

DEPARTMENT OF INDUSTRIAL RELATIONS

Christine Baker, Director

Office of the Director

1515 Clay Street, 17th Floor

Oakland, CA 94612

Tel: (510) 286-7087 Fax: (510) 622-3265



April 21, 2016

Rob Carrion
District Representative
Operating Engineers Local Union No. 3
3920 Lennane Drive
Sacramento, CA 95834

Re: Public Works Case No. 2014-029
Trout Creek Trail and Bikeway
Town of Truckee

Dear Mr. Carrion:

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 California Labor Code section 1773.5¹ and Code of Regulations, title 8, 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 Town of Truckee's Trout Creek Trail and Bikeway project (Project) is a public work; and the charter city status of the Town of Truckee (the Town) does not exempt the Town from the requirement to pay prevailing wages.

FACTS

In June 2014, the Town contracted with Herback General Engineering (Herback) to construct the Project, consisting of a paved, recreational, multi-use trail connecting the Tahoe Donner subdivision to downtown Truckee. Upon completion, the Project consisted of the main trail at 3,711 linear feet, as well as a spur trail of 400 linear feet to connect the main trail to the existing Pioneer Commerce Trail. The trail's pavement is ten feet wide with two-foot shoulders on either side. Retaining walls up to nine feet high were constructed, as well as safety railings with concrete footings. The construction contract was for \$1,113,292.00, although the Town asserts that the total Project cost was approximately \$1,250,000.00. The Town also entered into a contract for \$183,256.00 with a civil Engineering firm, Lumos & Associates (Lumos). Lumos had previously provided a preliminary design for the Project; under the contract, Lumos finalized the design and provided construction plans and specifications.² The entire Project lies within the municipal boundaries of the Town. A Notice of Completion for the Project was recorded on February 3, 2015.

¹ All citations are to the California Labor Code, unless otherwise specified.

² Lumos was also responsible for permitting, obtaining environmental clearances, right of way issues, and project management.

Most of the funding for the Project consisted of money collected from an annual parcel charge assessed on property located in Town Special Services Area 1 (TSSA 1). TSSA 1 encompasses the Tahoe Donner residential subdivision within the Town. In 2014, the annual assessment for property within TSSA 1 was \$95.00 per improved lot and \$70.00 per unimproved lot. The actual collection and assessment of the parcel charges within TSSA 1 is done by Nevada County. In authorizing the Project, the Town adopted the recommendation of the Town's Senior Engineer that a portion of TSSA 1 funds collected in 2014 be allocated to trail development and construction within TSSA 1, including the Trout Creek Trail.³

Additional funding for the Project was obtained from the Local Transportation Fund of Nevada County (LTF) disbursed by the Nevada County Transportation Commission (NCTC), a regional transportation planning agency. (See Gov. Code § 29532 and Pub. Util. Code § 99233.) Pursuant to the Transportation Development Act of 1971 (TDA), an LTF exists in each California county. Under the TDA, ¼ cent of the statewide sales tax collected in each county is returned to each county by the State Board of Equalization (BOE) for local transportation programs. (See Gov. Code § 29530 et seq.) After certain other statutorily authorized allocations, two percent of the LTF funds remaining are to be made available to "facilities provided for the use of pedestrians and bicycles". (Pub. Util. Code § 99233.3.) The NCTC reviews LTF funding requests for Nevada County and the municipalities therein, including the Town. Upon review, the NCTC allocates LTF money for eligible purposes in Nevada County, Grass Valley, Nevada City, and the Town.

The Town applied for, and received, \$125,794.00 in LTF funding, ostensibly to offset the cost of the Town's contract with Lumos. The funding request was done at the direction of the Town Council in 2013, "for design, permitting and construction" of the Project. The LTF was included among the funding sources listed in the Town's capital improvement budget for the Project in 2013.

