

STATE OF CALIFORNIA

DEPARTMENT OF INDUSTRIAL RELATIONS

DECISION ON ADMINISTRATIVE APPEAL

RE: PUBLIC WORKS CASE NO. 2007-018

ZOO IMPROVEMENTS

CITY OF MERCED

I. INTRODUCTION

On December 17, 2007, the Director of the Department of Industrial Relations (“Department”) issued a public works coverage determination (“Determination”) finding that the construction of the Ed-Zoo-Cation Center at the Applegate Park Zoo (“Project”) constitutes a public work, but that the City of Merced’s (“City”) chartered city status exempts it from the requirement to pay prevailing wages.

On January 16, 2008, the Northern California Electrical Construction Industry Labor-Management Cooperative Trust (“Cooperative Trust”) filed a “petition for review” of the Director’s determination, including a request for hearing. The “petition for review” is deemed a timely administrative appeal pursuant to California Code of Regulations, title 8, section 16002.5.

With regard to the request for hearing, California Code of Regulations, title 8, section 16002.5(b) provides that the decision to hold a hearing is within the Director’s sole discretion. While Cooperative Trust has asserted some additional facts in its appeal, they are at best tangential to the issues in dispute, and the material facts remain undisputed. Because the issues raised in the appeal are predominantly legal ones, no hearing is necessary. This appeal, therefore, is decided on the basis of the administrative record, and the request for hearing is denied.

All of the submissions have been considered carefully. Except as noted below, they raise no new issues not already addressed in the Determination. For the reasons set forth in the Determination, which is incorporated herein, and for the additional reasons stated below, the appeal is denied and the Determination is affirmed.

II. CONTENTIONS OF THE PARTIES

The Department advised Cooperative Trust that a hearing would not be held, and invited it to submit any additional evidence it wished to have considered. In response, Cooperative Trust submitted "Offers of Proof," setting forth a mixture of factual assertions and arguments, which are summarized as follows:¹

1. City did not initially claim a charter city exemption in its communications with Cooperative Trust, but invoked that exemption only after Cooperative Trust obtained documents showing that Project was not 100 percent privately funded.
2. The Zoo Policy quoted in footnote one shows that "funding and other financial support for the Zoo comes from sources outside the City of Merced."
3. The Zoo is a regional rescue facility to which animals are given by the California Department of Fish and Game.²

¹ In addition, Cooperative Trust asserts that the Determination failed to acknowledge a document entitled "Applegate Park Zoo Group Tour and Group Non-Tour Policy," which states in part:

The City, at taxpayers' expense provides the Zoo. The admission fees collected fall considerably short of meeting operating expenses. Operation of the Gift Shop including collection of the admission fees and volunteers and sponsorships from individuals and businesses in Merced County accomplish most zoo improvements. Profits from gift sales, memberships in the Merced Zoological Society, contributions by the Society and various fundraisers during the year help to meet this shortfall. Therefore it is not possible to offer any discounts.

All of the native wild animals in our zoo are non-releasable. Most come to us from wildlife rescue centers or the California Department of Fish and Game. Many are handicapped and require human care to survive in a controlled environment. They are here to provide public education and awareness of California's wildlife heritage.

² Cooperative Trust asserts that the Zoo is subject to various California Fish and Game regulations, and further must meet the U.S. Department of Interior Fish & Wildlife Service's permit requirements.

4. The Zoo is a tourist attraction touted by the local Chamber of Commerce and intended for use by members of the public, including those who are not residents of the City of Merced.
5. Funding for the Zoo is not primarily municipal because the account from which Zoo funds are disbursed is a repository for various public moneys, including funds received from the state.
6. Project is classified as a "City Zoo Improvement" by both City and the Director, and cannot be separated from the Zoo itself for the purpose of avoiding application of prevailing wage requirements.
7. The Zoo has sought and received accreditation from the American Zoo and Aquarium Association, and has a Class C Exhibitor's license.³ The City's applications to such outside accrediting and licensing entities serve to defeat City's claim that the Zoo is "solely a municipal affair."
8. A sign on state property along Highway 99 reads:

"Applegate Park
Zoo Museum
NEXT EXIT"⁴

The sign was provided by Caltrans and supports the position that the Zoo is a regional destination.

City's responses to these "offers of proof" are summarized as follows:

1. Because of City's chartered city status, it must determine whether prevailing wage requirements apply before a project goes out to bid. Chartered city status was not "invoked" in response to documents provided to Cooperative Trust showing that the Rossotti fund would not be sufficient to fund the entire Project.

³ As stated in the Determination, the Zoo in fact is unaccredited. Cooperative Trust has made no showing to the contrary.

