Oregon

Bureau of Labor and Industries
Brad Avakian
Commissioner

November 6, 2014

Paul Sutherland
R3 Development, LLC
3015 Salem Ave. SE
Albany, OR 97321

Re: *Determination Whether Project is Subject to Prevailing Wage Rate Law*
Project: J.C. Penney Building Renovations
Requested by: R3 Development, LLC

Dear Mr. Sutherland:

On October 24, 2014, you submitted a request on behalf of R3 Development, LLC ("**R3 Development**") requesting a determination of whether the tenant upgrades to and the renovation of the J.C. Penney Building need to be considered a single project, and subject to the Prevailing Wage Rate laws. On October 30 and November 4-5, 2014, you sent this office emails responding to some questions I had regarding the project.

Sufficient information to make a determination was received on November 6, 2014, and therefore, the commissioner issues the following determination:

FINDINGS OF FACT:

1. The J.C. Penney Building is located in Albany, Oregon. R3 Development purchased the building in 2008. At that time, R3 Development performed significant work to restore and rehabilitate the building, including installing an elevator, seismic upgrades and installation of an automatic fire sprinkler system. R3 Development gutted much of the building and converted the basement into an antique mall, the first floor and mezzanine into a restaurant and commercial space, and the third floor into office space. As part of the 2008 renovation, R3 Development installed, in the restaurant space, front operational windows to open to the street in the summertime, a grease trap system, additional power and a ventilation system.

2. In order to help finance the 2008 renovation, R3 Development entered into a Developer Partnership with the Central Albany Revitalization Area ("**CARA**"). CARA authorized a grant in the amount of $542,000 and a forgivable loan in the amount of $200,000. In the Developer Partnership Application filled out by R3 Development on December 8, 2008, it states that one condition of forgiveness of the $200,000 loan is that R3 Development must find and secure a long-term lease for the restaurant space within 5 years.

3. In addition to the amounts supplied by CARA, R3 Development contributed approximately $3.4 million in private equity funding.

4. R3 Development was unable to find a restaurant to lease the space within the 5-year time frame. At the June 18, 2014 meeting of the CARA Advisory Board (the "**Board**"), Kate Porsche, Director of Economic Development and Urban Renewal for the City of Albany, and Rick Mikesell of R3 Development approached the Board to request an additional two years to try to get a restaurant into the space and forgiveness of the $200,000 loan at the end of the additional two-year term, regardless of whether there was a restaurant in the space. The extension was granted, but the Board stated it would revisit the repayment issue at the end of the two-year extension.

5. R3 Development has now found a potential restaurant tenant to lease the space. R3 Development is proposing tenant improvements to the restaurant space to be paid by R3 Development, including building an "interior corridor division wall, floor insulation, electrical, plumbing, kitchen flooring, and trash enclosure." Additionally, tenant improvements would include "kitchen equipment, lighting, bar, and built in booths." R3 Development estimates the landlord costs could be as much as $350,000. Additionally, the potential tenant may contribute some of its own funds, but at this time it is not known whether they will, and if they do, how much that might be.

6. R3 Development has discussed with the City of Albany the concept of the new tenant receiving funds directly from CARA. The amount requested from CARA is estimated to be approximately $100,000.

7. The total project cost for both the original restoration and the proposed tenant improvements will be approximately $4,552,841.51. Funding for the project includes the following sources:

    i. Funds of a Public Agency: $802,841.51
        1. Central Albany Revitalization Area
            a. Grants - $502,841.51
            b. Forgivable loans - $200,000
            c. Either grant or forgivable loan - $100,000
    ii. Other Funds: Approximately $3,750,000
        1. R3 Development:
            a. For 2008 renovations – approx. $3,400,000
            b. For tenant improvements – approx. $350,000
        2. Potential tenant:
            a. Unknown

CONCLUSIONS OF LAW:

1. The J. C. Penney Building renovation would be a major renovation of a privately owned building that used funds of a private entity and $750,000 or more of funds of a public agency. Therefore, the definition of "public works" under ORS 279C.800(6)(a)(B) would apply to this project.

2. The J. C. Penney Building renovation and tenant improvements would be a single project. When determining whether multiple contracts constitute a single project, the commissioner considers the following:

    a. The physical separation of the project structures. Here, all work would be performed on the same structure – the J. C. Penney Building.

    b. The timing of the work on project phases or structures. In this situation, there would be a significant lapse of time between the renovations and the tenant improvements. However, the 2008 renovations specifically anticipated a restaurant moving into the space on the first floor. The gap in time between the original renovations and the tenant improvements was caused only by the inability of R3 Development to find a tenant for the space, and is not because the work was planned in phases.

    c. The continuity of project contractors and subcontractors working on project parts or phases. R3 Development does not yet know what contractors or subcontractors might work on the tenant improvements.

