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

May 6, 2002

Charles M. Taylor, Representative
Northern California Carpenters
Regional Council
445 Hegenberger Road
Oakland, CA 94621-1418

Re: Public Works Case No. 2001-016
Development of River Street Historic District
City of San Jose

Dear Mr. Taylor:

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 development of the River Street Historic District ("Project") is a public work and that the City of San Jose's charter city status does not exempt it from the requirement to pay prevailing wages.

BACKGROUND

The Project is part of the Guadalupe River Park ("GRP") Master Plan ("GRP Master Plan") adopted by the City of San Jose ("City") and the Redevelopment Agency of the City of San Jose ("Agency") in 1989.[1] The GRP includes a large, linear segment of land along the eastern bank of the Guadalupe River, stretching from highway 280 to highway 880, which land is owned by various entities including City, Agency and Santa Clara Valley Water District ("District"). The County of Santa Clara ("County") contributed $14 million toward acquisition and development of the GRP. The GRP Master Plan refers to the GRP as a regional park servicing San Jose and other communities. The GRP is supported by City, County, Agency and numerous other local, state and federal agencies.

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[1] At about the time the Project first was conceived, City Council memoranda refer to it as being within the GRP. One subsequent memorandum refers to the Project as being adjacent to the GRP. The requesting party provided the Department of Industrial Relations ("DIR") with a map of the GRP, which shows very clearly that the Project lies within the boundaries of the GRP and, therefore, for purposes of this determination, it is so concluded.

Within the GRP is a flood zone designated as the Guadalupe Flood Control Project ("GFCP"). The United States Army Corps of Engineers ("COE") is charged with the responsibility of implementing and maintaining the GFCP. City, Agency and District entered into an agreement dated March 20, 1992 providing for sharing of costs and other rights and obligations in connection with construction of improvements by COE.

Located in the GFCP were several buildings targeted for demolition and removal. Under the National Historic Preservation Act, the COE identified several historic buildings within the GFCP that were destined to be demolished, and recommended to City that at least nine of these be relocated.

To implement this recommendation, City approved a concept plan submitted by a private developer group, the River Street Development Group ("RSDG"). Under the plan, the proposed Project site encompassed land parcels owned and controlled by City, Agency and District within the GRP ("Site"). To put this plan into effect, on June 4, 1996, City and RSDG entered into two agreements, Master Agreement For The Development Of The River Street Historic District ("Agreement") and Agreement to Lease ("Lease"). The purpose of the Agreement and Lease is to set forth the responsibilities of the City and RSDG in relocating and restoring the nine historic buildings identified by the COE for preservation.

THE AGREEMENT

Under the Agreement, the Project is divided into two phases, with City preliminarily responsible for obtaining complete ownership of the Site and performing the necessary soils testing, remediation and rough grading. City estimated the cost of this work at $350,000.

Under Phase I, RSDG is required to install foundations and utility points at the Site and relocate the buildings. Phase II requires RSDG to renovate the buildings and construct the necessary accessory structures and landscaping. Throughout the Agreement, these two phases are collectively referred to as "Developer's Improvements."

Before any of the above work is undertaken, the Agreement requires RSDG to enter into a lease of the Site from City, as discussed further below. Under the Lease and Agreement, City has approval authority over RSDG's use of the Site and buildings.

Generally, use of the Site is restricted to uses that are consistent with the GRP Master Plan. The Site cannot be used for speculation in landholding.

In carrying out both phases of the Project, RSDG is required to comply with State Historic Building Code Standards. City is responsible for approving all design and construction documents. To facilitate the approval process, City is to hold regular progress meetings during the preparation of the plans and specifications.

RSDG is bound to a City-imposed construction schedule. City is entitled to access the Site during normal construction hours. The Agreement also requires RSDG to complete the Phase II improvements free of liens.

The Agreement requires that the construction contract protect City's investment in the Project. If City terminates the Agreement for cause, then City becomes the owner of all plans, drawings and other written data generated for construction of the Project.

