

DEPARTMENT OF INDUSTRIAL RELATIONS

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January 25, 2018

Via U.S. Mail and Electronic Mail

Mr. Jon Welner, Esq.
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Two Embarcadero Center
Fifth Floor
San Francisco, California 94111-3813

Re: Nut Tree – Proposed Sale of Land Within Boundaries of
Westrust Nut Tree Project
Public Works Case No. 2017-014

Dear Mr. Welner:

This letter constitutes the determination of the Director of Industrial Relations concerning coverage of the above-referenced “Proposed Project,” as described below, under California’s prevailing wage laws. This Determination is in response to a request submitted by you on behalf of Nut Tree Holdings, LLC (“NTH” or “Nut Tree Holdings”), and is made pursuant to California Labor Code section 1773.5 and California Code of Regulations, title 8, section 16001, subdivision (a). Based on my review of the facts and an analysis of the applicable law, it is my determination that any real property parcels within the boundaries of the original Westrust Nut Tree Project that are sold to a third party prior to the issuance of a Certificate of Completion for that parcel pursuant to the provisions of the November 10, 2010 Amended and Restated Disposition and Development Agreement for the Westrust Nut Tree Project remain subject to California prevailing wage laws. The proposition you assert in your letter that Nut Tree Holdings may sell property that is part of the original Westrust Nut Tree Project to a third party, prior to completion and discharge of the obligations that exist under the current development agreement, and thereby evade the prevailing wage laws, is in error.

Facts**A. The “Proposed Project.”**

In the request for this coverage determination, you define the “Proposed Project” as the “future development” of seven parcels of land that are currently owned by Nut Tree Holdings (“NTH”), and that are “within the boundaries” of the 76-acre Westrust Nut Tree Project previously determined to be a public works project, in Public Works Case No. 2011-021 (hereinafter the “Original Westrust Nut Tree Project” or “the Project”), after those parcels have been publicly marketed and sold by NTH, at fair market value, to a third party buyer. You have requested a

determination as to whether such “future development” on the subject parcels will constitute “public work” subject to the prevailing wage laws.

Although you have attempted to define a new “Proposed Project” for purposes of this coverage determination, the record clearly demonstrates that the parcels of land NTH proposes to sell are part of the Original Westrust Nut Tree Project and are currently subject to the existing and still-in-force provisions of the November 20, 2010 Amended and Restated Disposition and Development Agreement (“ARDDA”) that govern the Original Westrust Nut Tree Project. Thus, any “future development” on such parcels, prior to the issuance of a “Certificate of Completion” as required under the existing ARDDA, is not and will not be a new “Proposed Project;” it is and will be part of the Original Westrust Nut Tree Project, subject to the provisions of the ARDDA, and also subject to my prior determination that the Original Westrust Nut Tree Project is a public work.

B. The Original Westrust Nut Tree Project.

There has been extensive description and discussion of the Original Westrust Nut Tree Project in the prior public works coverage determination proceedings for that project, and I will not repeat that information here. In very general terms, the Original Westrust Nut Tree Project was, and still is, an approximately 76-acre long-term, mixed use development project located near the Interstate 505/Interstate 80 interchange within the City of Vacaville. On August 8, 2014, I issued a coverage determination for the Original Westrust Nut Tree Project finding it to constitute a public works project, subject to the prevailing wage laws. On June 25, 2015, I issued a Decision on Administrative Appeal affirming the coverage determination and explaining in detail the bases for my determination. That decision was challenged by Nut Tree Holdings in a Petition for Writ of Mandate filed in the Superior Court of Solano County. On August 17, 2016, the Court denied Nut Tree’s Petition, upholding the coverage determination. As you know, Nut Tree has appealed that decision, and the appeal remains pending.

The agreements that created and govern the Original Westrust Nut Tree Project are set forth in an Amended and Restated Disposition and Development Agreement, with an effective date of November 10, 2010 (hereinafter “the ARDDA” or “the Agreement”). Nut Tree Holdings (“NTH”) was, and still is, a party to that agreement. In general terms, and among numerous other provisions, the ARDDA provided for an exchange of real property parcels within the Nut Tree project area between the Vacaville Redevelopment Agency and Nut Tree Holdings in order to facilitate the overall development project. Thus, certain parcels that were owned by the Redevelopment Agency at the time were conveyed to NTH, and certain parcels that were owned by NTH at the time were conveyed to the Redevelopment Agency. The purchase price for each of these conveyance transactions was \$1.00, reflecting the exchange or “swap” nature of the transaction. As I found in the prior coverage determination for the Project, and for the reasons explained at length in my Decision on Administrative Appeal, the properties conveyed by the Redevelopment Agency to NTH had significantly greater fair market value than the properties conveyed by NTH to the Redevelopment Agency. Specifically, the fair market value, as determined at the time, of the parcels conveyed by the Redevelopment Agency to NTH was approximately \$9.6 million greater than the fair market value of the parcels conveyed by NTH to the Redevelopment Agency. This was one reason, among others, I found the Project to constitute a public work, requiring the payment of prevailing wages.