⁴ A photograph of this sign had previously been sent via Internet to the Department's investigator. Cooperative Trust requested that the Department's file be "amended" to include the photograph. A printout of the photograph has been placed in the file.

2. Funding sources were previously raised by Cooperative Trust and addressed in the Determination.
3. City is unaware of the Zoo being designated as a "regional" rescue facility and the relevance of any such designation. The title appears to be one bestowed by Cooperative Trust.
4. The Determination addressed the communications from the Chamber of Commerce, a private nonprofit organization designed to promote economic viability for the community. How it does so is not for the City to decide. Any benefit to the Zoo from tourists is incidental to its intended purpose. The Determination correctly characterized the Zoo as a local attraction like any other city park that is occasionally visited by non-residents.
5. Cooperative Trust's assertion is unclear, and City therefore denies it. Additionally, the funds from which Zoo moneys are dispersed is irrelevant; the issue is the source of Project funds.
6. The bid documents refer to Project as the "Applegate Park Ed-Zoo-Cation Center." The Director's reference to "Zoo Improvements" is irrelevant, and simply a title for ease of reference.
7. The accreditation issue has already been considered by the Director.
8. As is common with most localities, there are numerous signs along the freeway identifying the City, particular exits, items of interest, etc. Such signs are designed to assist not only out-of-town travelers, but also local residents who travel on the freeway. While some non-residents may visit the Zoo, that is incidental to its fundamental purpose as a local attraction within a municipal park.

III. DISCUSSION

The analysis set forth in the Determination is incorporated by reference herein. As stated in the Determination, City awarded and executed the contract; City paid for the Project using municipal and private funds; the Project is of a local character. As such,

under the factors set forth in *Southern California Roads Co. v. McGuire* (1934) 2 Cal.2d 115, the Project is a municipal affair. Regarding Cooperative Trust's assertions number two and five regarding funding, nothing in the Zoo Policy indicates that construction was paid for with extra-municipal public funds. Regarding Cooperative Trust's assertions number three, four, six, seven and eight regarding the Project's nature and purpose, the fact that the animals are regulated, that the Zoo may attract tourists, that the Ed-Zoo-Cation Center is part of the Zoo, that the Zoo's accreditation or lack thereof is determined by a national organization, and that a sign on the highway points to the Zoo is immaterial. Even assuming all of the facts asserted by Cooperative Trust are correct, they do not point to a contrary legal conclusion. Finally, regarding Cooperative Trust's assertion number one that City has waived its right to assert the chartered city exemption, Cooperative Trust provides no authority.

Cooperative Trust attaches great significance to the fact that the Zoo receives animals from the California Department of Fish and Game, citing *Ex Parte Bailey* (1909) 155 Cal. 472. That century-old case, however, does not present any issue as to the powers of chartered cities, and has little, if any, factual relevance to the present case. At issue in *Bailey* was an ordinance by the Town of Santa Monica restricting net and seine fishing in the Pacific Ocean near the town's wharves, docks and piers. *Id.* at pp. 473-474. In holding the ordinance to be in conflict with the general laws of the state, the court stated:

Nothing is better settled than the doctrine that the *ownership of wild game, not reduced to actual possession by private parties*, of which the fish in our waters constitute a part, is in the people of the state in their collective sovereign capacity. [Citation omitted.] The people of the town of Santa Monica have no such proprietary interest in the fish swimming in the waters of the Pacific Ocean within the corporate limits of the town, as authorizes them to protect and preserve them therein, simply that they may be taken by those fishing from the wharves. Until actually reduced to possession, the fish belong to all the people of the state in common, and those engaged in the exercise of the common right to take them from what is a public highway, open to all people alike, cannot be impeded in the slightest degree in the exercise of that right solely for the purpose of making the wharves, etc., of the town a more advantageous place from which to fish.

Id. at pp. 474-475 (emphasis added).

“Game,” in the context used in *Bailey*, means “[w]ild animals, birds, or fish hunted for food or sport.” *The American Heritage Dictionary of the English Language* (New College Ed. 1979) at p. 541. Even if the animals in the Zoo were to be considered “wild game,” they have been “reduced to actual possession” by the Zoo. Accordingly, *Bailey* has no relevance to the present case. To conclude otherwise, one would have to conclude that *Bailey* stands for the proposition that the captive animals in the Zoo are subject to state hunting regulations to the exclusion of municipal protection. As stated by City, the Project is not about who “owns” the animals on exhibit, where they are housed, or whether a municipality has authority to legislate constraints that interfere with the enjoyment by the people of wild animals.