Finally, the last paragraph of the Agreement requires that prevailing wages be paid for Phase I construction work. Prevailing wages are not required to be paid for Phase II work except for construction of improvements in the non-exclusive areas, i.e., all areas except those areas for exclusive use by the tenants. Construction of the public walkways are one example of Phase II improvements requiring payment of prevailing wages under the Agreement.

FUNDING OF PROJECT

City is responsible for all costs associated with Site acquisition and preparation. In addition, City is required to finance a maximum total of $725,000 towards the costs associated with Phase I. City is also required to pay any permit and design review costs that exceed $40,000. RSDG is solely responsible for all Phase II costs.

Three separate funding sources make up City's $725,000 construction grant. The first source is COE. Under an agreement dated June 5, 1996, COE granted to City $200,000 for the relocation of six of the nine buildings involved in the Project. Under this agreement, City is required to comply with the federal codes and standards for rehabilitation of historic buildings.

City is also required to pay federal prevailing wage rates for workers hired to effect the relocation of these buildings.

The second funding source has been described in City memoranda as "RDA Funds to Replace County Park Trust Funds" in the amount of $475,000. According to City memoranda, these funds were originally to be paid by County to Agency to renovate an unrelated historic building. Agency, to assist in the construction of the Project, asked County to instead pay these funds towards the development of the Project. Because this money was to come from County Park Trust Funds that had end-use restrictions in conflict with the development of Project, City requested these funds be re-directed to construction of an unrelated project that originally was to be undertaken by Agency. In turn, Agency agreed to pay $475,000 for City public works projects "thereby making available [City] capital project funds for the River Street project." (City of San Jose - Memorandum, dated May 21, 1996, Item 11a(2).)

The remaining $50,000 came from City's Municipal Golf Course Fund.

THE LEASE

RSDG has leased the Site from City for a period of 50 years. For the first 30 years, the rent is $1 per year. Beginning in the 30th year, rent is increased to reflect a percentage of the gross revenues received by RSDG.

The Lease provides that the historic structures and all improvements belong to RSDG during the term of the lease. At the conclusion of the Lease, ownership of these structures and improvements vests with City.

In addition, the Lease specifies that it will not take effect unless RSDG successfully completes the Project. RSDG is also required to operate the Site as an historic district and allow City and non-profit groups to use the non-exclusive areas for benefits and programs.

DISCUSSION

Prevailing wages are to be paid to workers employed on public works. Lab. Code §1771. Public work is defined as: "[c]onstruction, alteration, demolition or repair work done under contract and paid for in whole or in part out of public funds ...." Lab. Code §1720(a). The above facts demonstrate that both phases of the Project involve construction, alteration and repair work done under contract. It is undisputed that Phase I of the Project was financed with public funds and that prevailing wages were paid for this portion of the construction work. Prevailing wages also will be paid for construction of Phase II improvements involving non-exclusive areas. The issue is whether prevailing wages should be paid on the remaining Phase II work. The answer to this question lies in whether Phase I, which is publicly funded, is a separate and distinct project from Phase II, which is privately funded.

City, Agency and RSDG argue that Phase II of the Project is a separate and distinct project, funded solely by RSDG. Because Phase II involves no expenditure of public funds, City, Agency and RSDG argue that this work falls outside of the definition of public work, and prevailing wages do not have to be paid for this phase of construction. City further argues that if the DIR determines that the Project is a single, integrated public works project, the decision whether prevailing wages must be paid on Phase II of this Project rests solely with City under its city charter exemption from state regulation found in the California State Constitution.

<u>The Project is a Single, Interdependent and Integrated Public Work Requiring Payment of Prevailing Wages</u>.

The determination whether a construction undertaking is one project or a series of separate projects must be done on a case-by-case basis. Nevertheless, a variety of factors must be considered, including: (1) the manner in which the construction is organized in view of, for example, bids, contracts and workforce; (2) the physical layout of the project; (3) the oversight, direction and supervision of the work; (4) the financing and administration of the construction funds; and (5) the general interrelationship of the various aspects of the construction. A finding that a construction undertaking is either a single project or a series of separate projects is relevant in determining the extent to which prevailing wage obligations apply. In making this finding, it is the analysis of the above factors, not the labels assigned to the various parts of the project by the parties, that control. Under Labor Code section 1720(a), if there is a single project involving the payment of public funds, prevailing wages will apply to the entire project. If there are multiple projects, prevailing wages may apply to one project but not another, depending on the circumstances.

