



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.<sup>1</sup>

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

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<sup>1</sup> 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.