The parcels conveyed by the Redevelopment Agency to NTH under the ARDDA were referred to in the Agreement as the “Post Exchange NT Holdings Parcels,” i.e., the parcels that NTH would own following completion of the swap. Although NTH does not identify with any precision in its current request for this determination the parcels it proposes to sell for fair market value as part of the “Proposed Project,” it does acknowledge they are “within the boundaries” of the Original Westrust Nut Tree Project. On examination, the record makes clear that these parcels are in fact “Post Exchange NT Holdings Parcels” as described in and subject to the provisions of the ARDDA.

Specifically, NTH’s request states that the parcels it proposes to sell are “fully described” in an attached Appraisal Report. That Appraisal Report includes an aerial map and identifies the “subject property” in reference to a Parcel Map for the Nut Tree project as Parcels 1A, 1B, 1C, 1D, 2A, 2B, 2C. A comparison of the map in the Appraisal Report to maps depicting the Original Westrust Nut Tree Project, including in particular, the Site Map showing parcel ownership after the property exchange provided for in the ARDDA, shows clearly that the parcels Nut Tree Holdings is now proposing to sell are those identified as Parcel 1 and Parcels 2A, 2B, and 2C depicted on the “Amended Site Map Depicting Ownership After Close of Escrow,” which was Exhibit C to the ARDDA (and are Parcels 1A, 1B, 1C, 1D, 2A, 2B, and 2C on the “Replacement Exhibit C” that was attached to the parties First Implementation Agreement to the ARDDA, dated December 15, 2010). As is apparent from that Exhibit C, and as is expressly stated in the ARDDA, Parcels 1 and 2A, 2B, and 2C are “Post Exchange NT Holdings Parcels.” (ARDDA, Section 1.1, (bbbb), p. 11.) This means they are parcels that were owned by the Redevelopment Agency prior to the property exchange provided for in the ARDDA, that they were conveyed to and subsequently owned by NTH as part of and following that exchange, and that they are part of the Original Westrust Nut Tree Project and subject to the provisions of the ARDDA.

C. The Provisions of the ARDDA.

The ARDDA for the Original Westrust Nut Tree Project contains a number of provisions that are directly relevant to, and indeed dispositive of, the issues presented in NTH’s current request for a coverage determination as to the “Proposed Project.” These include, among others, the following:

Improvements. The Agreement defines the term “Improvements” as meaning:

[T]he first improvements during the Terms of this Agreement to be constructed on a **Post Exchange NT Holdings Parcels** [sic] on or a Post Exchange NT Retail Parcels [sic] in connection with the initial development of a Post Exchange NT Holdings and NT Retail Parcel. The term “Improvements” is limited to the warm shell of a building, and does not include any tenant improvements, including but not limited to, completed windows, doors, restrooms, walls, ceilings, electrical and plumbing, or any additional improvements (including, but not limited to additional or special paint, carpet, lighting, special electrical, HVAC or plumbing improvements, furniture, fixtures, equipment and signage) to be provided by the initial tenant occupying the space (unless such improvements are constructed prior to the issuance of a Certificate of Completion). Once a **Certificate of Completion** has been obtained by the Owner of Post Exchange NT Holdings Parcels or Post Exchange NT Retail Parcels for the initial Improvements to be constructed on a

parcel, further alteration, modification or improvement of such parcel shall never constitute an Improvement. (ARDDA, Section 1.1, (vv), p. 8, emphasis added.)

Owner. The Agreement defines the term “Owner” as meaning “NT Holdings, NT Retail, an Affiliate or any **Qualified Transferee of NT Holdings**, an Affiliate or a Qualified Transferee of NT Retail, as applicable, **or any other party who owns the fee interest of a Post Exchange NT Holdings and NT Retail Parcel.** (ARDDA, Section 1.1 (sss), p. 11, emphasis added.)

Policy Plan. The Agreement defines the term “Policy Plan” as meaning “the Nut Tree Ranch Policy Plan, as last amended, which has been adopted by the City and details the physical development of the Parcels **and the standards by which the Owners of the Post Exchange NT Holdings and NT Retail Parcels must develop the Improvements, as amended from time to time.**” (ARDDA, Section 1.1 (xxx), p. 11, emphasis added.)