With respect to the first factor, City informed the DIR that it did not have the construction contracts and advised the DIR to obtain them from RSDG. Despite several requests, RSDG did not provide the DIR with the construction documents. Santa Clara Valley Corp. ("SCVC"), identified by the requesting party as the contractor, informed the DIR that it was the general contractor as to Phase II. SCVC provided the DIR with several subcontracts but not the contract between RSDG and SCVC.

Notwithstanding SCVC's assertion it was the contractor only on Phase II, there are ample facts contained in the documents supplied by City and the requesting party that overwhelmingly support the conclusion that, as to the first criterion, the Project is an integrated, single public work. Under the Agreement, the purpose of the Project is the removal and restoration of nine historic buildings. Fulfillment of this purpose could not be accomplished, however, without both construction phases being completed, i.e., the restoration of the nine historic buildings cannot be accomplished until foundation construction is completed. Conversely, the value of the Phase I construction lies in the successful completion of Phase II.

Under the second factor, both phases of the construction involve the same nine historic buildings. The physical layout of the Project, therefore, supports the conclusion that it is a single project.

With regard to the third factor, the Agreement and Lease between City and RSDG give City ultimate approval over the two phases of construction. Under the Agreement, City controls the use of the Site as well as the use of the nine historic buildings despite the fact that the buildings belong to RSDG during the term of the Lease. City required RSDG to sign the Lease as a condition of its funding of the Project. City required that the construction contract for Phase II protect City's investment in the Project. All plans and drawings for the restoration of the buildings (Phase II) were subject to City approval. The Agreement further requires that City be allowed access to the Site to assure that restoration of the buildings conforms to the City-approved drawings. It should also be noted here that City retains a proprietary interest in the Site as well as in the nine historic buildings. The Lease states specifically that RSDG is the owner of the buildings only during the term of the lease. At the end of the Lease, ownership of the buildings vests with City. These facts lead to only one conclusion, that the Project is a single project.

With respect to the fourth factor, it appears City treated the two phases as one for funding purposes, as reflected in the form Notification of Agreement Being Processed, which shows Project amount to be $700,000 (subsequently increased to $725,000) and Scope of Work as including both relocation and renovation. As stated in the Agreement, RSDG specifically recognized that the restoration and other Developer improvements could not be accomplished without "[t]he substantial financing and other public aids ... made available ... by City ...." The fact that Phase II is not being paid for with public funds is of little import because expenditure of the private funds would not occur unless and until the publicly funded Phase I was completed. Under this criterion, the inter-relationship between the two phases makes this a single project.

As to the last factor, both City and RSDG share a financial stake in the success of the Project. During the last 20 years of the Lease, the amount of rent paid to City depends on the gross revenues received from the buildings' use. Furthermore, as noted above, the ownership of the buildings reverts to City at the end of the term. Therefore, the Lease gives City a proprietary interest in the completed Project, which supports a finding the Project is not two separate projects.

In sum, based on the above analysis, I find that the Project is a single, interdependent and integrated public work requiring the payment of prevailing wages to all workers on both phases of the Project.

<u>The City's Charter City Status Does not Exempt the Project From Prevailing Wage Requirements</u>.

Having found the River Street Historic District development to be one project, the next question is whether it is exempt from prevailing wage requirements under charter city analysis.

City Council Resolution 61144, entered into on February 7, 1989, contains City's prevailing wage policy. Section 1(A) requires the payment of prevailing wages, as defined by the California Labor Code, on "city public works construction projects funded in whole or in part by City funds, where work is performed pursuant to any public works construction contract to which the City is a party." In section 2(C), City Council reserves the right to require payment of prevailing wages on other city projects not expressly designated in the policy. Section 2(D) provides that the policy "is not intended to create any power or duty in conflict with state or federal law or to diminish any rights or obligations established by state or federal law." Section 4(A) states that "[n]othing in this Resolution and Policy shall preclude enforcement by the State Department of Industrial Relations in the projects or services specified in section 1, above."

