

DEPARTMENT OF INDUSTRIAL RELATIONS

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January 23, 2004

Robert A. Levy, Esq.
Luce, Forward, Hamilton & Scripps, LLP
600 West Broadway, Suite 2600
San Diego, CA 92101

Re: Public Works Case No. 2003-040
Sierra Business Park
City of Fontana

Dear Mr. -Levy:

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 Sierra Business Park ("Project") is not a public work, and therefore is not subject to prevailing wage requirements except as noted below.

The Project entails the construction of a business park on land ("Property") to be acquired by the developer, LNR Fontana, Inc. ("LNR") from the Fontana Redevelopment Agency ("Agency"). The Property consists of two parcels with a total of approximately 208.8 acres of raw land, one parcel consisting of approximately 196 acres and another parcel consisting of approximately 12.8 acres. LNR has agreed to purchase the 196 acre parcel for \$25,243,000, and to purchase the 12.8 acre parcel for \$2,500,000, for a total purchase price of \$27,743,000. Appraisers commissioned by the City of Fontana ("City") determined that the market value of the Property was \$27,471,700.

The 196-acre parcel is located within the boundaries of Community Facilities District No. 91-20 ("Existing CFD"), established by the City in 1991. A previous failed development within the Existing CFD resulted in significant delinquencies in the payment of bonds ("Existing Bonds") issued by the Existing CFD. The development of the Project is part of a larger plan by the City to resolve those delinquencies. To that end, the City has formed a new community facilities district, CFD 22, which will issue new bonds to cover the delinquencies of the Existing Bonds. In order to pay off the delinquencies, it is necessary for the City to close the transaction with LNR, close a settlement agreement with another property owner within the boundaries of the Existing CFD, and issue the new bonds. The proceeds of these transactions will be used, in part, to defease or redeem the defaulted Existing Bonds.

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LNR will pay for all construction of the Project out of private funds, with the exception of certain public improvements that must be constructed as a condition of City's regulatory approval.¹ The Agency will contribute a maximum of \$10,500,000 toward the actual cost of such improvements, but will not contribute any amounts in excess of actual costs.²

City imposes impact fees on new developments to fund the construction of public facilities such as storm drains, landscaping, circulation facilities, fire, library and police facilities and parks. A number of the public facilities required for the Project that would normally be financed through the City's development impact fee program were already financed and constructed with proceeds from the existing bonds. CFD 22 will issue new bonds to refinance the existing bonds and will assess new special taxes, which will effectively pay for the public facilities already constructed in connection with the Property. LNR will be responsible for paying the new special taxes assessed against the Property. In recognition of this, City provided an offset to LNR against the development impact fees for landscape, circulation, fire, police, library and storm drain facilities. City commissioned a Fee Study which established that the already financed and constructed public facilities cost \$1.7 million more than the amount of the offsets provided to LMR.³

Labor Code section 1771⁴ requires, with certain exceptions, that prevailing wages be paid to all workers employed on public works. Section 1720(a)(1) defines "public works" to include "[c]onstruction, alteration, demolition, installation, or repair work done under contract and paid for in whole or in part out of public funds." Section 1720(b) provides in pertinent part:

(b) For purposes of this section, "paid for in whole or in part out of public funds" means all of the following:

. . .

¹ These public improvements include street improvements, storm drain improvements, sewer improvements and/or water improvements for Slover Avenue, Tamarind Avenue, Santa Ana Avenue, Street "B", and Sierra Avenue at "A" Street.

² The Disposition Agreement between LNR and the Agency acknowledges the possibility that other governmental agencies may require additional public improvements, and provides that in that event, the parties would negotiate in good faith with respect to their respective contributions toward the cost of such additional improvements.

³ According to the Fee Study, the Project will contribute approximately \$6.1 million in fee-related improvements to City through the CFD, while City is giving only \$4.3 in fee offsets. Thus the Project's contributions exceed the fee offsets by approximately \$1.7 million. The Fee Study further notes that in every facility category the fee offsets are less than the construction costs funded by the CFD special taxes paid by the property that LNR is purchasing.

⁴ All subsequent statutory references are to the Labor Code, unless otherwise indicated.