Qualified Transferee. The Agreement defines a “Qualified Transferee” as a person who:

(i) has the financial resources necessary to pay the expected costs necessary for the development of one or more of the Post Exchange NT Holdings and NT Retail Parcels being transferred to such Person; (ii) has experience and expertise in developing projects similar in size and scope to the Post Exchange NT Holdings and NT Retail Parcels being transferred to such person; and (iii) in the reasonable discretion of the Agency, has an established and good business reputation, including an established record of maintaining fair employment practices. (ARDDA, Section 1.1(hhhh), p. 12.)

Term. The Agreement expressly provides that it “shall be in effect from the Effective Date and shall not terminate **until a Certificate of Completion is issued on all Post Exchange NT Holdings Parcels and NT Retail Parcels.**”

The Agreement further provides that:

Notwithstanding the foregoing, provided the Owner of a Post Exchange NT Holdings Parcel or a Post Exchange NT Retail Parcel is not in breach of its obligations under this Agreement, this Agreement shall terminate with respect to any Post Exchange NT Holdings Parcel or a Post Exchange NT Retail Parcel owned by Owner (a ‘Released Parcel’) **on the date a Certificate of Completion is issued for the Improvements on such Parcel.** From and after the date of the Certificate of Completion, the terms and conditions of this Agreement shall no longer apply to the Released Parcel and the Owner of the Released Parcel shall have no further obligations to the Agency and/or City under this Agreement with respect to the Released Parcel (except for any provision herein that explicitly survives termination). (ARDDA, Section 2.3, p. 15, emphasis added.)

Required Development. The Agreement expressly provides that the Post Exchange NT Holdings and NT Retail Parcels “shall be developed for the uses permitted under the Policy Plan.” (ARDDA, Section 5.2 (a), p. 33.)

Requirement of Completion. The Agreement requires, subject to allowable extensions as specified, an “Owner” of any of the Post Exchange NT Holdings or NT Retail parcels to “diligently prosecute to completion the construction of Improvements upon such Owner’s Parcel not later than five (5) years from the Close of Escrow.” Further, “completion of construction shall mean the date on which the Owner achieves substantial completion of the site work, landscaping improvements, shell building improvements, and the applicable City conditions of approval for that particular Parcel, as reasonably determined by the Agency.” (ARDDA, Section 5.2(b), p. 33.)

Certificate of Completion. The Agreement provides the following with respect to Post Exchange NT Holdings Parcels:

After completion of substantially all of the Improvements to be constructed on a Post Exchange NT Holdings Parcels in accordance with the provisions of this Agreement, the Agency shall provide, in accordance with subsection (c), below, an instrument to the Owner of the applicable Post Exchange NT Holdings Parcels so certifying the completion of the Improvements on the Parcel (the “Certificate of Completion”). (ARDDA, Section 5.8(a), p. 36.)

Prevailing Wages. The Agreement expressly provides, *inter alia*, that “[f]or construction work performed **prior to the issuance of a Certificate of Completion**,” which is referred to as the “Prevailing Wage Improvements,” performed “by, or on behalf of, an Owner of a Post Exchange NT Holdings and NT Retail Parcel, including but not limited to construction work performed by, or on behalf of a tenant . . . of such Owner **prior to the issuance of a Certificate of Completion**, such Owner shall, and shall notify any Applicable Tenant, or any general contractor retained by the Owner, to pay prevailing wages in the construction of the Prevailing Wage Improvements as those wages are determined pursuant to Labor Code Sections 1720 et seq.” (ARDDA, Section 5.4, p. 34, emphasis added.)

Transfers. Article 7 of the ARDDA specifically addresses assignments and transfers, including “[a]ny total or partial sale” of any of the Post Exchange NT Holdings and NT Retail Parcels. In other words, the ARDDA **explicitly** addresses whether, and under what circumstances, NTH may proceed with any sale of the subject parcels as contemplated in the “Proposed Project.”

On the issue of transfers, the Agreement provides, *inter alia*, as follows:

This Agreement is entered into solely for the purpose of development and operation of the Improvements on the Post Exchange NT Holdings and NT Retail Parcels and its subsequent use in accordance with the terms of this Agreement and the Applicable Land Use Approvals. The qualifications and identity of NT Holdings and NT Retail are of particular concern to the Agency and City, in view of the importance of the redevelopment of the Post Exchange NT Holdings and NT Retail Parcels to the general welfare of the community, and the specific assistance by the Agency to be provided in connection with such redevelopment as set forth herein.

It is because of the qualifications and identity of NT Holdings and NT Retail that the Agency and City are entering into this Agreement with NT Holdings and NT Retail, committing to the Agency/NT Holdings Property Exchange and the other commitments (pursuant to the terms hereof), and therefore, in consideration for the Agency and the City execution of this Agreement, **NT Holdings and NT Retail agree and acknowledge that Transfers are permitted only as provided in this Agreement.** (ARDDA, Section 7.2(a), pp. 41-42, emphasis added.)

