

DEPARTMENT OF HOUSING AND COMMUNITY DEVELOPMENT

Division of Legal Affairs

1800 Third Street, Suite 440
P.O. Box 952052
Sacramento, CA 94252-2052
(916) 323-7288
FAX (916) 323-2815



November 3, 2004

MEMORANDUM

FROM: Legal Affairs Division

SUBJECT: California Constitution Article XXXIV Guidance

This memorandum addresses the applicability of Article XXXIV ("Article 34") of the California Constitution to housing projects funded by the Department of Housing and Community Development ("HCD" or "Department"). Specifically, the memorandum provides guidance to applicants and their counsel as to the information and analysis that should be provided to support a conclusion that a rental housing project either is exempt from Article 34, or has sufficient local Article 34 authority.

HCD, as a state agency and a public lender, has an obligation to ensure that the requirements of Article 34 are met, if applicable, by projects for which it provides assistance. In order to do so, it is a requirement of the Department's multi-family assistance programs that the applicant provide evidence that a project complies with, or is exempt from, the requirements of Article 34 either at the time of application (HOME) or as a condition of funding (Serna Farmworker Housing Grant Program and Multifamily Housing Program [MHP]). Applicants generally attempt to satisfy this requirement by providing a letter from the applicant's legal counsel. Frequently, these letters contain a brief conclusion that a project is exempt from Article 34, but fail to include any factual information or legal analysis in support of the conclusion.

Section 1 of Article 34 reads as follows:

"No low rent housing project shall hereafter be developed, constructed, or acquired in any manner by any state public body until, a majority of the qualified electors of the city, town or county, as the case may be, in which it is proposed to develop, construct, or acquire the same, voting upon such issue, approve such project by voting in favor thereof at an election to be held for that purpose, or at any general or special election."

In summary, Article 34 applicability is conditioned upon the existence of:

- 1) An actor – a state public body must be involved;
- 2) An action – the state public entity involvement must be in the form of development, construction, or acquisition; and
- 3) An object – the housing involved must be a “low rent project for persons of low income.”

“State Public Body” Article 34 itself defines “state public body” as the state, or any city, city and county, county, district, authority, agency, or any other subdivision or public body of Article 34, section 1, of the state Constitution.

“Low Rent Housing Project” The Legislature has provided guidance with respect to conditions 2) and 3) in the Public Housing Election Implementation Law (Health & Saf. Code, §§ 37000-37002). Health and Safety Code section 37001 lists a number of project types that are not considered “low rent housing projects.” The most typical exemption is subdivision (a)(1) which exempts projects that receive no property tax exemption, other than the welfare exemption, and in which no more than 49% of the units will be occupied by persons of low income.

“Develop, Construct, or Acquire” The meaning of the phrase “develop, construct, or acquire” was analyzed by the California Supreme Court in *California Housing Finance Agency v. Elliott* (1976) 17 C.3d 575 (“*Elliott*”). In *Elliott*, the Court found that CalHFA’s regulatory agreement was so extensive that CalHFA became a co-developer of the project. Subsequent to *Elliott*, the Legislature provided guidance as to governmental activities that do not constitute development, construction or acquisition for purposes of Article 34. (See Health & Saf. Code, § 37001.5.)

Because of the detailed nature of HCD’s regulatory agreements for HOME, Serna and MHP, it is HCD’s opinion that units assisted by these programs are “developed” by HCD within the meaning of Article 34 pursuant to *Elliott*.

Content of an Article 34 Opinion Letter:

The Article 34 opinion letters submitted to HCD must demonstrate that the applicant has considered both the legal requirements of Article 34 and the relevant facts of the project (e.g., the state public body lenders, the number of low income restricted units, and the general content of any regulatory restrictions). Any conclusion that a project is exempt from Article 34 must be supported by specific facts and a specific legal theory for exemption that itself is supported by the Constitution, statute, and/or case law.¹

If a project is subject to Article 34, the letter must demonstrate that there is Article 34 authority for the project. This may be done by providing information from an

¹ See, e.g., *Elliott, supra.* and *California Housing Finance Agency v. Patitucci* (1978) 22 Cal.3d 171 upholding the Public Housing Implementation Law.

appropriate local government official either that a referendum for the specific project has been passed by the voters, or that a blanket referendum has been passed and that the locality has allocated sufficient Article 34 authority to the project.

Any questions regarding this memorandum may be directed to Dennis L. Beddard, Acting Chief Counsel at (916) 323-7279.