    d. The manner in which the public agency and the contractors administer and implement the project. CARA has treated the project as including a restaurant throughout. In ARA Resolution 2008-13, the ARA found that the restoration of the J. C. Penney Building would encourage economic development because the space would be "used as a large retail and restaurant space," and be for the public good because it brought "a mixed-use of retail, restaurant and office space… to Central Albany." CARA conditioned forgiveness of the $200,000 loan on R3 Development leasing the space to a restaurant within five years, and then granted an extension of that timeline for an additional two years in June of 2014.

    e. Whether a single public works project includes several types of improvements or structures. In this instance, the project would include primarily historical preservation and renovation. All construction will take place in a single structure.

    f. Whether the combined improvements or structures have an overall purpose or function. The project has the overall purpose of rehabilitating and preserving a historic building while also drawing people and commerce to central Albany. The proposed tenant improvements combine with the renovations already performed to achieve that purpose. According to ARA Resolution No. 2008-13, the anticipated outcomes of the project included economic development ("a people attractor for our downtown"), historic preservation, and public good (by bringing a mix of uses including retail, restaurant and office space in central Albany). The proposed tenant improvements are a continuation of these anticipated outcomes.

    Considering these factors, the Bureau determines that the historical renovations and proposed tenant improvements should be considered one project.

3. More than $750,000 of funds of a public agency would be used on the project. OAR 839-025-0004(9)(a)(A) defines "directly used funds of a public agency" as "revenue, money, or that which can be valued in money collected for a public agency or derived

from a public agency's immediate custody or control." The project would use more than $750,000 from CARA's immediate custody or control and therefore are funds of a public agency.

DETERMINATION:

Based on the foregoing, the Prevailing Wage Rate laws, ORS 279C.800 to ORS 279C.870, and OAR Chapter 839, Division 025, would apply to the J. C. Penney Building renovations.

This determination is based on the agency's file as of the date of this determination. The commissioner may make a different determination if any of the project information is incorrect, or if the project or project documents are modified or supplemented after the date of this determination.

REQUEST FOR RECONSIDERATION:

After the commissioner issues a determination, the requestor or any public agency served with a copy of the determination may request that the commissioner reconsider the determination. A request for reconsideration must be submitted in writing to the Prevailing Wage Rate Unit, must include the reason or reasons for the request and any documents in support of the request, and must be received within 15 calendar days of the date the determination was mailed. A request for reconsideration does not toll the time period for requesting a contested case hearing on the determination.

RIGHT TO A HEARING

The requestor and any person adversely affected or aggrieved by this determination are entitled to a hearing as provided by the Administrative Procedures Act (ORS 183.413 to 183.470) and ORS 279C.817. If you want a hearing, the Bureau of Labor and Industries, Wage and Hour Division must receive your written request for hearing within 21 days from the date this notice was mailed. Hearing requests should be addressed and delivered to:

Administrator
Wage and Hour Division
Bureau of Labor and Industries
800 NE Oregon St., Suite 1045
Portland, Oregon 97232

If a written request for hearing is not received within this 21-day period, your right to a hearing shall be considered waived, this determination order will be final, and the agency file on this matter shall serve as the record for purposes of proving a prima facie case.

If you request a hearing, you will be notified of the date, time and place of the hearing. You have the right to be represented by legal counsel at a hearing. However, if you are a government agency, corporation, partnership, or unincorporated association, you must be represented by either legal counsel or an authorized representative. If you request a hearing, you will receive information on Contested Case Rights and Procedures before the hearing. After the hearing, an order confirming, modifying, or reversing this determination order will be issued. This determination shall remain in effect until the final order is issued.

If you request a hearing, but fail to appear at any scheduled hearing, you will have waived your right to hearing, and the commissioner may issue a final order by default. If the commissioner issues a final order by default, the agency file on this matter shall serve as the record for purposes of proving a prima facie case.

Date: November 6, 2014

BRAD AVAKIAN, Commissioner
Bureau of Labor and Industries

GERHARD TAEUBEL,
Administrator
Wage and Hour Division
Bureau of Labor and Industries

Certificate of Service

On November 6, 2014, I sent the Prevailing Wage Rate Determination for the J. C. Penney Building Renovations to the requestor and affected agencies via email and as follows:

Paul Sutherland
Controller
R3 Development, LLC
3015 Salem Ave. SE
Albany, OR 97321

Certified Mail – Return Receipt Requested
Article #: 7014 0510 0001 9849 8768

Kate Porsche
Economic Development Director
City of Albany
PO Box 490
Albany, OR 97321-0144

Certified Mail – Return Receipt Requested
Article #: 7014 0510 0001 9849 8775

Rachel Diamond

Rachel Diamond
Compliance Specialist
Wage and Hour Division
Bureau of Labor and Industries