... The City and Agency specifically retain the right to approve any assignment or transfer of the rights under this Agreement and to deny any such assignment or transfer that, in the reasonable judgment of the City and Agency, will not meet the goals and objectives of the development of the Post Exchange NT Holdings and NT Retail Parcels in accordance with the Redevelopment Plan and Policy Plan.... (ARDDA, Section 7.2(b), p. 42.)

... The limitations on Transfers set forth in this Article 7 shall apply to a Post Exchange NT Holdings and NT Retail Parcels **from the Effective Date until a Certificate of Completion has been issued for the applicable Parcel.** Subject to Section 7.4 below, neither NT Holdings, NT Retail nor any other Owner shall make or create any Transfer, either voluntarily or by operation of law, of any Post Exchange NT Holdings and NT Retail Parcels prior to the recordation of a Certificate of Completion with respect to such Parcel without the prior approval of the Agency and the City, which may be granted or denied in the Agency's and City's reasonable discretion. (ARDDA, Section 7.3(a), emphasis added, p. 42.)

...In connection with a Transfer ..., the transferor and the transferee shall execute an assignment and assumption agreement in a form reasonably acceptable to the Agency **to evidence the transfer of such transferor's obligations under this Agreement to such proposed transferee, and the proposed transferee's acceptable of the duties and obligations imposed under this Agreement** (the "Assignment and Assumption Agreement"), ... The Assignment and Assumption Agreement shall only provide for the assumption by the transferee of the provisions of this Agreement that apply to the specific Parcel being Transferred to the Qualified Transferee, and shall not obligate the Qualified Transferred [sic] to assume the obligations applicable to any other Parcel. ... (ARDDA, Section 7.4(c), p. 42, emphasis added.)

... This Article 7 shall not apply to a Transfer of any Post Exchange NT Holdings and NT Retail Parcels **after a Certificate of Completion has been obtained** with respect to such Parcel. (ARDDA, Section 7.6, p. 45, emphasis added.)

"Binding Upon Successors Covenants to Run With Land." The Agreement expressly provides, in a paragraph titled as above, that its terms are binding on any successors in interest and assigns of each of the Parties. As stated: "Any reference in this Agreement to a specifically named Party shall be deemed to apply to any successor, heir, administrator, executor, successor, or assign of such Party who has acquired an interest in compliance with the terms of this Agreement or under law." (ARDDA, Section 11.17, p. 56.)

The provisions of the ARDAA summarized above, among others in the Agreement, establish at least the following basic principles concerning the Original Westrust Nut Tree Project and the obligations imposed on the parties to the ARDDA with respect to the Post Exchange NT Holdings Parcels, including the parcels that NTH now proposes to sell:

- 1) The term of the Agreement, with respect to each Post Exchange NT Holdings parcel, including the parcels at issue here, runs until a Certificate of Completion has been issued for that parcel;
- 2) The obligations under the ARDDA to improve the parcels according to the terms of the ARDDA run not only to NT Holdings and NT Retail but to any “Owners” of those parcels, including to any subsequent third party purchasers for fair market value;
- 3) The transfer (i.e., including the sale) of any Post Exchange NT Holdings parcel prior to the issuance of a Certificate of Completion for that parcel is **prohibited** except as expressly allowed and provided for under the ARDDA; and
- 4) The sale of any Post Exchange NT Holdings Parcel to a third party prior to issuance of a Certificate of Completion for that Parcel is allowed only in conjunction with the execution of an Assignment and Assumption Agreement binding the purchaser to the obligations of the ARDDA.

Thus, under the express terms of the ARDDA, including those specifically referenced above, the obligations, terms and conditions of the Agreement continue, and do not terminate, for any Post Exchange NT Holdings parcel, including those that Nut Tree now proposes to sell to a third party, until and unless a Certificate of Completion has been issued for that parcel.

D. The 2016 Implementation Agreements.

In response to a request for information to the City of Vacaville (“the City”) concerning NTH’s request for this coverage determination, the City provided copies of two recent “Implementation Agreement[s] to the Amended and Restated Disposition and Development Agreement (Nut Tree Property).”

