



October 9, 2012

Ms. Sarah Ryan
Ball Janik, LLP
101 SW Main Street
Suite 1100
Portland, OR 97204

Re: *Determination Whether Project is Subject to Prevailing Wage Rate Law*
Project: Privately Owned Apartment and Commercial Building in
Sherwood's Old Cannery Site District
Requested by: Ball Janik, LLP on behalf of Capstone Partners, LLC

Dear Ms. Ryan:

On September 24, 2012, you submitted a request on behalf of Capstone Partners, LLC asking if the Prevailing Wage Rate law would apply to the proposed Privately Owned Apartment and Commercial Building in Sherwood's Old Cannery Site District project. The issue to be determined is whether the proposed project is part of a larger project, and if so, whether the proposed project can be divided from the larger project under ORS 279C.827(3). Sufficient information to make these determinations was received on September 27, 2012, and therefore, the commissioner issues the following determination:

FINDINGS OF FACT:

1. Sherwood's Old Cannery District is an area of approximately 6.5 acres located in Sherwood's Old Town. The Old Cannery District has been master planned to include mixed use residential, office space, retail shops, a community plaza and a community center.

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2. Sherwood Urban Renewal Agency (“Sherwood URA”) has completed several developments in the Cannery District, including improving and reconfiguring the public streets and creating a public plaza. It plans to redevelop the Machine Works Building on Lot 2 into a community center. Sherwood URA’s developments in the Old Cannery District will allow orderly traffic flow and provide spaces for local residents to gather.
3. Capstone Partners, LLC (“Capstone”), City of Sherwood and Sherwood URA recognize that the developments completed to date in Sherwood’s Old Cannery District are public works and subject to the prevailing wage rate laws.
4. Capstone is assisting Sherwood URA in completing the developments in the Old Cannery District. Capstone is a private, limited liability company. Capstone has agreed to provide comprehensive services for managing, planning, developing, and constructing the public plaza and constructing and improving public rights-of-ways, including streets, sidewalks, utilities and storm water treatment facilities, improving parking lots and constructing a Storm Water Garden to perform wetland mitigation. None of these improvements took place or will take place on Lot 1 or Lots 3-10.
5. City of Sherwood Urban Renewal Agency (“Sherwood URA”) is selling Lot 1 and Lots 3-10 to Capstone. Sherwood URA originally contracted to sell the property to Capstone in September 2008 and the parties have entered into an Amended and Restated Purchase and Sale Agreement dated September 21, 2012. The City of Sherwood obtained an appraisal of the property in early 2007, including, but not limited to Lot 1 and Lots 3-10. The appraisal was performed by W. Paul Jackson, MAI, in compliance with the Uniform Standards of Professional Appraisal Practice (“USPAP”) of the Appraisal Foundation, the Code of Professional Ethics and Standards of Professional Appraisal Practice of the Appraisal Institute, Title XI of the Federal Financial Institution Reform Act (“FIRREA”) of 1989, and Regulation 12 C.F.R. Part 34 of the Office of the Comptroller of the Currency entitled “Real Estate Appraisals.” Based on the appraisal and a subsequent appraiser valuation, Capstone has agreed to pay current fair market value for the property. The purchase price will be an average of \$14.92 per square foot for all of the commercial lots (1 and 3-8) and \$7.10 per square foot for the residential lots (9 and 10).
6. Capstone plans to develop apartment and commercial buildings in the Old Cannery District on Lot 1 and Lots 3-10. Lot 1 and Lots 3-10 will be owned by Capstone prior to the commencement of construction. Capstone will build commercial buildings for tenants on Lot 1 and Lots 3-8. At this time, the tenants have not yet been identified. Construction of the commercial buildings will not commence until tenants are committed. Capstone will build two apartment

Privately Owned Apartment and Commercial Building
in Sherwood’s Old Cannery District
Ball Janik, LLP for Capstone Partners, LLC

buildings with approximately 50 units each on Lots 9 and 10. Capstone plans to begin construction of the apartment buildings as soon as possible and to complete construction in 2013.