The Town is a chartered city. Its charter, adopted in 1995, contains a "home rule" provision in Article 1, stating that the Town's governance is a municipal affair for the benefit of the Town's citizens. Article 2 reserves to the Town all power and control over public works contracts and the compensation to be paid for the performance of the work. Article 4 asserts that the provisions of the charter will prevail in the event of a conflict with the general law of the State of California. Chapter 3.13.010 of the Town's Municipal Code directs the Town's Public Works Director to establish wages to be paid on locally funded public works projects. Through Resolution 2009-18, the Town Council declared public works projects financed with local funds to be of local municipal concern, and established the Town's own base hourly wage rates for operating engineers, teamsters, and laborers. The Town also determined that workers in other crafts are to be paid 83 percent of the prevailing wage rate for Nevada County as determined by the Department. Fringe benefits are to be negotiated between contractors and their employees.

In the construction contract for the Project, Herback agreed to pay workers at prevailing wage rates as set forth by the Federal Department of Housing and Urban Development, the California Department of Industrial Relations, "or local prevailing wages as established under the Town Charter as appropriate to the project being constructed."

³ Road maintenance has been an authorized use of TSSA 1 funds since 1985.

DISCUSSION

Labor Code section 1771 generally requires the payment of prevailing wages to workers employed on public works. Section 1720, subdivision (a)(1) defines “public works” as “[c]onstruction, alteration, demolition, installation, or repair work done under contract, and paid for in whole or in part out of public funds For purposes of this paragraph, ‘construction’ includes work performed during the design and preconstruction phases construction”

It is undisputed that the Project involves construction that is done under contract and paid for in whole or in part out of public funds. The Town asserts, however, that its charter exempts it from compliance with California’s prevailing wage laws, section 1720 et seq. (CPWL), specifically the payment of prevailing wages, because the Project is purely a municipal affair.

1. Local Transportation Funds Exist to Further a Statewide Concern.

As described above, one of the purposes of the TDA is to return a portion of California’s sales tax revenues to the counties for the purpose of developing public transportation. In the Legislature’s statement of findings and declarations, the development of public transportation systems is seen “as an essential public service . . . for the benefit of the total transportation system of the state and all the people of the state” (Pub. Util. Code § 99220, subd. (a).) “The fostering, continuance, and development of public transportation systems are a matter of state concern.” (Pub. Util. Code § 99220, subd. (b).) Local transportation funds are provided “to meet the public transportation needs of an entire county” and “benefit the county as a whole.” (Pub. Util. Code § 99220, subd. (c).) Local transportation funds “are made possible by the imposition of the state’s sales and use taxes on motor vehicle fuel, which allows for a reduction in state taxes without a corresponding loss in revenue. (Pub. Util. Code § 99220, subd. (d).) It is abundantly clear that local transportation funds are made available to the counties to address what is explicitly deemed to be a matter of statewide and regional concern.

2. The Home Rule Authority of Charter Cities Under the City of Vista Decision.

The California Constitution explicitly authorizes charter cities to govern themselves, free from intrusion of the state legislature, regarding matters deemed municipal affairs. (*State Bldg. and Constr. Trades Council of California, AFL-CIO v. City of Vista* (2012) 54 Cal.4th 547, 555 (*City of Vista*); Cal. Const. Art. XI, section 5.) Charter cities “may make and enforce all ordinances and regulations in respect to municipal affairs, subject only to restrictions and limitations provided in their several charters and in respect to other matters they shall be subject to general laws.” (Cal. Const. Art. XI, section 5(a).) “City charters adopted pursuant to this Constitution shall... with respect to municipal affairs... supersede all laws inconsistent therewith.” (*Id.*) As to matters which are of statewide concern, charter cities remain subject to and controlled by general state laws regardless of the conflicting provisions of their charters. (*Bishop v. City of San Jose* (1969) 1 Cal.3d 56, 61-62.)

In 2012, the California Supreme Court reiterated the four-part analytical framework for resolving whether a matter falls within the home rule authority of a charter city:

First, a court must determine whether the city ordinance at issue regulates an activity that can be characterized as a “municipal affair.” Second, the court must satisfy itself that the case presents an actual conflict between [local and state law]. Third, the court must decide whether the state law addresses a matter of “statewide concern”. Finally, the court must determine whether the law is “reasonably related to... resolution of that concern and narrowly tailored to avoid unnecessary interference in local governance.