The first is dated January 15, 2016, and was entered into between and among the “Successor Agency” to the Vacaville Redevelopment Agency, the City, and NTH. This January 2016 Implementation Agreement acknowledges that NTH “owns the following Parcels: Parcel 1A, Parcel 1B, Parcel 1C, Parcel 1D, Parcel 2A, Parcel 2B, and Parcel 2C (collectively, the ‘Uncompleted Parcels’), and NT Holdings has not obtained a Certificate of Completion for such Parcels.” These parcels – referred to as the “Uncompleted Parcels” – are the parcels that NTH is proposing to sell in the “Proposed Project” that is the subject of this determination. The agreement further notes that under the terms of the ARDDA, NTH was to have completed construction of the required “Improvements” on these parcels within five years of the close of escrow on the ARDDA, which was June 24, 2016, unless an extension was granted. The agreement states that NTH had determined it would not complete the Improvements on the subject parcels by the deadline, and that the City and Successor Agency had determined NTH met the

requirements for an extension. Accordingly, this first Implementation Agreement provided for an extension for construction of the Improvements on the subject parcels until June 24, 2017. The agreement further provides that there were no other changes to the ARDDA except as expressly provided in the Implementation Agreement, and that “all other provisions of the Agreement remain unmodified and continue in full force and effect.”

The City also provided a copy of a second Implementation Agreement to the ARDDA, dated May 9, 2016. This May 2016 Implementation Agreement is largely identical to the earlier one, and contains the same recitations. It provides that NTH had determined it would not complete the Improvements on the subject parcels by the extended date of June 24, 2017, and grants NTH a further extension to December 31, 2018. Again, the Implementation Agreement specifies that “all other provisions” of the ARDDA “remain unmodified and continued in full force and effect.”

These Implementation Agreements confirm, expressly and unambiguously, that the provisions of the ARDDA remain in full force and effect, including in particular, as to the parcels that NTH is proposing to sell.

The City’s response to the DIR request for information did not address whether the City intends to approve the proposed fair market value sale to a third party; nor did the City address the express requirements of the ARDDA that would apply to such a transfer, as outlined above, including that any transfer would require an Assignment and Assumption Agreement binding the third party purchaser to the obligations of the ARDDA. The City also failed to address its rights, remedies and obligations under the ARDDA, which would be substantial, should NTH breach the Agreement.

E. The Grant Deed.

The Grant Deed that was recorded in the Office of the Recorder for Solano County on June 28, 2011 reflecting and stating the terms of the property exchange transaction between the Vacaville Redevelopment Agency and Nut Tree Holdings, as described above, also contains several provision relevant to this Determination. This Grant Deed reflects the terms under which the Post Exchange Nut Tree Holdings parcels were conveyed to NTH, including the parcels that NTH now proposes to sell.

The Grant Deed expressly provides that the properties are conveyed to NTH subject to the ARDDA. (Grant Deed, para. 1.) Further the Deed provides that NTH “covenants and agrees, for itself and its successors and assigns,” to complete the Improvements on the property as required under the ARDDA, to devote the properties “only to those uses specified” in the ARDDA, and to “operate and maintain” the properties “in compliance with all requirements for operation” set forth in the ARDDA. (*Id.*, paras. 2-4.)

The Deed further provides that any change in ownership is governed and limited by the ARDDA, and that NTH “covenants, for itself and its successors and assigns, that there shall be no sale, transfer, assignment, conveyance, lease, pledge or encumbrance of the [ARDDA], or the Post Exchange NT Holdings Property and the Improvements thereon or any part thereof, or of other ownership interest in NT Holdings, in violation of the [ARDDA].” (*Id.*, para. 5.)

And significantly, the Grant Deed provides:

The covenants contained in this Grant Deed shall be, without regard to technical classification or designation, legal or otherwise specifically provided in this Grant Deed, to the fullest extent provided by law and equity, binding for the benefit and in favor of and enforceable by the Agency, its successors and assigns, the City, and any successor in interest to the Post-Exchange NT Holdings Property or any part thereof, and such covenants shall run in favor of the Agency and such aforementioned parties for the entire period during which such covenants shall be in force and effect, without regard to whether the Agency is or remains an owner of any land or interest there to which such covenants relate.

(Grant Deed, para. 8.)

As is addressed below, under Civil Code section 1468 and applicable case law, these provisions of the Grant Deed create covenants that run with the land and are binding on successors for the duration of such covenants, i.e., until a Certificate of Completion has been issued for the parcel under provisions of the ARDDA.

