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STATE OF CALIFORNIA

GRAY DAVIS, *GOVERNOR*

DEPARTMENT OF INDUSTRIAL RELATIONS
OFFICE OF THE DIRECTOR
455 Golden Gate Avenue, Tenth Floor
San Francisco, CA 94102
(415) 703-5050

October 7, 2003

Ms. Diana Limon
Compliance Office
International Brotherhood of Electrical Workers
Management Trust
P.O. Box 2500
Pasadena, CA 91102-8612

Re: Public Works Case No. 2003-010
Destination 0-8 Shopping Center
City of Palmdale

Dear Ms. Limon:

This constitutes the determination of the Director of Industrial Relations regarding coverage of the above-referenced project under California's prevailing wage laws and is made pursuant to Title 8, California Code of Regulations, section 16001(a). Based on my review of the facts of this case and an analysis of the applicable law, it is my determination that the construction of the Destination 0-8 Shopping Center ("Project") in the City of Palmdale ("City") is a public work. In this case, however, the requirement to pay prevailing wages is restricted to the construction of off-site public infrastructure improvements associated with the Project.

City has entered into a "Reimbursement Agreement for Improvements on 10th Street West and Avenue 0-8" with Rothbart Development Corporation ("Developer") related to the development of the Project, a shopping center consisting of 360,000 square feet of commercial space, including a 156,000 square-foot Sam's Club warehouse store.

The October 23, 2002 Reimbursement Agreement between City and Developer refers to City's requirement that Developer install certain off-site public infrastructure improvements on 10th Street West and Avenue 0-8 as conditions for regulatory approval of the Project. In the Reimbursement Agreement, Developer assumes responsibility for street grading and paving, as well as the construction and installation of curbs, gutters, medians, sewer and water mains, catch basins, storm drain laterals, traffic signals, street lights, street striping and signage ("public improvements"). Developer also agrees that contractors hired to construct the public improvements will be required to comply with the prevailing wage laws.

For its part, City agreed to reimburse Developer from City's general funds for the actual cost of the design and installation of the public improvements in the form of quarterly installments in an amount equal to 50 percent of the sales tax revenue generated by the Project in the preceding quarter as well as a waiver of City's fees directly related to the construction of the public improvements.

On August 15, 2003, Developer submitted to City an "Application and Certificate of Payment" claiming costs of $1,512,435.60 for the construction of the public improvements. Developer will be augmenting this claim by an additional $86,403.26 for testing, inspection and engineering costs incurred in connection with the public improvements work.

Labor Code[1] section 1720(a)(1) generally defines public works to mean "construction, alteration, demolition, installation or repair work done under contract and paid for in whole or in part out of public funds ... ." Section 1720(b) defines the term "paid for in whole or in part out of public funds" as "(1) the payment of money or the equivalent of money by a state or political subdivision directly to or on behalf of the public works contractor, subcontractor, or developer ... (4) fees ... that are ... waived ... by the state of political subdivision."[2]

The Project is construction done under contract. Pursuant to Section 1720(b), City's payment to Developer for the public improvements construction in the form of sales tax revenues and fee waivers constitutes payment of public funds. As such, the Project is a public work.

Developer asserts, however, that the portion of the Project other than the construction of the public improvements is exempt from the requirement to pay prevailing wage rates pursuant to what is now Labor Code section 1720(c)(2), which provides, in pertinent part:

> If the state or political subdivision requires a private developer to perform construction, alteration, demolition, installation, or repair work on a public work of improvement as a condition of regulatory

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[1] Unless otherwise indicated, all statutory section references are to the Labor Code.

[2] Because the Reimbursement Agreement between City and Developer was entered into in 2002, the prevailing wage laws in effect in 2002 control.

> approval of an otherwise private development project, and the state or political subdivision contributes no more money, or the equivalent of money, to the overall project than is required to perform this public improvement work, and the state or political subdivision maintains no proprietary interest in the overall project, then only the public improvement work shall be thereby subject to this chapter.

Here, City required Developer to construct certain off-site public improvements as a condition of City's grant of regulatory approval. At the same time, City will reimburse Developer only up to the actual cost Developer incurred to design and construct the required public improvements.

The International Brotherhood of Electrical Workers contends that City retains a proprietary interest in the Project because the reimbursement payments are based on sales tax revenue generated by the completed Project. In fact, City's obligation to reimburse Developer is an independent legal duty that is not derived from the sales tax revenue. Under the Reimbursement Agreement, City's sales tax revenue figures will be used only to *measure* the amount of City's quarterly reimbursement payment to Developer, not as the source of the reimbursement, which will be paid from City's general funds. Moreover, City's receipt of sale tax revenues from the Project reflect the exercise of the governmental power of taxation and not a proprietary interest, which requires some form of ownership of the underlying property.

Accordingly, it appears the Project is an otherwise private development, and City has no proprietary interest in the overall Project. For these reasons, the overall Project appears to fall within the section 1720(c)(2) exemption, and prevailing wages need only be paid for the public improvements work.

I hope this determination satisfactorily answers your inquiry.

Sincerely,

Chuck Cake

Chuck Cake
Acting Director