(*City of Vista, supra*, 54 Cal.4th at p. 556 [internal quotation marks and case citations omitted].) The Court in *City of Vista* held that the “wage levels of contractor workers constructing locally funded public works are a municipal affair, and that these wage levels are not a statewide concern.” (*Id.*, at pp. 556, 566.) The analysis of the coverage question for this Project must begin with the first *City of Vista* factor.

Although the California Constitution grants charter cities the ability to regulate their own municipal affairs, the California Constitution does not provide a definition of what constitutes a municipal affair.⁴ As a result, “courts must decide, under the facts of each case, whether the subject matter under discussion is of municipal or statewide concern.” (*County of Riverside v. Superior Court* (2003) 30 Cal.4th 278, 292.)

In *Southern California Roads Co. v. McGuire (McGuire)*,⁵ the California Supreme Court considered the following factors in determining whether a project is a municipal affair or a matter of statewide concern: (1) the extent of the non-municipal control over the project; (2) the source and control of the funds used for the project; and (3) the nature and purpose of the project, including its geographical scope and extraterritorial effects.

3. Nevada County’s LTF is a Non-Municipal Source of Funds for the Project.

With respect to this Project, the second *McGuire* factor is determinative. The Project is funded by two sources, charges assessed on real property located within TSSA 1, and monies from Nevada County’s LTF. The TSSA 1 funding is derived from charges levied against property within the Town. The monies thus collected are allocated by the Town Council exclusively to roadways within the service area covered by TSSA 1. Property owners within the service area who pay the assessments are those who benefit directly from the Project. The TSSA funding is municipal in

⁴ There is no “precise definition” of the term “municipal affair.” *R & A Vending Services, Inc. v. City of Los Angeles* (1985) 172 Cal.App.3d 1188, 1192. Indeed, as the California Supreme Court long ago observed:

[T]he constitutional concept of municipal affairs is not a fixed or static quantity. It changes with the changing conditions upon which it is to operate. 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. *Pac.Tel. & Tel. Co. v. City & Cty. of San Francisco* (1959) 51 Cal.2d 766, 781.

⁵ (1934) 2 Cal.2d 115, 120-23.

nature.⁶ Unlike the TSSA funding, however, funds disbursed to the Town from the LTF are non-municipal. LTF funds originate with sales tax revenues collected by the BOE, a state agency, whereupon they are distributed to the counties. The LTF monies obtained by the Town here came directly from the coffers of Nevada County pursuant to approval by the NCTC.

An analysis of the first and third *McGuire* factors is unnecessary to this determination due to the outcome of the analysis of the second factor, to wit: that the Project is a matter of statewide concern by virtue of the Town's use of non-municipal LTF monies. The otherwise municipal nature of the Project does not negate the statewide concern involved in the allocation of funds from the LTF.

4. Subsidiary Arguments Presented by the Town.

The Town advances two arguments specifically directed to the question of whether the use of LTF monies for the Project converts the otherwise municipal nature of the Project into a matter of statewide concern.

A. De Minimis.

The Town points out that it applied for and received LTF monies to reimburse the Town for the preparation plans and specifications by Lumos. The Town asserts that, of the dollar amount obtained from the LTF (\$125,794.00), the charges from Lumos pertaining to this particular Project amounted to only \$53,664.70, or 4.3 percent of the total Project cost of \$1,125,000.00.⁷ Given this low percentage and the predominance of municipal funding for the Project, the Town argues that the LTF funding level is de minimis and insufficient to change the municipal character of the Project.

The Town cites no legal authority for this proposition, other than a general reference to other coverage determinations which purportedly find "the charter city exemption to be inapplicable due to the receipt of significant amounts of non-municipal funding." The Department is not aware of any other coverage determinations that so find, or any decisional law that would validate this argument. The only statutory authority for a de minimis exemption to the CPWL is found in section 1720, subdivision (c)(3). By its terms, this statute only applies to private development projects, so it cannot be applied to the Project here.