Discussion

“The conditions of employment on construction projects financed in whole or in part by public funds are governed by the prevailing wage law.” (*Cinema West LLC v. Baker* (2017) 13 Cal.App.5th 194, 204-205, quoting *Lusardi Construction Co. v. Aubry* (1992) 1 Cal.4th 976, 985, 4 Cal.Rptr.2d 837, 824 P.2d 643; see also Lab. Code § 1720, *et seq.* (the “Prevailing Wage Law”.) “The overall purpose of the prevailing wage law is to protect and benefit employees on public works projects.” (*Ibid.*) A “public works” project subject to the Prevailing Wage Law is defined, in general terms and with various additions and exceptions as specified in the statute, as “[c]onstruction, alteration, demolition, installation, or repair work done under contract and paid for in whole or in part out of public funds.” (Lab. Code, § 1720, subd. (a)(1).) As a statute intended for a public purpose, the Prevailing Wage Law “is liberally construed to further its purpose.” (*Cinema West, supra*, 13 Cal.App.5th at p. 205, quoting *Azusa Land Partners v. Department of Industrial Relations* (2010) 191 Cal.App.4th 1, 15.) The Director of the Department of Industrial Relations is charged with determining whether a specific project is a public work. (Lab. Code, § 1773.5.)

Here, NTH has requested a determination that the “Proposed Project” does not constitute a public work subject to the Prevailing Wage Law because the subject parcels will be sold at fair market value (“FMV”) to a third party buyer, without any subsidy, and therefore no “public funds” will be used the project. According to NTH, “if a property owner who has received public funds for a project decides to sell the property at FMV to an unrelated third party, a new analysis is required.” And further, “if a property is purchased at FMV; and if all future construction work done on the property is paid for entirely out of private funds; then future construction at the site cannot be a public work because such construction will not be ‘paid for in whole or in part by public funds.’” (Letter of Jon Welner, February 24, 2017, at pp. 2-3.) I find this argument to be without merit.

A. The “Proposed Project” Is Not a New and Separate Project; It is Part of the Original Westrust Nut Tree Project.

First, NTH’s argument is based on the faulty premise that its “Proposed Project” is separate from the Original Westrust Nut Tree Project. That assertion is plainly wrong, as is demonstrated by the provisions of the ARDDA as summarized above. As such, the additional premise asserted by NTH that the hypothetical FMV third party purchaser will not receive any public funds in connection with either the purchase or future development of the subject parcels is irrelevant. That issue is inapposite and illogical under the circumstances because the subject parcels are already part of an existing public works project that received a very substantial investment of public funds, and are already subject to the terms and conditions of an existing ARDDA. That ARDDA is still in force and in effect, and expressly provides that the obligations of the Agreement continue to run, and apply to any subsequent purchaser of a Post Exchange NT Holdings Parcel, until such time as a Certificate of Completion has been issued for that parcel. As noted above, the Implementation Agreements submitted by the City of Vacaville further confirm, expressly, that the ARDDA continues in full force and effect and applies to the subject parcels. Thus, NTH’s “Proposed Project” (defined as the “future development” of the subject parcels) is not a new or separate project; it is simply the work that is already required under the existing ARDDA, as part of the Original Westrust Nut Tree Project, including by any subsequent FMV purchaser of those parcels; any such purchaser is and will be expressly subject to the obligations of the ARDDA until a Certificate of Completion for those parcels is issued.

NTH’s assertion that “a new analysis is required” if a property owner on an existing public works project “decides to sell the property at FMV to an unrelated third party,” is made without supporting authority and is plainly wrong. The rights and obligations of the parties to an existing public works project are determined by the governing development agreement, here the ARDDA, and the applicable provisions of the Prevailing Wage Law. Work that is already required under an existing development agreement that has been determined to be a public work does not become exempt from the prevailing wage laws simply by transfer of the existing obligations to a third party. If that were true, a developer could accept substantial public funds for a project under the terms and conditions outlined in a development agreement, and then simply turn around and market and sell the property at fair market value to a third party purchaser, thereby evading all of the obligations imposed by law when public funds are invested. If prevailing wage obligations could so easily be extinguished notwithstanding the requirements of Labor Code section 1720, *et seq.*, and notwithstanding the terms of development agreements and the commitments and payments of public funds that are made in reliance on and furtherance of those development agreements, the Prevailing Wage Law would be rendered toothless and ineffectual for its important statutory purposes. (See *Lusardi Construction Co. v. Aubry* (1992) 1 Cal.4th 976, 987-988 [the obligation to pay prevailing wages arises not only from contractual obligations but also independently from the mandates of the Prevailing Wage Law, and may not be contracted away].)

B. Case Law Mandates That Public Works Projects Be Viewed As An Integrated Whole.

Nut Tree Holdings’ argument must also be rejected because the case law makes clear that a public works project must be viewed as a “complete integrated object.” (See *Oxbow Carbon & Minerals, LLC v. Dept. Industrial Relations* (2011) 194 Cal.App.4th 538, 549.) NTH’s argument is essentially that notwithstanding the existence of the Original Westrust Nut Tree Project, which is

an ongoing public works project, it is entitled to break off chunks that Project, specifically Parcels 1 and 2, and sell them at fair market value to a third party purchaser, thus exempting all future development on those parcels from the requirements of the prevailing wage law. The law does not allow this type of maneuvering and gamesmanship.

