MEMORANDUM OF LAW

DATE: January 20, 1994

TO: Afshin Oskoui, Senior Civil Engineer, Water Utilities Engineering Division

FROM: City Attorney

SUBJECT: Prevailing Wages -- Rose Canyon Trunk Sewer Project

This is to answer the question raised in your memorandum of January 7, 1994 asking whether the prevailing wage requirements of the Labor Code (sections 1770 et seq.) will apply to the Rose Canyon Trunk Sewer Project. Bid documents presently do not specify payment of prevailing wages, but new facts relating to the project provide cause for reconsideration before bids are received and opened. In view of revised plans for the financing and ultimate use of the project, we advise that you issue an addendum prior to the bid opening to require payment of prevailing wages.

The question arises as a familiar constitutional issue which juxtaposes the authority of the California Legislature to enact state general statutes against the authority of the City of San Diego to control its "municipal affairs" under its Charter. A dichotomy exists because City Charter section 94 implicitly prohibits a mandate of prevailing wages in municipal public work contracts, as this is at odds with the Charter requirement that contracts must be awarded to the lowest responsible bidder. A succinct discussion regarding case-by-case resolution of this "choice of law" conflict was given in the attached memorandum by then Deputy City Attorney Thomas F. Steinke dated April 9, 1982.

In summary, if a project is a "matter of statewide concern," prevailing wages must be paid according to the Labor Code; if, on the contrary, a project is a "municipal affair," prevailing wages cannot be required, for this would violate the lowest responsible bidder provision of San Diego City Charter section 94.

The issue must be resolved on a project by project basis, because California Constitution Article XI, which vests chartered cities with "home rule" autonomy, does not define the term "municipal affairs." "No exact definition of the term 'municipal

affairs' can be formulated, and the courts have made no attempt to do so, but instead have indicated that judicial interpretation is necessary to give it meaning in each controverted case." Bishop v. City of San Jose, 1 Cal. 3d 56, 62 (1969), citing Butterworth v. Boyd, 12 Cal. 2d 140, 147 (1938).

For this reason, Mr. Steinke's memorandum sets out general guidelines for making these determinations internally and in advance to avoid controversy and the need for actual judicial determinations. Of particular significance to your question is the point that "metropolitan sewer district utility construction" has been held to be a matter of statewide concern, while "municipal water and sewer construction" has been held to be a municipal affair.

The Rose Canyon Trunk Sewer, as we understand the facts, is a project that was originally intended to be purely municipal in nature. It is to be a pipeline gradually increasing in diameter from 48 inches, to 60 inches, then 72 inches, and was initially designed to exclusively accommodate raw sewage flows of almost entirely municipal origin from Pump Station 64 in the North City area. The Rose Canyon Trunk Sewer is to initially connect to the Morena Boulevard Interceptor, a 72 inch municipal project recently completed to the south of Rose Canyon. These facts explain why prevailing wages were not originally specified, for the Rose Canyon project will amount in concept to the upstream continuation of the municipal Morena Interceptor project.

However, you recently reported that a different use may be later intended for the Rose Canyon project. This use would be the pressurized conveyance of reclaimed water effluent flows from the North City Water Reclamation Plant which is presently under construction at NAS Miramar. A converted connection to an ocean outfall would, contingently, supersede the connection to the Morena Interceptor, which conveys raw sewage flows to Point Loma for treatment. As a result of this modified expectation regarding ultimate use, approximately one-third of the Rose Canyon project funding will come from the newly formed Metropolitan Sewer Department.

In light of these new facts pertaining to the intended involvement of the Rose Canyon project with metropolitan water reclamation efforts and associated funding, it is virtually certain that the project would be held to be a matter of state-wide concern. An addendum should thus be issued for the bid documents calling for payment of prevailing wages.

JOHN W. WITT, City Attorney

By

Frederick M. Ortlieb

Deputy City Attorney

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Attachment

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