

DEPARTMENT OF INDUSTRIAL RELATIONS
OFFICE OF THE DIRECTOR
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San Francisco, CA 94102
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March 15, 2005

Dana L. Wisehart, General Manager
United Water Conservation District
106 N. 8th Street
Santa Paula, CA 93060

Re: Public Works Case No. 2004-034
Lake Piru Recreation Area Concessionaire Improvements
United Water Conservation District

Dear Ms. Wisehart:

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 Lake Piru Recreation Area Concessionaire Improvements ("Project") is not a public work subject to the payment of prevailing wages.

The United Water Conservation District ("District") owns real property at Lake Piru in Ventura County, on which the District wants to develop recreational and related facilities. The proposed Concession Agreement ("Agreement") with a third party concessionaire ("Concessionaire") is a 40-year lease with three additional 10-year renewal options. Under the terms of the proposed Agreement, Concessionaire will be required to construct, maintain, renovate, repair or improve several categories of recreational and related support facilities. Concessionaire is also responsible to construct or cause to be constructed off-site utility and road improvements to the recreation area.¹ Such work will be in accordance with standards approved by District and the County of Ventura, but District will neither perform nor pay for the utility and roadwork. The proposed Agreement requires Concessionaire to bear the entire cost of the Project, which is estimated at \$18,000,000.

In addition, the proposed Agreement requires Concessionaire to pay District a basic rent of \$300,000 per year, with annual adjustments upward based on the Consumer Price Index, plus the difference between 6 percent of Concessionaire's gross receipts and the basic rent. The beginning minimum rent of \$300,000 per

¹ This is pursuant to a recent amendment to section 3.14 of the Agreement.

year was set to offset a majority of istrict's ongoing costs for providing lake patrol services during the four to six years needed to construct necessary improvements and develop a clientele for the recreation facilities. According to the oral statements of your appraiser, the maximum rent of six percent of gross receipts is within the prevailing range of four to eight percent for percentage-based public land leases in Ventura County, and is particularly reasonable from District's standpoint in light of the substantial capital investment Concessionaire must make up front before it can enjoy the benefit of the lease.

Concessionaire will also have a continuing duty to maintain the facilities and replace destroyed facilities over the life of the lease, and after a certain interval of time to undertake modernization. Concessionaire will own all improvements up through the termination or expiration of the lease, at which time the improvements automatically will become the property of District without additional compensation to Concessionaire.

Labor Code section² 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 1771 includes maintenance in the definition of public work.

Section 1720(b), in relevant part, defines "paid for in whole or in part out of public funds" as including:

"Payment of money ... by the ... political subdivision directly to or on behalf of the public works contractor, subcontractor, or developer." (§ 1720(b)(1).)

"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." (§ 1720(b)(4).)

The Project includes construction, alteration, demolition, installation, repair and maintenance work. It will be performed under contract. Concerning the public funds element of public work, under the Agreement, Concessionaire is to perform and pay the entire cost of the above-described work. The rent to be paid by Concessionaire to District, which consists of an upwardly adjusted \$300,000 per year plus a percentage of gross receipts,

² All section references are to the Labor Code.

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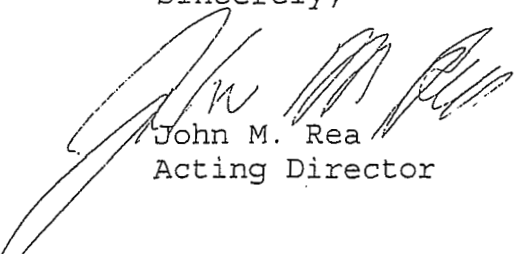
must, under Section 1720(b)(4), be at or above fair market value in order to avoid characterization as a payment of public funds. "Fair market value" is based on the highest and best use for which a property is geographically and economically adaptable. See *City of Los Angeles v. Decker* (1977) 18 Cal.3d 860. In the eminent domain context, in which the term "fair market value" frequently arises, fair market value is determined in reference to the property's condition before any development. Code Civ. Proc. § 1263.320 et seq. The information provided by the appraiser for District and the lack of any countervailing appraisal leads to the conclusion that the rent on the property here is not for less than fair market value.

In summary, the Project is not a public work for which prevailing wages must be paid because there is no payment of public funds. This conclusion is consistent with longstanding decision law in which a public agency makes no payments but instead leases land to a developer who is required to pay rent and bear all the responsibility, costs and risk of development., See *International Brotherhood of Electrical Workers v. Board of Harbor Commissioners of the City of Long Beach* (1977) 68 Cal.App.3d 556 [137 Cal.Rptr. 372] (oil and gas lease for which the city would receive a percentage of profits as royalties held not a public work).

This determination is qualified by the fact that you have submitted a proposed rather than an actual agreement governing the Project. If the actual agreement is different from the one presented or if evidence is brought forth that differs from the facts you have presented to the Director, including but not limited to proof that the rent is being charged at less than fair market value, a different determination might be made with respect to public works coverage.

I hope this letter satisfactorily answers your inquiry.

Sincerely,



John M. Rea
Acting Director