To the contrary, in order to effectuate the important public purposes of the Prevailing Wage Law, courts have repeatedly emphasized that projects must be viewed as a whole and that parties may not “contract around” the provisions of the statute. (See *Lusardi, supra*, 1 Cal.4th at pp. 987-988 [contractors and awarding bodies may not structure contracts to circumvent the Prevailing Wage Law]; *Oxbow, supra*, 194 Cal.App.4th at p. 550-551 [a focus on the “complete integrated object” is the best approach and is consistent with the language and purpose of the statute].) Courts apply a “totality of the facts” analysis to determine whether work performed in separate stages, on different components, or under allegedly separate contracts, constitutes part of a “complete integrated object,” and thus one project. (*Cinema West, supra*, 13 Cal.App.5th at p. 212; *Oxbow, supra*, 194 Cal.App.4th at p. 549.) Once a project has been determined to be a public work, the entirety of the project is subject to the Prevailing Wage Law. (See *Azusa Land Partners v. Dept. of Industrial Relations* (2010) 191 Cal.App.4th 1, 29 [“Once the determination is made that the Project is a ‘public work’ under section 1720, subdivision (a)(1), the entire Project is subject to the PWL.”].)

As summarized in *Azusa*:

... [T]he PWL does not permit parties to an agreement to carve up the individual components of an overall project into publicly and privately financed pieces. [Labor Code Section 1720] Subdivision (a)(1)’s “paid for in part” language renders this approach contrary to the Legislature’s intent that projects that are at least partially funded with public funds are subject to prevailing wage requirements in their entirety.

(*Azusa, supra*, 191 Cal.App.4th at p. 36.)

Here, it is undisputed (for purposes of this Determination) that the Original Westrust Nut Tree Project is a public work, and further, that Parcels 1 and 2 which NTH now intends to sell were, and still are, part of that project. NTH may no more “contract around” the provisions of the PWL for those two parcels now, in 2017, by selling them off to a third party purchaser, than it would have been entitled to do at the inception of the project in 2010. Not only does the ARDDA prohibit any transfer unless the purchaser expressly agrees to assume all of NTH’s obligations under the ARDDA, including the obligation to pay prevailing wages, but the Prevailing Wage Law itself prohibits any such attempt to contract around its provisions. (Lab. Code, § 1720, subd. (a); *Lusardi, supra*, 1 Cal.4th at pp. 987-988; *Azusa, supra*, 191 Cal.App.4th at p. 36; *Oxbow, supra*, 194 Cal.App.4th at p. 549.)

Furthermore, the nature of a public works project and the question of whether it is paid for in whole in part of out of public funds, see Labor Code section 1720, subd. (a), must be determined based on the facts and circumstances, and the provisions of the relevant development agreements, at the inception of the project, not based on after-the-fact developments, attempted renegotiation, and other maneuvering. A developer that has accepted the investment of public funds on a project may not later attempt to evade the provisions of the Prevailing Wage Law by, for example,

delaying or declining receipt of public funds that are owed under the terms of the parties' development agreements, attempting to renegotiate the deal, or – as contemplated here –selling off parcels of land that are subject to the existing development agreement.

As stated in *Cinema West*:

[A]llowing a developer to accept public benefits and, if a later determination is made that the project is a public work, disclaim public benefits to avoid paying prevailing wages would seriously undermine the PWL. It would incentivize gamesmanship on the part of local government bodies and developers whereby projects would be publicly subsidized but constructed without PWL compliance. If an investigation later revealed the violation, the developer could still avoid paying prevailing wages and statutory penalties by repaying or disclaiming the public subsidy. And if the developer chose instead to retain the subsidy because its value exceeded the cost of post hoc PWL compliance and penalties, employees would be worse off because the passage of time and transitory nature of construction work increase the likelihood that some employees could not be found. Such a rule would discourage voluntary compliance and place undue burdens on the Department's limited enforcement personnel. This cannot have been the Legislature's intent.

(*Cinema West, supra*, 13 Cal.App.5th at p. 216.)

C. The Obligation to Pay Prevailing Wages for Any Future Development On the Subject Parcels Is a Covenant that Runs with the Land Until a Certificate of Completion Has Been Issued.

As is addressed above, the ARDDA for the Original Westrust Nut Tree Project requires the payment of prevailing wages for all work performed on the "Improvements," i.e., for all development on the parcels covered by the Agreement until a Certificate of Completion has been issued. This is an express obligation under the terms of the ARDDA, and is also an obligation imposed by law under the provisions of the Prevailing Wage Law because the Original Westrust Nut Tree Project is a public works project. (Lab. Code, §§ 1720; 1771.)