Cooperative Trust’s various factual and legal assertions are insufficient to overcome the well-established principle, stated in the Determination, that the disposition and use of a city’s park lands is a municipal affair. *Simons v. City of Los Angeles* (1976) 63 Cal.App.3d 455, 468; *Hiller v. City of Los Angeles* (1961) 197 Cal.App.2d 685, 689; *Wiley v. City of Berkeley* (1955) 136 Cal.App.2d 10. As stated in *Hiller*:

The disposition and use of park lands is a municipal affair (*Wiley v. City of Berkeley*, 136 Cal.App.2d 10 [288 P.2d 123]; *Mallon v. City of Long Beach*, 44 Cal.2d 199 [282 P.2d 481]), and a charter city “has plenary powers with respect to municipal affairs not expressly forbidden to it by the state Constitution or the terms of the charter.” (*City of Redondo Beach v. Taxpayers, Property Owners, etc. City of Redondo Beach*, 54 Cal.2d 126, 137 [5 Cal.Rptr. 10, 352 P.2d 170].)⁵

Hiller, supra, 197 Cal.App.2d at p. 689.

Cooperative Trust argues, however, that the Project is not purely a municipal affair because “[t]he extraterritorial effects of the Zoo and its rescue functions are no less than the extraterritorial effects enunciated in *City of Santa Clara v. Von Raesfeld* (1970) 3

⁵ The above passage from *Hiller* was quoted with approval in *Simons, supra*, 63 Cal.App.3d at p. 468, a subsequent case involving Elysian Park. Immediately preceding the *Hiller* quotation is a discussion of the distinction between municipal affairs and matters of statewide concern: “In general, statutes which are enacted by the state Legislature are limited in their reach to general law cities and inapplicable to charter cities. ... The power of a charter city over exclusively municipal affairs is all embracing, restricted and limited only by the city’s charter, and free from any interference by the state through the general laws” *Ibid.* (citations omitted).

Cal. 3d 239. To the contrary, *Von Raesfeld* involved revenue bonds to be issued to finance the City of Santa Clara's share of a regional water pollution control facility in which several other cities were participating. The court noted that the \$30 million facility could not be built without Santa Clara's financial participation, and stated: "Furthermore, the sewage treatment facilities will protect not only the health and safety of [Santa Clara] inhabitants, but the health of all inhabitants of the San Francisco Bay Area. Accordingly, the matter is not a municipal affair." *Id.* at p. 247. Contrary to Cooperative Trust's assertion, it has shown no similar extraterritorial effect for this Project.

The other cases cited by Cooperative Trust are similarly inapposite. It cites *Shaltz v. Union School District* (1943) 58 Cal.App.2d 599, 607 for the proposition that every presumption is in favor of the validity of prevailing wage laws. While this is a correct statement of law, it has no application to this case. The dispute here is not about the *validity* of the statutory scheme, but only whether it is applicable to this Project. For the same reason, *Metropolitan Water District v. Whitsett* (1932) 215 Cal. 400 is also inapposite.

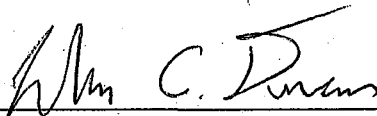
Finally, Cooperative Trust states: "Although case authority does exist stating that prevailing wages are not matters of statewide concern, the cases that come to that conclusion do not address Article XIV of the Constitution, nor do they survive scrutiny based on such a Constitutional analysis. The California Supreme Court in ... *City of Long Beach v. DIR* (2004) 34 Cal.4th 942 seems to suggest that the matter is ripe for further judicial review." The authority acknowledged by Cooperative Trust does, indeed, exist. "The prevailing wage law, a general law, does not apply to the public works projects of a chartered city, as long as the projects in question are within the realm of 'municipal affairs.'" *Vial v. City of San Diego* (1981) 122 Cal.App.3d 346, 348, citing *City of Pasadena v. Charleville* (1932) 215 Cal. 384, 392. *City of Long Beach* does state that: "We leave open for consideration at another time ... whether the [prevailing wage law] is a matter of such 'statewide concern' that it would override a charter city's interests in conducting its municipal affairs." *City of Long Beach v. DIR, supra*, 34 Cal.4th at p. 947. The fact that the courts may revisit the issue in the future does not,

however, empower this Department to ignore existing judicial precedent. *Vial* remains controlling precedent, and the Department is bound by its holding.

IV. CONCLUSION

In summary, for the reasons set forth in the Determination, as augmented by this Decision on Administrative Appeal, the appeal is denied and the Determination is affirmed. This Decision constitutes the final administrative action in this matter.

Dated: 5/2/08



John C. Duncan, Director