

DEPARTMENT OF INDUSTRIAL RELATIONS

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



July 10, 2003

Mel Sakata
Compliance Agent
South Bay Piping Industry Labor
Management Trust
P.O. Box 58032
Santa Clara, CA 95052

Re: Public Works Case No. 2002-099 (Lowe's Home Improvement Center)
Public Works Case No. 2002-100 (Costco Retail Building)
Pacheco Pass Retail Center, City of Gilroy

Dear Mr. Sakata:

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 Pacheco Pass Retail Center ("Project") in the City of Gilroy ("City") is a public work. In this case, however, the requirement to pay prevailing wages is restricted to the construction of the public improvements associated with the Project.

City has entered into individual economic incentive agreements with Costco Wholesale Corporation ("Costco") and Lowe's HIW, Inc. ("Lowe's") related to the development of the Project, which is a plan by City to create 18 commercial parcels on a 97-acre site.

The July 18, 2002 agreement between City and Costco concerns Costco's plan to construct a new 148,700 square-foot retail establishment on the Project. In the agreement, City agrees to waive various development impact fees in the amount of \$1,316,590.96 in exchange for Costco's guarantee that the new business will generate a certain level of sales tax revenues within the first three years of operation.

The September 11, 2002 agreement between City and Lowe's concerns Lowe's plan to construct a new 166,000 square-foot home improvement center on the Project. Under the agreement, City agrees to waive various development impact fees in the amount of \$1,189,159.30 in exchange for Lowe's guarantee that the new

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business would generate a certain level of sales tax revenues within its first three years of operation.

Among City's conditions for regulatory approval of the construction of the Costco retail establishment and the Lowe's home improvement center, City required Costco and Lowe's, respectively, to construct public improvements, including improvements to adjacent public roads and the construction of such items as curbs, gutters, sidewalks and underground utility lines. Records provided by Costco reflect that, as of April 1, 2003, Costco has paid \$1,478,882.75 for the construction of the off-site public improvements alone. Records provided by Lowe's reflect that, as of March 7, 2003, Lowe's has paid Developer \$1,484,427.87 for the construction of the off-site improvements associated with the Project.

Labor Code¹ 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) defined the phrase "paid for in whole or in part out of public funds" to include "fees, costs, rents, insurance or bond premiums, loans, interest rates, or other obligations that would normally be required in the execution of the contract, that are paid, reduced, charged, at less than fair market value, waived or forgiven; money to be repaid on a contingent basis; or credits applied against repayment obligations."²

The Project is construction done under contract. Pursuant to section 1720(b), City's waiver of the development impact fees due from Costco and Lowe's constitutes the payment of public funds because they are fees waived or forgiven by City. As such, the Project is a public work.³

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

² Because the economic incentive agreements between City and Costco and Lowe's were entered into in 2002, the prevailing wage laws in effect in 2002 control.

³ The Department has been asked to make a determination regarding the public works status of the Project, in particular concerning the Costco and Lowe's construction. While this determination finds the overall Project to be a public work, any questions concerning the public works status or prevailing wage obligations of future phases or parcels should be submitted to the Department in the form of a public works coverage request.

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Both Costco and Lowe's, however, assert 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 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 Costco and Lowe's to construct certain public improvements as a condition of City's grant of regulatory approval. The amount of the development impact fees City waived as to Costco was \$1,316,590.96, which is less than Costco has already paid to construct the required public improvements. The amount of the development impact fees City waived as to Lowe's was \$1,189,159.30, which is less than Lowe's has already paid to construct the required public improvements. Further, it appears that the Project is an otherwise private development, and City has no proprietary interest in the overall Project. Accordingly, the overall Project appears to fall within the section 1720(c)(2) exemption, and prevailing wages need only be paid for the public improvement work.⁴

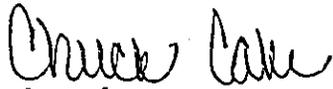
⁴ Both Costco and Lowe's represent that prevailing wages were paid to workers employed in the construction of the public improvements required by City. This determination addresses only the City funds provided Costco and Lowe's in an amount less than or equal to the cost of the public improvements. Should other public funds be provided to the Project in circumstances under which there is no prevailing wage exemption, additional prevailing wage requirements may attach.

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I hope this determination satisfactorily answers your inquiry.

Sincerely,



Chuck Cake
Acting Director

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