Under traditional charter city analysis, a charter city's home rule authority extends only to municipal affairs, not to matters of statewide concern. As discussed below, the Project's extra-municipal funding, extra-municipal control and extra-municipal purpose take the Project outside the ambit of a municipal affair. Under article XI, section 5 of the California Constitution, a city "may make and enforce all ordinances and regulations in respect to municipal affairs, subject only to restrictions and limitations provided in their several charters and in respect to other matters they shall be subject to general laws."

Generally, a municipal affair is of local interest or effect. A matter of statewide concern is of regional or statewide interest, and its impact extends beyond a charter city's boundaries. (Grodin, Massey and Cunningham, The California State Constitution, A Reference Guide (1993) pp. 188-190.)

In *So. Cal. Roads Co. v. McGuire* (1934) 2 Cal.2d 115 [39 P. 2d 412], the California Supreme Court considered the following criteria in determining whether a road improvement project was a municipal affair subject to charter city exemption: (1) the extent of extra-municipal control over the project; (2) the source and control of the funds used to finance the project; and (3) the nature and purpose of the project. Related to the nature and purpose of the Project are its geographical scope, (*Young v. Superior Ct. in and for Kern County* (1932) 216 Cal. 512, 516-517 [15 P.2d 163]), and extra-territorial effects, (*Pacific Telephone and Telegraph Co. v. City and County of San Francisco* (1959) 51 Cal.2d 766, 771-772 [336 P.2d 514]).

Regarding the first *McGuire* criterion, under the Agreement and Lease, City exerted considerable, but not exclusive, control over the Project. Numerous City Council memoranda, however, refer to ongoing coordinated efforts amongst federal, state, regional and local governing bodies required to get this Project off the ground. Execution of the Agreement and Lease required the following: (1) amendment to GRP agreement amongst City, County and Agency; (2) a park funding agreement between City and County concerning the disposition of $475,000 in County parks funds; (3) amendment to a validation action settlement agreement involving City, County and Agency; (4) amendment to GRP Master Plan; (5) cooperative agreements between City and Agency and between City and COE; and (6) land transfers between District and City and between Agency and City. In addition, the cooperative agreement between City and COE requires COE to provide City with technical advice to ensure that the construction work is performed in accordance with the standards of the National Historic Preservation Act and the Secretary of the Interior's standards for rehabilitation of historic buildings. As such, analysis of this criterion supports a finding that the Project is not purely a municipal affair.

Regarding the second *McGuire* criterion, non-municipal funding sources comprise the lion's share of the construction grant from City to RSDG. Agency, organized under the laws of the state and legally considered an entity of the state, contributed $475,000 toward the total $725,000. COE, a federal entity, contributed $200,000. As such, analysis of this criterion supports a finding that the Project is not purely a municipal affair.

Regarding the third *McGuire* criterion, development of the River Street Historical District was precipitated by a determination by a federal entity, the COE, under federal law, the National Historic Preservation Act, that there existed buildings of historic importance within a flood zone. COE was responsible for implementing and maintaining the GFCP and under its authority required the relocation, rather than the demolition, of the nine historic structures involved in the Project.

Finally, although the Project is located entirely within City's geographic boundaries, it is part of a regional park system, which provides services to City and other communities and is supported by municipal and non-municipal governing bodies. As such, analysis of the third criterion supports a finding that the Project is not a municipal affair.

In sum, analysis of the above criteria renders the charter city exemption inapplicable because the Project is not a municipal affair. It was financed in part with non-municipal funds. Its existence derives from historic building preservation requirements under federal law. It is part of a regional park system. And, it required the cooperation and coordination of COE, Agency, County, District and City. In other words, this Project would not have been possible without the involvement and participation of every level of municipal and non-municipal government. Far from being a municipal affair, the Project is a matter of regional and statewide concern, subject to general laws, including California's prevailing wage obligations.

I hope this determination satisfactorily answers your inquiry.

Sincerely,

Stephen J. Smith

Stephen J. Smith
Director