

DEPARTMENT OF INDUSTRIAL RELATIONS
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October 25, 2007

TO ALL INTERESTED PARTIES

**RE: DECISION ON ADMINISTRATIVE APPEAL
PUBLIC WORKS CASE NO. 2005-012
SEWER AND STORM LIFT STATION UPGRADE PROJECT
CITY OF VISALIA/GOSHEN COMMUNITY SERVICES DISTRICT**

We are enclosing a new copy of the Decision on Administrative Appeal in the above-entitled matter. This is being sent to you to correct a clerical error whereby two lines of text on page 1 replicate the beginning of the first paragraph on page 2. The two extra lines on page 1 have been removed from this corrected copy.

Enclosure

STATE OF CALIFORNIA

DEPARTMENT OF INDUSTRIAL RELATIONS

DECISION ON ADMINISTRATIVE APPEAL

RE: PUBLIC WORKS CASE NO. 2005-012

SEWER AND STORM LIFT STATION UPGRADE PROJECT

CITY OF VISALIA/GOSHEN COMMUNITY SERVICES DISTRICT

I. INTRODUCTION

On August 8, 2006, the former Acting Director of the Department of Industrial Relations issued a public works coverage determination (“Determination”) finding that the Sewer and Storm Station Upgrade Project (“Project”) undertaken by the City of Visalia (“City”) is a public work, and that City’s chartered city status does not exempt it from the requirement to pay prevailing wages. On September 7, 2006, City filed an administrative appeal from the Determination and requested an appeal hearing. City’s appeal is limited to the issue of the applicability of City’s chartered city exemption for municipal affairs, which it contends was wrongly decided under the facts of this case.¹ The Foundation for Fair Contracting (“FFC”) and Northern California Basic Crafts Alliance (“Alliance”) each submitted a response in opposition to the appeal on October 27, 2006. City filed a reply on November 17, 2006, and a further supplemental statement on April 3, 2007.²

¹ City also objects to the length of time taken to issue the Determination, noting that it was issued after the closure of a related enforcement complaint by the Division of Labor Standards Enforcement. However, City makes no argument or showing that it is therefore entitled to a different determination. In *Lusardi Construction Co. v. Aubry* (1992) 1 Cal.4th 976, the Director determined that a project was subject to the payment of prevailing wages after the awarding body and contractor had agreed that it was not public work and the contractor had completed significant portions of the project. The Supreme Court held, among other things, that the statutory obligation to pay prevailing wages for public work is not dependent upon the prior understanding or agreement of the contractor or awarding body.

² Counsel for American Incorporated, the contractor hired by City to perform the work, also filed a letter stating that the contractor “would rely on the briefs submitted in the matter by the City”

All of the submissions have been considered carefully. Except as noted below, they raise no new issues not already 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 is affirmed and incorporated herein by reference.

II. SUMMARY OF FACTS

The facts pertaining to this appeal were set forth in the Determination as follows:

The City of Visalia is a chartered city. City's present Charter contains a "home rule" provision that "The City of Visalia shall have the right and power to make and enforce all laws and regulations in respect to municipal affairs"

In approximately August 2003, City began planning the Project to upgrade City's lift and pump stations ("lift stations") [which are part of City's wastewater conveyance and treatment system]

The first component of the Project is to upgrade the electrical control panels, which are large cabinets containing instruments and electronic components necessary for the proper operation of the lift stations All the work on the Project will take place within the City's geographic limits.

In June 1995, City entered into a Wastewater Services Agreement with the Goshen [*footnote*: Goshen is an unincorporated town adjacent to the City of Visalia, in the County of Tulare] Community Services District for the collection, transmission, treatment, and disposal of Goshen's wastewater. Pursuant to this Wastewater Services Agreement, Goshen constructed a single 24-inch diameter pipe to deliver its wastewater to City. [*Footnote*: ownership of this pipe was later transferred to City.] From this pipe, Goshen's wastewater passes into City through lift station "A," which is located within and is owned by City and is being upgraded as part of the Project. City processes the wastewater from Goshen in City's wastewater treatment plant

Under the Wastewater Services Agreement, Goshen pays monthly sewer service charges to City's Wastewater Enterprise, which is a business division within City staffed by City employees. Wastewater Enterprise funds are comprised of service charges paid by City residents and service charges paid by Goshen and its residents under the Wastewater Services Agreement. City and Goshen service charges are not segregated from each other. City represents that its Wastewater Enterprise receives approximately \$12 million, of which approximately \$120,000 per year is from Goshen. [*Footnote*: In addition, Goshen pays City other fees (a

conveyance system charge and a treatment connection charge) under the Wastewater Services Agreement for which Goshen receives grant and loan funds from the United States Department of Agriculture – Rural Economic and Community Development Service.] The Project is being paid for with Wastewater Enterprise funds.

