor would be substituted for the City as the tort feasor, and would therefore be subject to any liability incurred as a result of its own acts or omissions. Subrogation is generally considered to be a creature of equity and is administered to secure justice between the parties.

Where a contract exists between the City and an independent contractor, indemnity is a more appropriate form of relief than subrogation because while subrogation is a creature of equity, indemnification rests on privity of contract. All contracts have, or should have indemnification and hold harmless clauses for the protection of the City. However, even with the inclusion of such clauses, the issue of City liability with respect to the actions of independent contractors

is frequently litigated by this office and due to the expanding areas of liability indemnification and hold harmless clauses do not adequately protect the City.

Additionally, while workers' compensation laws took care of injuries to employees in the past, the courts have begun to recognize that workers' compensation does not always adequately compensate injured workers.

As the court noted in Widman v. Rossmoor Sanitation, Inc., 19 Cal. App. 3d 734, 747 (1971):

> It is common knowledge that workmen injured or killed in construction work do not receive full compensation under the Workman's Compensation Act for damages that they sustain, notwithstanding the commendable purpose of such legislation. Consequently, a portion of said damages should be allocated in the land developer or City. Lastly, the public has an interest in the prevention of accidents such as the one which occurred herein, and has a right to insist that safety precautions be taken by the land developer, and in the event he fails to conform to safety requirements, resulting in injury or death, that the victims be adequately compensated so as not to become a public charge.

This language was later reiterated in Castro v. State of California, 114 Cal. App. 3d 503, 515 (1981). In the Castro case, the defendant was a public entity and the court had no difficulty in imputing liability to the state for the independent contractor's failure to follow industry safety standards.

Thus, while workers' compensation and hold harmless clauses may mitigate some of the City's liability, these devices in no way guarantee that the City is immune from all liability.

The questions you raise concerning Senate Bill 198 present a different issue. Briefly, this bill requires employers to promulgate written safety programs for the benefit of employees, and to train employees to ensure adherence to the procedures. While the City may be defined as an employer for purposes of liability, it is not an employer of the employees of independent contractors for purposes of Senate Bill 198. While the City has a duty to its own employees under SB 198, it would be ludicrous to assume that the City must develop programs for every independent contractor with which it contracts. To the extent that the issue of City liability was addressed by Deputy City Attorney Frederick M. Ortlieb in his Memorandum of Law dated August 27, 1991, it should be noted that liability only in connection with the mandates of Senate Bill 198 was considered by that Memorandum.

Penal Code section 387, formerly Assembly Bill 2249, provides for criminal penalties for managers and supervisors who fail to report known hazards or safety violations in the workplace to the appropriate agency. The statute is known as the "Corporate Criminal Liability Act." Under ordinary rules of statutory construction "where a statute enumerates things upon which it is to operate it is to be construed as excluding from its effect all those not expressly mentioned." People v. Mancha, 39 Cal. App. 3d 703, 713 (1974). Thus the question to be answered is: Is the City covered by this statute? (Note that it is not actually the City that incurs criminal liability, it is the City employee functioning as a manager or supervisor who would be found in violation of the statute.) The legislation was authored by Terry Friedman (D. Sherman Oaks) and sponsored by the Los Angeles District Attorney's office. In discussions with the City's lobbyist in Sacramento, Assemblyman Friedman indicated the bill was intended to apply to public entities. Additionally, in response to questions concerning which entities are subject to the Act, the District Attorney provided the following answers:

> The Act applies only to corporations and managers having authority in or as a business entity. A public entity is not covered unless it is incorporated. A manager with a public agency may be covered if the entity functions as a business entity. For example, a manager with a municipal utility selling water or power would be covered if he or she has the necessary responsibility under the Act. (Emphasis added.)
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> Again, a consultant or contractor must meet the definition of manager under the Act to be subject to liability. The law only holds responsible a corporation or a person who is a manager, as defined by the Act.

Manager is defined in the following manner.

> (1) "Manager" means a person having both of the following:
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> (A) Management authority in or as a business entity.
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> (b) Significant responsibility for any aspect of a business which includes actual authority for the safety of a product or business practice or for the conduct of research or testing in connection with a product or business practice.

Under the Home Rule provision of the California Constitution Article XI section 5 and pursuant to San Diego City Charter section 1, the City is a municipal corporation. Thus, whether a City safety inspector or

safety engineer would be considered managers for purposes of the Act would be a question of fact based upon the particular duties he or she is performing. It appears, however, that the potential for criminal liability exists to the extent the City is functioning as a seller of goods, as it does in certain areas within water utilities. It is unclear at this time whether services such as those provided by waste management would also subject the City to liability.

The statute took effect in January 1991, thus there is no case law which interprets its specific applications. It is reasonable to assume that violations by independent contractors could be imputed to the City through Government Code section 815.4, particularly in instances when the City has City inspectors at the work site. In the instances you note in your memorandum which fall within the parameters of Penal Code section 387, we advise that City personnel inform CAL/OSHA pursuant to Penal Code section 387(a)(2)(A) which states that managers must: "(A) Inform the Division of Occupational Safety and Health in the Department of Industrial Relations in writing, of known hazards unless the corporation or manager has actual knowledge that the division has been so informed."

Additionally, the contractor should be informed that CAL/OSHA has been notified and affected employees must be warned pursuant to Penal Code section 837 (a)(2)(B). Contracts which have been let to known violators of safety standards should be reviewed. If language in the contract shows that contractors have agreed to comply with safety regulations, the City may wish to halt work for the protection of the employees.

CONCLUSION

Potential liability, both civil and criminal, exists for the City due to the acts or omissions of independent contractors doing work on behalf of the City. Affirmative steps should be taken by the City to correct known dangerous conditions and flagrant safety violations or work by the independent contractors should be halted. In addition to the potential liability issues raised by your questions, we feel the City has an ethical duty to ensure workplace safety for all workers performing jobs for the City. This is true regardless of whether the workers are employees of the City or of an independent contractor. If we can be of further assistance in this area, please feel free to contact us.

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