

## DEPARTMENT OF INDUSTRIAL RELATIONS

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January 16, 2003

Thomas A. May, Esq.  
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600 West Broadway, Suite 2600  
San Diego, CA 92101

Re: Public Works Case No. 2002-040  
Advisory Opinion Re: Proposed Hotel Developments  
Under Senate Bills 975 and 972

Dear Mr. May:

This is in response to your May 10, 2002 request for an opinion concerning the applicability of the California public works laws to a set of hypothetical facts concerning hotel development. Based on my review of the facts you have presented and an analysis of the applicable law, it is my determination that the potential hotel development projects you describe, which are funded by a rebate of local transient occupancy taxes, would be public works subject to the payment of prevailing wages.

Your request for an advisory opinion rests on the following hypothetical facts. A private hotel is to be built for \$200 million. This cost includes costs of construction,<sup>1</sup> land acquisition and other expenses. Before construction, there is an agreement between the developer and the city where the hotel is to be built, whereby the city agrees it will rebate to the developer a portion of the transient occupancy tax ("TOT") revenues collected by the city after the hotel is fit for occupancy and fully operational. The value of the rebate is estimated to be \$10 million. The TOT revenues will be collected, and then rebated after all construction costs have been paid. No other public funds will be used by the developer for construction of the hotel.

You have asked whether the TOT rebate would convert the otherwise privately financed hotel construction project into a public work requiring the payment of prevailing wages to workers employed in the project's construction. If so, you have asked whether the TOT rebate would be regarded as *de minimus* in the context of the project, exempting the project from the prevailing wage

<sup>1</sup> You indicate that the "hard" construction costs are estimated to be approximately \$100 million of the \$200 million.

requirements pursuant to what is now Labor Code section 1720(c)(3).<sup>2</sup>

You assert that the hypothetical project would not be a public work because the construction would not be paid for with public funds. You base your argument on the fact that the TOT rebate would not occur until after a developer completes the construction work. You also argue that, even if the rebate constitutes public funds for construction, it amounts to only 5 percent of the entire construction cost, which is so proportionately small that it should be treated as a *de minimus* subsidy under section 1720(c)(3).

Under section 1720(a)(1), "public works" are defined as "construction, alteration, demolition, installation or repair work done under contract and paid for in whole or in part out of public funds . . ." Clearly, the hotel development projects would constitute construction done under contract.

Under section 1720(b), "...paid for in whole or in part out of public funds" means... (1) The payment of money or the equivalent of money by the state or political subdivision directly to or on behalf of the public works contractor, subcontractor or developer." Under the facts presented, the TOT rebate constitutes public funds because it is tax revenues collected by a city, which is a political subdivision of the state, paid directly to a developer. Under this section, it matters not whether the funds are paid pre-construction or post-construction.<sup>3</sup>

With regard to the argument that the rebate does not fund construction, again the timing of the payment is not conclusive as to whether public money pays for construction. Furthermore, section 1720(b) only requires that public funds be spent on a project, not that those funds specifically fund the construction aspects of the project. Notwithstanding this, the city's purpose in granting the TOT rebate under your scenario is to induce the developer to locate the hotel within the city's boundaries. In other words, the city agrees to forego some of its TOT revenue as consideration for the developer's agreement to construct the hotel in this particular city. For these reasons, the rebate funds the construction.

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<sup>2</sup> All subsequent references are to the Labor Code, unless otherwise specifically indicated.

<sup>3</sup> *Tustin Fire Station (Tustin Ranch)*, PW 1993-054 (April 14, 1994).

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As to the question whether the TOT rebate should be regarded as a *de minimus* amount and thereby exempt under section 1720(c)(3), I have not yet applied the statutory *de minimus* exemption in the context of any particular public works project nor defined *de minimus* generally. Here, you indicate that the public funds approximate 5 percent of the overall project costs. In my view, this would not constitute *de minimus* in that such a percentage is not "trifling, minimal.. or insignificant..." Black's Law Dictionary (7<sup>th</sup> ed. 1999, p. 443).

In conclusion, the hypothetical situation you have presented leads to a probable finding that the TOT rebate constitutes the payment of public funds for construction, triggering the duty to pay prevailing wages to workers employed in the hotel's construction. Additionally, the developer of the project would not qualify for the *de minimus* exemption from the prevailing wage laws under section 1720(c)(3).

I hope that this advisory opinion satisfactorily answers your inquiry. Please note that under title 8, California Code of Regulations section 16001(a), the Director is authorized to issue public works coverage determinations for specific projects or types of projects. This opinion, therefore, is based specifically on the set of hypothetical facts provided.<sup>4</sup> Any alteration of those facts in a particular project could lead to a different result. Should your clients proceed with a specific project, I would encourage you to submit the facts and all documentation with a request for a public works coverage request at that time.

Sincerely,



Chuck Cake  
Acting Director

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<sup>4</sup> Note that even in providing this opinion there are some additional facts not presented that we would request before issuing a formal opinion.