Project specifically provides for upgrades to 11 sanitary sewer lift stations and 33 storm water lift stations within City that regulate the flow of wastewater, most of which is collected within City. It does not entail work on the wastewater treatment plant or other parts of the conveyance and disposal system. Goshen's wastewater is collected separately and then conveyed to City for treatment and disposal pursuant to the Wastewater Services Agreement. The pipe that conveys Goshen's wastewater connects with City's conveyance system upstream from Lift Station A, which is one of the 11 sanitary sewer lift stations involved in Project. Ninety-five percent of the wastewater handled by Lift Station A is generated by City, while five percent is generated by Goshen. The upgrades will not increase Lift Station A's capacity.

Stated purposes of Project are to update the management of wastewater generated within City by City's ratepayers and to bring the facilities up to fire standards. Another stated purpose of Project is to comply with new federal regulations regarding sewer overflows. Pumps operate at each lift station to maintain certain wastewater levels. At storm water lift stations, wastewater is pumped to a higher elevation where it is discharged into a storm basin or drainage channel. At sanitary sewer lift stations, wastewater gravity-flows to City's Wastewater Treatment Facility. The discharge of waste materials from City's Wastewater Treatment Facility is regulated through a National Pollutant Discharge Elimination System permit issued by the California Water Quality Control Board, Central Valley Region ("WQCB, CVR"). Treated wastewater is discharged into Mill Creek (identified in the Order [cited *infra*] as "a water of the United States"), onto City-owned agricultural land immediately to the south of the Wastewater Treatment Facility, and into on-site disposal ponds. (WQCB, CVR Order No. R5-2006-0091, entitled "Waste Discharge Requirements for City of Visalia Wastewater Treatment Facility Tulare County," p. 1, ¶1.)

During much of the year, the treated wastewater discharged into Mill Creek comprises most of the creek's flow from the point of discharge to percolation ponds located four miles downstream from the Wastewater Treatment Facility. (*Id.* at pp. 12-13, ¶52.) Downstream users use some of the flow for crop irrigation, and both the flow and percolation ponds serve to recharge groundwater, which provides a source of domestic and agricultural water supply. (*Ibid.*) WQCB, CVR Order No. R5-2006-0091 reflects a number of federal and state regulatory concerns relative to Mill Creek, as a surface water covered by the WQCB, CVR's Water Quality Control Plan for the Tulare Lake Basin.³

III. DISCUSSION

A. Project Is Not A Purely Municipal Affair.

In *City of Santa Clara v. Von Raesfeld* (1970) 3 Cal.3d 239, the California Supreme Court observed as follows:

Historically the treatment and disposal of city sewage is a municipal affair [citations] As in the case of other municipal projects, however, sewer projects may transcend the boundaries of one or several municipalities. Such projects also may affect matters which are acknowledged to be of statewide concern; e.g., protection of navigable waters [citation], tidelands [citation], and the public health [citation]. In such circumstances the project "ceases to be a municipal affair and comes within the proper domain and regulation of the general laws of the state." [Citation.] As this court stated in *City of Pasadena v. Chamberlain* (1928) 204 Cal. 653, 659-660 [269 P. 630], "It may be admitted that, generally speaking, the distribution of water within municipalities would be as to each of such municipalities a municipal affair, but it would be entirely too narrow an interpretation of the purposes and scope of the Metropolitan Water District Act to hold that, because the distribution of water for domestic use in each of a number of the municipalities within a designated area is a municipal affair, the formation of a common purpose for the acquisition of water in large quantities from sources outside of such municipalities, and even outside of the area within which they exist, and the distribution of such