In addition, as is also addressed above, the provisions of the recorded Grant Deed by which the Post Exchange NT Holdings Parcels were conveyed to NTH expressly provide that the provisions of the ARDDA are binding on NTH's successors and assigns, and that the covenants in the Grant Deed "shall run in favor of the Agency and such aforementioned parties for the entire period during which such covenants shall remain in force and effect," and are binding on any successor in interest to any of the Post Exchange NT Holdings properties. (Grant Deed, at para. 8.) The import of this provision is that until a Certificate of Completion has been issued for each parcel under the terms of the ARDDA, which is the point at which the term of the ARDDA ends for that parcel, the covenants under the ARDDA run with the land as to that parcel and bind any successive owner.

This is not only stated expressly in the ARDDA and in the Grant Deed, but it is also the result compelled by Civil Code section 1468, which addresses when a covenant that burdens land (as opposed to benefitting land) "runs" with the land so as to bind successive owners. (See *Monterey/Santa Cruz County Bldg. and Const. Trades Council v. Cypress Marina Heights* (2011) 191 Cal.App.4th 1500, 1517-1518.) That provision provides, in relevant part, that a covenant

“made by the grantee of land conveyed with the grantor thereof, to do or refrain from doing some act on his own land, which doing or refraining is expressed to be for the benefit of the land of the covenantee, runs with both the land owned by or granted to the covenantor and the land owned by or granted to the covenantee and shall, . . . benefit or be binding upon each successive owner” where certain requirements are met. These requirements are that the land must be particularly described in the instrument; that the instrument must express that successive owners are bound; that the “act relates to the use, repair, maintenance or improvement of, or payment of taxes and assessments on, such land or some part thereof, . . .”; and that the instrument is recorded. (Civ. Code, § 1468.) Each of these requirements is met here with respect to the Grant Deed for the Original Westrust Nut Tree Project.

In *Monterey/Santa Cruz County Bldg. and Const. Trades Council, supra*, the court held that a requirement to pay prevailing wages contained in various development and implementation agreements “facially complied with the requirements of Civil Code section 1468.” (*Id.*, 191 Cal.App.4th at p. 1518 [“The deed covenants required MRDA to do an act (pay prevailing wage) which would benefit all of the FORA land owned by FORA by ensuring that no parcel would be exempt from the prevailing wage requirement.”].)

The notion that an obligation to pay prevailing wages runs with the land and is binding on successor owners, until the public works project is completed under the terms of the governing development agreement, is consistent with and furthers the purposes of the Prevailing Wage Law and the case law as summarized above. NTH’s contrary proposition that a developer should be entitled to sell off parcels of land within an ongoing and existing public works project that was infused with a substantial investment of public funds, and that is subject to an existing development agreement, and thereby exempt future development on those parcels from prevailing wage requirements, is plainly wrong, contrary to both the purposes and the provisions of the Prevailing Wage Law, and the case law. This does not mean, contrary to NTH’s suggestion, that a prevailing wage obligation on a parcel of land would run in perpetuity. Under both the ARDDA and the Grant Deed, the obligations and covenants are concluded and terminated when a Certificate of Completion is issued.

Conclusion

As I have previously determined, the Original Westrust Nut Tree Project is a public works project. Millions of dollars in public funds have been invested in the project. It is an ongoing project, subject to an existing development agreement that continues and remains in full force and effect to this date. NTH is expressly obligated under the provisions of that agreement to complete the required Improvements on the parcels that it is now intending to sell to a third party; failure to do so would constitute a rather obvious and significant breach of the agreement. While NTH is not precluded by the ARDDA from selling the subject parcels, any such transfer is subject to the ARDDA as stated therein and must be completed in accordance with that Agreement. Under the express provisions of both the ARDDA and the Grant Deed, any purchaser of the subject parcels is subject to all of the obligations, terms and conditions of the ARDDA, including the obligation to pay prevailing wages.

Separate from the contractual obligations, the law requires that prevailing wages be paid on any “future development” of the subject parcels because such development is and will be part of an

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existing public works project, i.e., the Original Westrust Nut Tree Project, until a Certificate of Completion has been issued pursuant to the ARDDA for those parcels. The Certificate of Completion will certify that the Improvements required for those parcels under the ARDDA have been completed, thereby discharging the obligations of the ARDDA, including the obligation to pay prevailing wages.

I hope this satisfactorily answers your inquiry.

Sincerely,



Christine Baker
Director

cc. Melinda C.H. Stewart
City Attorney
City of Vacaville
(Via U.S. Mail Only)

Roberta Perkins
Weinberg, Roger & Rosenfeld
(Via E-Mail Only)