7. Sherwood URA has virtually completed all of the public rights-of-way, the plaza and the storm water treatment facilities. The parking lot improvements will be completed over the next year.
8. Sherwood URA's general contractors (Kodiak Pacific Construction and JP Contractors) will not be the general contractor overseeing Capstone's construction of the apartment buildings. The contractor for the commercial space has not yet been selected, but neither Kodiak nor JP performs building construction.
9. Capstone's total budget is estimated at \$12,800,000 for the two apartment buildings and is estimated at approximately \$13,000,000 for the commercial buildings. The sole public funding for the apartment and commercial building project will be \$40,000 from Sherwood URA. The remainder of the funding will be private from owner's equity and a construction loan.

CONCLUSIONS OF LAW:

1. The proposed project does not meet the definition of "public works" under ORS 279C.800(6)(a)(A) because the project will not be carried on and contracted for by a public agency.
2. The proposed project does not meet the definition of "public works" under ORS 279C.800(6)(a)(B) because although the project will be privately owned, it will not use \$750,000 or more in funds of a public agency.
3. If the proposed Privately Owned Apartment and Commercial Building in Sherwood's Old Cannery District project was a public work under ORS 279C.800(6)(a), ORS 279C.827(3) allows the commissioner to divide a project to separate the parts of the project that are owned by a public agency from parts that are owned by a private entity after applying the factors set forth in ORS 279C.827(1)(c) and OAR 839-025-0310. Some factors used in making this determination include:
 - a. The physical separation of the project structures,
 - b. The timing of the work on project phases or structures,
 - c. The continuity of project contractors and subcontractors working on project parts or phases,
 - d. The manner in which the public agency and the contractors administer and implement the project,

- e. Whether a single public works project includes several types of improvements or structures, and
- f. Whether the combined improvements or structures have an overall purpose or function.
- g. Other relevant matters as may arise in any particular case.

A consideration of the factors would weigh in favor of dividing the privately owned apartment and commercial building project from the publicly funded public works in Sherwood's Old Cannery District.

First, the construction of the apartment and commercial buildings will be implemented and administered by Capstone, a private entity. Other developments in the Old Cannery District have been/are being implemented and administered by Sherwood and Sherwood URA. Second, Sherwood URA's developments are virtually complete, whereas Capstone's construction on the apartment buildings and commercial buildings has not yet commenced. Third, there will be no continuity of contractors between Sherwood URA and Capstone. Fourth, the project structures are separated into distinct lots and tracts. Lastly, even if the overall purpose of all Cannery District developments is to renovate the district, this factor alone would not be enough to weigh against dividing Capstone's Apartment and Commercial Building project from work completed by Sherwood URA.

DETERMINATION:

Based on the foregoing, the Prevailing Wage Rate laws, ORS 279C.800 to ORS 279C.870, and OAR Chapter 839, Division 025, will not apply to the proposed construction, reconstruction, major renovation and/or painting of the Privately Owned Apartment and Commercial Building in Sherwood's Old Cannery Site District.

The issue to be determined was whether the privately owned apartment and commercial building construction was part of a larger covered project, and if so, whether the proposed project can be divided from the larger project under ORS 279C.827(3). Because we conclude that the proposed project can be separated under ORS 279C.827(3), and it is not otherwise a project subject to the Prevailing Wage Rate Laws, we do not need to reach a conclusion about whether or not it is part of a larger project.

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 A 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, OR 97232

If a written request for hearing is not received within this 21-day period, your right to a hearing shall be considered waived.

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 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. You are not entitled to judicial review of this determination order unless you have made a timely request for a hearing.

Date: October 9, 2012

BRAD AVAKIAN, Commissioner
Bureau of Labor and Industries

Christine N. Hammond

CHRISTINE N. HAMMOND,
Administrator
Wage and Hour Division
Bureau of Labor and Industries

Certificate of Service

On October 9, 2012, I mailed the Prevailing Wage Rate Determination for the Privately Owned Apartment and Commercial Building in Sherwood's Old Cannery Site District project to the requestor, as follows:

Ms. Sarah Ryan
Ball Janik, LLP
101 SW Main Street
Suite 1100
Portland, OR 97204

Certified Mail – Return Receipt Requested
Article #: 7012 1010 0001 2377 6330

City of Sherwood Urban Renewal Agency
Attn: Tom Pessemier
22560 SW Pine Street
Sherwood, Oregon 97140

Certified Mail – Return Receipt Requested
Article #: 7012 1010 0001 2377 6323



Cristin Casey
Compliance Specialist
Wage and Hour Division
Bureau of Labor and Industries