

STATE OF CALIFORNIA

DEPARTMENT OF INDUSTRIAL RELATIONS

DECISION ON ADMINISTRATIVE APPEAL

RE: PUBLIC WORKS CASE NO. 2004-019

STRAND REDEVELOPMENT PROJECT

Introduction

On June 20, 2005, the Acting Director of the Department of Industrial Relations issued a public works coverage determination ("Determination") finding the entire Strand Redevelopment Project ("Project") to be a public work subject to the payment of prevailing wages. On July 19, 2005, the developer, CIM Group, Inc. and CIM/Huntington, LLC ("CIM") filed an administrative appeal from the Determination and requested a hearing. Thereafter, additional arguments and evidence were submitted by CIM and several other interested parties.¹

All of the submissions have been considered carefully. Except as noted below, they raise no new issues not already

¹ The items submitted are as follows: CIM appeal with Exhibits 1-3, Declaration of Matthew C. Fragner, and copy of case report (July 19, 2005); CIM submission on legislative history of SB 975 with attached legislative history documents (Aug. 11, 2005); Response to Appeal by Southern California Labor/Management Operating Engineers Contract Compliance Committee ("Operating Engineers") (Aug. 15, 2005); Operating Engineers Response to legislative history submission (Aug. 23, 2005); Declaration of David Biggs submitted by City of Huntington Beach (Aug. 24, 2005); Brief of California Professional Association of Specialty Contractors (Sept. 1, 2005); Letter brief of California Redevelopment Association (received Sept. 9, 2005); Response to Appeal by Los Angeles/Orange Counties Building and Construction Trades Council (Sept. 9, 2005); Letter brief of California Building Industry Association (Sept. 16, 2005); E-mail representation that City of Huntington Beach regularly builds and pays for parking garages (Sept. 20-21, 2005); CIM Reply to other submissions (Sept. 22, 2005); CIM counsel's submission of additional case authority (Oct. 4, 2005); and Operating Engineers response to additional case authority (Oct. 18, 2005).

addressed in the Determination. Therefore, for the reasons set forth in the Determination, and for the additional reasons stated herein, the appeal is denied, and the Determination dated June 20, 2005, is affirmed and incorporated herein by reference.

Benchmark Analysis

To bolster their argument that the governing law should be that in effect on October 30, 2002 -- the date of the Third Implementation Agreement -- and not July 9, 1999 -- the date of the Disposition and Development Agreement ("DDA") -- CIM and the City of Huntington Beach ("City") submitted additional argument and evidence on appeal to show that the DDA had been subject to termination prior to the date of the Third Implementation Agreement because of the inability to secure all of the parcels the parties originally planned to include in the development. The record discloses, however, that the DDA was subject to termination by either party for a variety of reasons, that the parties in fact did not terminate the agreement, and that for reasons they considered advantageous to the progress of the development, the parties chose to modify the original DDA, which otherwise remained "in full force and effect, enforceable in accordance with its terms" (Third Implementation Agreement, ¶22), rather than negotiate an entirely new agreement.

In addition to the treatment of this issue in the Determination, another problem with CIM's approach to determining the benchmark date is that it offers no certainty as to prevailing wage obligations for the regulated public, including any contractor that may choose to bid on the work. Another notable aspect of the DDA is section 308's requirement for the developer to begin constructing the improvements promptly upon the delivery of

any portion of the parcels to be included in the agreement. Thus, CIM's approach would allow for the anomalous result of having the construction work start, while the law governing that work remains to be determined at a future date.

Unlike the approach proffered by CIM, the Department's policy of using the date of the formative agreement as the benchmark for determining the applicable law is fair to all parties and provides predictable guidance to the regulated public.² The effective date of the DDA is a date certain, from which all parties with an interest in the public works consequences of the project can ascertain their rights and responsibilities. It is also a date over which the parties to the agreement have complete control. No persuasive argument has been advanced for not following the Department's policy of applying the law in effect on the date of the DDA in redevelopment cases.

Application of Labor Code section 1720(c)(3)

The only new issue raised on appeal concerns the applicability of an exception to public works coverage contained in Labor Code section 1720(c)(3).³ The California Building Industry Association argues that what it regards as the "private" components of this Project are exempt from coverage under Section 1720(c)(3). CIM seeks to bolster this new argument with the representation that the City

² See September 16, 2005 appeal of CBIA, footnote 1, applauding the Department's use of the "benchmark date" method as a fair notice approach.

³ Section 1720(c)(3) provides: "Notwithstanding subdivision (b): ... (3) If the state or a political subdivision reimburses a private developer for costs that would normally be borne by the public, or provides directly or indirectly a public subsidy to a private development project that is *de minimis* in the context of the project, an otherwise private development project shall not thereby become subject to the requirements of this chapter."

"regularly builds and pays for parking garages." This argument is unavailing.

Dispositively, subsection 1720(c)(3) was added by Stats. 2001, Chap. 938 (S.B. 975), which did not become effective until January 1, 2002, well after CIM and the Redevelopment Agency of the City of Huntington Beach entered into their DDA. Thus, for the reasons noted above and discussed at greater length in the Determination, the subsection simply does not apply here.

Even if section 1720(c)(3) were applicable law, for the reasons set forth in the Determination, the Project is not an "otherwise private development project." As such, the exemption contained in section 1720(c)(3) is not available.

CIM also asserts on appeal that section 1720(c)(3) exempts the Project from public works status because the costs of building the parking facility are ones "that would normally be borne by the public." This argument need not be addressed in light of the conclusion that the Project is not an otherwise private development project.

Request For Hearing

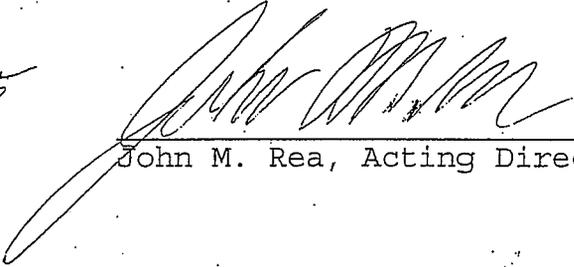
CIM requests a hearing. California Code of Regulations, title 8, section 16002.5(b) provides that the decision to hold a hearing is within the Director's sole discretion. Because the issues raised on appeal are purely legal ones and the material facts are undisputed, no factual issues need to be decided and no hearing is necessary. This appeal is, therefore, decided on the basis of the evidence submitted, and the request for hearing is denied.

Conclusion

Some of the arguments offered for reversing the Determination appear to be based on the view that this is fundamentally a private development project into which a public agency interjected itself and imposed its will to obtain a public improvement. That perception is belied by the actual facts of this agreement, in which the parties combined efforts to use a combination of mostly public land and both private and public funds to construct a single integrated project consisting of a parking lot, commercial and retail stores, and a hotel.

In summary, for the reasons set forth in the Determination, as supplemented by this Decision on Administrative Appeal, CIM's appeal is denied and the determination that the Strand Redevelopment Project is a public work is affirmed. This decision constitutes final administrative action in this matter.

Dated: 17 Nov 05


John M. Rea, Acting Director