(3) Transfer by the state or political subdivision of an asset of value for less than fair market price.

(4) 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 by the state or political subdivision.

The first question presented is whether the Property was transferred by the Agency to LNR for "less than the fair market price" within the meaning of subdivision (b)(3) of section 1720. The term "fair market price" is not a term in common usage, nor is it defined by statute. However, subdivision (b)(4) includes the phrase "fair market value." In the absence of evidence of contrary legislative intent, we deem "fair market price" to be synonymous with "fair market value."

There is nothing in the public works statutory scheme or the legislative history of section 1720(b) that provides guidance as to the appropriate measure of "fair market price" which we have determined is synonymous with "fair market value." The term "fair market value," however, arises frequently in the eminent domain context and embodies the notion of the price a property would command on the open market if purchased by a willing buyer from a willing seller.⁵ "Fair market value" is based on the highest and best use for which the property is geographically and economically adaptable. See *City of Los Angeles v. Decker* (1977) 18 Cal.3d 860. In the eminent domain context, fair market value is determined in reference to the property's condition before the development, i.e., without regard to the acquiring agency's intended use of the property. Because the intended use of the property in this case does not appear to entail any Agency-imposed restrictions that diminish its value, the adoption of the definition of "fair market value" developed in the eminent domain context is appropriate for our purposes here.⁶

In this case, state certified appraisers determined that the highest and best use of the Property was for industrial purposes. They valued the property by means of the direct comparison approach, which is a method of analyzing property by comparison of actual sales of similar properties, weighing both overall

⁵ See, e.g., Code of Civil Procedure section 1263.320 et seq. (in the context of eminent domain).

⁶ In other circumstances, for example where a public entity places restrictions on the use of property that diminish its value to the purchaser, "fair market value" under section 1720(b) would be determined in reference to the condition of the property after the development, taking into account those development controls and restrictions imposed by the public entity.

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comparability and the relative importance of such variables as time, terms of sale, location of sale property, and lot characteristics.⁷ On the basis of this comparison, they concluded that the market value of the entire 212-acre industrial parcel was \$28,000,000, and that the value of the 208 acres purchased by LNR was \$27,471,700. This is less than the \$27,743,000 paid by LNR. In the face of the credible appraisal obtained by City in this case and absent a contrary credible appraisal, the appraisal obtained by City here is presumed to be correct. The transfer of the Property here, therefore, was not for "less than fair market price."

The next issue is whether the partial offset of impact fees would constitute a payment out of public funds as defined by subdivision (b)(4). Because LNR will be paying special taxes for already-constructed public facilities, the offset is necessary to avoid requiring LNR effectively to pay twice for the same facilities. Under the facts discussed above, the fees charged by the City are not "less than fair market value" for the cost of the improvements within the meaning of subdivision (b)(4).

The remaining issue is whether the Agency's payments toward construction of certain public improvements make the Project a public work within the meaning of section 1720. Subdivision(c)(2) provides:

If the state or a 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 thereby become subject to this chapter.

Since construction of the public improvements is a condition of regulatory approval and the parties agreed that the Agency's payments would not exceed the actual costs of those improvements, the payments fall within the scope of subdivision 1720(c)(2). Accordingly, prevailing wages are required only for construction of public improvements.

For the foregoing reasons, construction of the Project will not be paid for in whole or in part out of public funds. Accordingly, it is not subject to prevailing wage requirements.

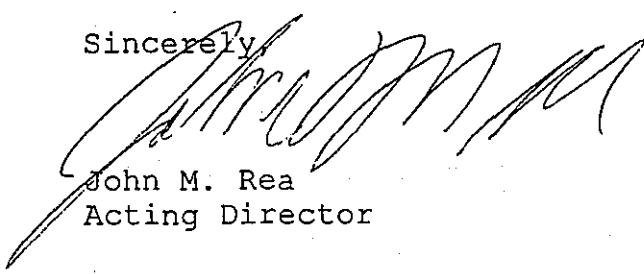
⁷ Appraisal Report at 113-114.

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I hope this determination satisfactorily answers your inquiry.

Sincerely,



John M. Rea
Acting Director

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