³ Also noted within WQCB, CVR Order No. R5-2006-0091 is a separate March 25, 1999 Memorandum of Understanding between City and the Goshen Community Services District through which City agreed to accept day-to-day responsibility for management, operation, and maintenance of the Wastewater Treatment Facility and to regulate Goshen's industrial discharges to the Wastewater Treatment Facility through City's Industrial Pretreatment Program. (*Id.* at p. 5, ¶20.) The Order further notes that this Memorandum of Understanding and City's implementing ordinance are subject to legal review for adequacy by the State Water Resources Control Board. (*Ibid.*)

water, when so acquired, among such cities, in accordance with a common plan, and with a view to achieving equitability in the distribution and use of such water, would in any sense be, as to each or any of such combined municipalities, a municipal affair. The impossibility or impracticability of any one or more of such municipalities acting separately and independently in the acquisition and distribution of such water would seem to argue conclusively that in achieving such object by the means provided for in said act the municipalities engaged therein could not be held to be engaged in the conduct of a merely municipal affair." [Citations.]

(*City of Santa Clara v. Von Raesfeld, supra*, 3 Cal.3d at pp. 246-7.)⁴

The Determination found that the chartered city exemption did not apply to Project based upon an analysis of the three factors derived from *Southern California Roads v. McGuire* (1934) 2 Cal.2d 115, to wit: (1) the extent of extra-municipal control over the project; (2) the source and control of the funds used to finance the project; and (3) the nature and purpose of the project, including its geographical scope and extra-territorial effects. While finding that the first factor weighed in City's favor because City has complete control over the planning and execution of Project, the Determination found that the other two factors weighed against the exemption because funding comes from the Wastewater Enterprise Fund into which Goshen contributes (also noting that some of Goshen's contribution was derived from federal funding), and Project will benefit the part of the system that serves Goshen and its users as well as City.

City's appeal offers essentially three arguments why the Determination was wrongly decided and Project should be considered a municipal affair exempt from state law prevailing wage requirements. First, City contends that Project will only upgrade lift stations located within City for the benefit of City's sewage and storm water collection systems, which City views as distinct from both Goshen's collection systems and the Wastewater Treatment Facility operated by City that serves both communities.⁵ As the

⁴ The Court cited additional cases at the end of this passage, including *Pacific Telephone and Telegraph Co. v. City and County of San Francisco* (1959) 51 Cal.2d 766, which held that the construction and maintenance of telephone lines in streets or other places within a city was a matter of statewide concern and which further noted that, "What may at one time have been a matter of local concern may at a later time become a matter of state concern controlled by the general laws of the state." (*Id.* at p. 771.)

⁵ City concedes that the Wastewater Treatment Facility "is, to a certain degree, considered a regional facility." (Appeal at p. 5.)

quoted passage from *City of Pasadena v. Chamberlain* (within the *City of Santa Clara v. Von Raesfeld* quotation above) indicates, a regional wastewater system cannot be split into constituent pieces in order to bring a project within the municipal affairs exemption. Contrary to City's position, the collection, conveyance, treatment and disposal functions are more correctly viewed as components of a unified regional wastewater system - serving both City and Goshen - that delivers treated wastewater beyond City to downstream users.

Underlying City's argument is the view that a project must be "primarily" extra-territorial in nature, scope and purpose to overcome the chartered city exemption, citing the description of the wastewater treatment improvements in a prior public works coverage determination, PW 97-018/97-019 *Primary Plant Headworks and Cannery Segregation Project, City of Modesto* (March 17, 2000). City also points to the use of the same word "primarily" as a modifier of "regional" in *Committee of Seven Thousand v. Superior Court of Orange County* (1988) 45 Cal.3d 491. However, City reads more into that word than the context in either case allows. In *City of Modesto*, the Department used "primarily" to indicate what the facts actually showed relative to a claim that the project's extra-territorial aspects were merely incidental. In *Committee of Seven Thousand*, the Court was distinguishing between "matters of statewide concern [and] strictly municipal affairs," noting that "[a]s used in this discussion, 'statewide' refers to all matters of more than local concern and thus includes matters the impact of which is primarily regional rather than truly statewide." (*Committee of Seven Thousand, supra*, 45 Cal.3d at p. 505.) In other words, the Court was making the point that "regional" equates with statewide; it was not saying something must be predominantly regional in order to not be a municipal affair.⁶

It is more appropriate to look at the modifiers used by courts when applying the chartered city exemption in determining whether a particular act or activity by a chartered city is free from otherwise applicable state law. Courts have asked whether the act or

⁶ In *Committee of Seven Thousand*, the Court held that a statute permitting local governments in Orange County to impose development fees to fund highway construction involved a matter of statewide concern and thus local citizens could not invoke city charter-based initiative rights to challenge an ordinance imposing those fees.

