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

June 24, 2002

Michelle R. Justice, Director
CANDO Contract Compliance
P.O. Box 642
Buckeye, AZ 85326-0047

Re: Public Works Case No. 2001-021
One Harbor Plaza
Suisun City Redevelopment Agency

Dear Ms. Justice:

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 One Harbor Plaza ("Project") is a public work subject to the payment of prevailing wages.

The Project entails the construction of a 47,000 square foot Class "A" office building and the development of a restaurant on an adjacent 8,000 square foot "Outlot." As part of a redevelopment plan for the Suisun City downtown area, the Redevelopment Agency of the City of Suisun City ("Agency") sold the site to The Wiseman Company, LLC ("Developer") for the stated sum of $723,500 per the Disposition and Development Agreement ("DDA") executed in September 2000. Pursuant to the purchase contract, the purchase price was paid to the Agency in the form of equity participation in the project.[1] The Agency agreed to pay the Developer $250,000 "to compensate for the extraordinary

[1] The Agency estimates that the purchase price is "approximately equal to the fair market value of the site for its highest and best use." (Report of the Redevelopment Agency of the City of Suisun City on the Redevelopment of a Portion of the West Waterfront and the Amended Disposition and Development Agreement Between the Agency and The Wiseman Company L.L.C. (December 5, 2000) p. 5.) However, the stated purchase price is somewhat illusory, since the Agency received equity participation in lieu of cash. As discussed infra, the total equity participation received by the Agency for the land sale and the Agency's cash payments may be worth as little as $500,000. Under some circumstances, we would find that a below market sale of public property in consideration for the agreement to perform construction would constitute payment for construction out of public funds. Such issue need not be addressed here, however, in light of the findings that there are various other payments of public funds for the Project. See also, Labor Code Section 1720(b), which was effective January 1, 2002, albeit not applicable to the Project herein.

costs incurred with respect to the filling and grading work to be performed on the Site." (DDA, Article I, section 1.6(b)(I), p.5.) Additionally, the Agency agreed to pay up to $48,500 towards the installation of an off-site storm drainage line. The DDA further provided that:

> Agency shall pay the cost of all fees levied or assessed by the City of Suisun City and other agencies except (I) the outside Building Plan Check fee; (II) the Strong Motion Fee, (III) the Water Meter Fee, (IV) the User Administration Charge and (V) Construction Water Fee. In addition, Agency shall pay the Fairfield-Suisun Sewer District, the Suisun-Solano Water Authority and the fee known and referred to as the Solano County Public Facilities fee. Developer shall pay all other development and permitting fees required to be paid as a condition of a development contemplated herein; provided, however, in no event shall the Developer's liability for fees exceed Forty-Five Thousand Dollars ($45,000). (*Id.*, section 1.6(b)(ii).)

> Agency shall reimburse Developer for fifty percent (50%) of the costs incurred by Developer to improve the Outlot and one hundred percent (100%) of the costs of providing utility services and connections thereto. The reimbursement shall be paid upon proof that the expenditures have been incurred in accordance with a budget and estimate approved by the Agency and that the work has been completed free of liens. (*Id.*, section 1.6(b)(iii).)

The DDA provided that the reimbursements would be paid upon requisition by the Developer after the work was performed and the Agency certified that the item of work for which reimbursement was sought had been completed in accordance with the plans and specifications. (*Id.*, section 1.6(c)(ii).)

The Agency received equity participation as consideration for the reimbursements:

> Agency shall receive the Equity Participation in the ownership of the Site, Buildings and Improvements as consideration for the sale of the Site and Agency's contribution to Site improvement and for payment of a portion of the development

> fees. The Equity Participation shall entitle the Agency to receive the greater of Five Hundred Thousand Dollars ($500,000) or ten percent (10%) of the "Total Cumulative Gross Proceeds" (as hereinafter defined) of the Development up to and including proceeds of sale of the Development, after repayment of loans secured by encumbrance upon the Development. (*Id.*, Article IV, section 4.1.)