⁶ With respect to the TSSA 1 funding, this conclusion is consistent with PW 2000-074, *Lopez Ridge Neighborhood Park Project* (May 16, 2001). In that case, assessments levied in conjunction with the issuance of building permits within a public facilities benefit assessment district within the City of San Diego were used to fund the building of a neighborhood park. Those revenues were deemed to be municipal in character under *McGuire*. See also PW-2014-028, *2014 Paving and Drainage Project – Town of Truckee* (December 22, 2015) (Assessments against real property in Truckee's TSSA 1 were determined to be a municipal source of funding.)

⁷ The Town has submitted the declaration of Dan Wilkins, its Engineer and Public Works Director. Wilkins states that, of the \$125,794.00 of LTF program funds obtained by the Town, only \$53,664.70 was allocated to work done by Lumos on this particular Project. Wilkins' assertion is not corroborated by any of the other documents provided by the Town in support of its request for this coverage determination. The receipt of \$125,794.00 from the LTF represents 10 percent of the total Project costs.

Aside from the lack of statutory support for the Town's de minimis argument, the fact remains that the LTF funds were more than ten percent of the overall Project costs. Therefore, even if the concept of a "de minimis exemption" might be relevant to an analysis of the second of the *McGuire* factors, it would not apply here because ten percent is not de minimis.⁸ To the contrary, the LTF monies were a significant component of the overall funding for the Project.

B. Professional Services.

The Town also contends that the Department has not enforced the CPWL with respect to professional services such as those furnished by Lumos, and therefore the source of the funding for those services is irrelevant to any analysis as to whether the Project is a municipal affair. However, effective January 1, 2001, the definition of the term "construction" in section 1720, subdivision (a), was amended to include "work performed during the design and preconstruction phases of construction". There can be no plausible argument that the preparation of plans and specifications for the Project by Lumos were not part of the "design phase" of the Project's construction. Consequently, the professional services rendered by Lumos were a component part of the construction of the Project and the source of funds for those services is directly relevant to a determination as to whether the Project is a purely municipal affair.⁹

5. The Remaining City of Vista Factors.

As to the other analytical factors set out in the *City of Vista*, there exists an actual conflict between the local law and state law as embodied in the CPWL. Through its charter, Municipal Code, and Resolution 2009-18, the Town Council has asserted that compliance with the CPWL is not required for local public works projects financed with locally-sourced funds. At the same time, the CPWL does not exempt charter cities from its reach, and absent an exemption the CPWL would require the payment of prevailing wages on the Project.

In *City of Vista*, the Court explicitly decided that the CPWL is not a matter of statewide concern. Accordingly an analysis of the third and fourth *City of Vista* factors is unnecessary here.¹⁰

⁸ Among the several other cases addressing the de minimis exception in section 1720, subdivision (c)(3), the highest percentage of public funding determined to qualify for the de minimis exception was 1.75 percent. See PW 2011-033, *Blue Diamond Agricultural Processing Facility – City of Turlock* (May 9, 2012). Thus, even if the Town's 4.3 percent figure were to be accepted, that percentage would still exceed the outermost boundary of the de minimis exception as it has been construed by the Department.

⁹ The relevant inquiry is not, as the Town suggests, whether the Department has issued or enforced prevailing wage rates for work done by engineers and other professionals employed by Lumos. The relevant inquiry involves ascertaining the scope of the Project and its funding, to assess the extent to which the Project, as a whole, is purely municipal in character.

¹⁰ The third factor is whether the state law addresses a matter of statewide concern; the fourth factor is whether the state law is reasonably related to resolution of that concern and narrowly tailored to avoid interference with local governance. *City of Vista*, supra, 54 Cal.4th at p. 556.

CONCLUSION

There is an actual conflict between the local law as promulgated by the Town of Truckee and state law as expressed in the CPWL. Therefore, the Town's claim that the Project is exempt from the CPWL by virtue of its status as a charter city turns on whether the Project involves a matter of statewide concern. Due to the Town's receipt and use of a significant percentage of non-municipal LTF monies for the Project, the Project is not a purely municipal affair but rather a matter of statewide concern that comes within the domain and statutes of the general laws of the state. Therefore the Project is a public works and subject to prevailing wage requirements.

I hope this determination satisfactorily answers your inquiry.

Sincerely,

A handwritten signature in cursive script that reads "Christine Baker".

Christine Baker
Director