activity is “merely a municipal affair” (*City of Pasadena v. Chamberlain* (1928) 204 Cal. 653, 660, “strictly municipal affairs” (*Committee of Seven Thousand, supra*, 45 Cal.3d at p. 505), “purely municipal affairs” (*Baggett v. Gates* (1982) 32 Cal.3d 128, 136), or “exclusively municipal affairs” (*Professional Fire Fighters, Inc. v. City of Los Angeles* (1963) 60 Cal.2d 276, 291; and *Southern California Roads, supra*, 2 Cal.2d at p. 126).⁷

Analyzing whether the lift station upgrade work is a purely municipal affair, the storm water and wastewater collection systems do not serve a purpose that can be divorced from the overall purpose of collecting, treating, and disposing of wastewater in a manner that comports with state and federal water quality and conservation requirements designed to protect the interests of downstream users as well as City residents. City has joined forces with Goshen for the maintenance and operation of what City acknowledges to be a regional wastewater treatment facility. Project benefits the system that delivers sewage to this facility and diverts excess storm water, including the part of the system that serves Goshen, even if that is not its paramount intent. Project also helps City control what the system discharges into Mill Creek downstream of the Wastewater Treatment Facility, which is a matter of significant ongoing regulatory concern for the state through the WQCB, CRV. As such, while the work is performed on lift stations located within City, it provides a benefit to the system as a whole, which cannot be described as a purely, strictly, merely or exclusively municipal affair.

Second, City asserts that its ratepayers will bear the entire cost of the upgrades, though paid through the Wastewater Enterprise Fund.⁸ The facts, however, indicate that the system and Project are financed by a single Wastewater Enterprise Fund that includes revenues generated by Goshen.

Finally, City contends that the extra-territorial effect of Project will be merely incidental to the municipal purpose, emphasizing that Goshen’s wastewater flows through only one of the pump stations being upgraded and represents only five percent of the flow

⁷ Emphasis has been added to each modifier. City’s briefs acknowledge some of these modifiers without discussing their meaning.

⁸ In support of this assertion City argues that payments by and for Goshen to the Wastewater Enterprise Fund, including federal loans and grants that were long since spent, are limited to the treatment and disposal of Goshen’s wastewater and therefore cannot be regarded as a source of funds for Project, even though commingled in a single account from which Project is funded.

through that pump station. The extraterritorial impacts of Project are not “incidental” as that term is properly understood in relation to the chartered city exemption.⁹ City’s wastewater system serves Goshen as a matter of intent and not by happenstance or because City must go through Goshen to dispose of its wastewater. By design, the system also discharges wastewater downstream of City where it impacts other users and implicates state and federal regulatory interests, a fact tacitly acknowledged in Project’s stated purpose of better controlling both wastewater and storm water flows generated within City. As such, the extraterritorial effects are not incidental to the municipal purpose of the Project.

For the foregoing reasons, Project is not a purely municipal affair. Consequently, City’s chartered city status does not exempt Project from state law prevailing wage requirements.

B. Request For Hearing Denied.

City requests an “appeal hearing.” California Code of Regulations, title 8, section 16002.5, subdivision (b) provides that the decision to hold a hearing is within the Director’s sole discretion. All facts and arguments presented by City in several different submissions have been duly considered. 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 record, and the request for hearing is denied.

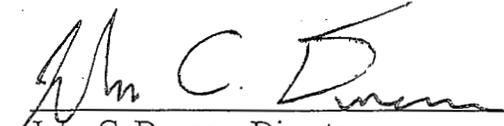
IV. CONCLUSION

In summary, for the reasons set forth in the Determination, as supplemented by this Decision on Administrative Appeal, City’s appeal is denied. The determination that the Sewer and Storm Lift Station Upgrade Project is a public work that does not fall within the chartered city exemption and is therefore subject to California’s prevailing

⁹ Merriam-Webster’s On Line Dictionary defines “incidental” when used as an adjective as “being likely to ensue as a chance or minor consequence” or “occurring merely by chance or without intention or calculation.” ([http://www.m-w.com/dictionary/incidental.](http://www.m-w.com/dictionary/incidental))

wage requirements is affirmed. This Decision constitutes final administrative action in this matter.

Dated: 10/9/07


John C. Duncan, Director