The Agency estimates that its return on the equity participation "could range from $500,000 to over $2.0 million . . .." (Report of the Redevelopment Agency of the City of Suisun City on the Redevelopment of a Portion of the West Waterfront and the Amended Disposition and Development Agreement Between the Agency and The Wiseman Company, L.L.C. (December 5, 2000) p.4.) The same report lists the Agency's costs, including $298,500 in site improvement costs and $659,000 in development fees. If the Agency's return falls within the range it estimates, it is unlikely to be sufficient for the Agency to fully recoup the funds it has expended. It may take 13 years or more for the Agency to receive any return on its investment, and even then the return is unlikely to be sufficient to compensate the Agency for the time value of its money. Thus, there would appear to be a net expenditure of public funds on this project. Further, in the absence of any certainty that the value of the equity participation will equal or exceed the Agency's expenditures for the land sale, site improvement and development fees, we cannot make such an assumption.

The DDA obligated the Agency to lease from the Developer 16,200 square feet of space in the office building for a period of five years. This obligation was characterized as a form of financial underwriting, and the parties agreed to cooperate in securing a third party sublease of the space. (*Id.*, Article III, section 3.2.)

On December 21, 2000, the Developer entered into a standard form construction contract[2] with John F. Otto, Inc. ("Contractor"). The contract provided that the Contractor would construct the project on a cost-plus basis, with a guaranteed maximum price of $4,073,500.

With certain exceptions not relevant here, Labor Code section 1771[3] requires the payment of prevailing wages to all workers

---

[2] Doyle Wiseman signed the contract on behalf of the owner, and the contract identifies the owner as "One Harbor Center LLC c/o The Wiseman Company."

[3] Subsequent statutory references are to the Labor Code.

employed on public works. What is now section 1720(a)(1) defines "public works" to generally include construction or alteration work "done under contract and paid for in whole or in part out of public funds . . .." As indicated above, the construction here is being done under contract. Construction is paid for out of public funds where, as here, a redevelopment agency agrees to pay construction-related fees to other governmental entities.[4] Moreover, the Agency's payment to the Developer of $250,000 to compensate for the costs of the filling and grading work is a payment out of public funds for construction or alteration work within the meaning of section 1720(a).[5] Additionally, and independent of those costs for which the Agency has received equity participation, the Agency's reimbursement of 50 percent of the costs incurred by the Developer to improve the Outlot is a payment out of public funds for construction.

The Developer contends that it and the Agency "always understood this to be a purely private project" not subject to the Labor Code's prevailing wage requirements. Letter of January 7, 2002, from Doyle Wiseman. Indeed, Article I, section 1.6(c)(iii) provides that: "Agency's contribution to defray the extraordinary costs of the Site to Developer shall not be deemed to cause all or any portion of the extraordinary work performed to be a public project . . .." However, the duty to pay prevailing wages is statutory, and cannot be negated by contractual language or the subjective understandings of the contracting parties. As the California Supreme Court stated in *Lusardi Construction Co. v. Aubry* (1992) 1 Cal.4th 976, 987-988:

> [B]oth the awarding body and the contractor may have strong financial incentives not to comply with the prevailing wage law. To construe the prevailing wage law as applicable only when the contractor and the public entity have included in the contract language requiring compliance with the prevailing wage law would encourage awarding bodies and contractors to legally circumvent the law, resulting in payment of less than the prevailing wage to workers on construction projects that would otherwise be deemed public works. To allow this

---

[4] Precedential Public Works Coverage Determination Case No. 2000-15, Downtown Redevelopment Plan Projects, City of Vacaville (March 22, 2001).

[5] *See Priest v. Housing Authority of the City of Oxnard* (1969) 275 Cal.App.2d 751, 756; Precedential Public Works Coverage Determination Case No. 2000-036, Carlson Property Site Lead Affected Soil Removal and Disposal Project (May 31, 2000); Precedential Public Works Coverage Determination Case No. 93-034, SAMTRANS/BART (Colma BART Station) (November 3, 1993).

> would reduce the prevailing wage law to merely an advisory expression of the Legislature.

The Developer also asserts that it would be unfair to retroactively apply prevailing wage requirements after the contracts have been negotiated and the work completed. A similar argument was rejected in *Lusardi*, *supra*, 1 Cal.4th at 900, on the ground that a coverage determination is not an adjudication for which advance notice is required. *Lusardi* distinguished coverage determinations that do not deprive contractors of any property interest from enforcement proceedings in which the contractor does have a right to notice and the opportunity to be heard. (*Id.* at 990-993.)

For the foregoing reasons, the construction of One Harbor Plaza is a public work subject to prevailing wage requirements.

I hope this determination satisfactorily answers your inquiry.

Sincerely,

Stephen J. Smith
Director