

STATE OF CALIFORNIA

GRAY DAVIS, GOVERNOR

DEPARTMENT OF INDUSTRIAL RELATIONS

OFFICE OF THE DIRECTOR
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January 17, 2003

Desmond C. Lee, Esq.
 DeCarlo, Connor & Selvo
 533 South Fremont Avenue, 9th Floor
 Los Angeles, CA 90071-1706

Re: Public Works Case No. 2002-038
 Kohl's Warehouse and Distribution Center

Dear Mr. Lee:

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 Title 8, California Code of Regulations, 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 construction of a warehouse and distribution center by Kohl's Department Stores, Inc. ("Kohl's") in the City of San Bernardino ("Project") is a public work subject to the payment of prevailing wages.

This Project involves the construction of a 650,000 square-foot regional warehouse and distribution center by Kohl's, a national department store chain. The warehouse and distribution center will be used to support Kohl's retail store expansion into Southern California, Nevada and Arizona. The Project is being built at the site of the former Norton Air Force Base.¹ The master developer in the efforts of the City of San Bernardino to redevelop this former military property is Hillwood Investment Group ("Hillwood"). Hillwood brokered the deal between Kohl's and City.

To implement the Project, in Fall 2001 Agency entered into Disposition and Development Agreement No. 3 ("DDA") with Hillwood. Under the DDA, Agency transferred to Hillwood a 50-acre "Primary Parcel." Close of escrow on the Primary Parcel was conditioned on the concurrent closing of escrow between Hillwood and Kohl's, whereby Kohl's purchased the same Primary Parcel from Hillwood in back to back escrow. The escrow holder was directed

¹ The Air Force transferred the property to the Inland Valley Development Agency ("Agency") and the San Bernardino International Airport Authority ("Airport Authority") for civilian reuse and redevelopment purposes and to replace the 10,000 jobs that were lost when the base closed. The property is now known as the San Bernardino International Airport and Trade Center.

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to record the deed directly from Agency to Kohl's to avoid a second deeding.²

Prior to the close of escrow and transfer of property, Hillwood and Kohl's prepared the Primary Parcel for construction pursuant to a series of temporary licensing agreements with Agency. Hillwood demolished existing structures, abated asbestos and lead-based paint found within those structures and constructed improvements to the storm water drain and sanitary sewer line; Kohl's performed rough grading work. Following demolition and rough grading, Kohl's undertook actual building construction.

As an inducement to locate the warehouse and distribution center in San Bernardino, Kohl's and Agency entered into a Tax Increment Revenue Reimbursement Agreement ("Tax Agreement") through which Kohl's will receive a property tax rebate of \$576,890 (22 percent of Kohl's property tax assessment) per year for ten years. The Tax Agreement refers to this rebate as "redevelopment assistance" to "reduce Development Costs," which include "significant off-site infrastructure costs, utility construction costs and other eligible public infrastructure costs in connection with development of the Project" (Tax Agreement, p. 2.)

Kohl's also entered into a Primary Parcel Development Mitigation Credits Agreement with Agency in which Kohl is to receive the following: (1) 4,282 vehicle trip credits per day (valued at \$17 per trip to offset a \$75,369 traffic impact fee; and (2) 14,118 gallons per day of sanitary sewer treatment capacity rights, offsetting a \$175,769 sewer capacity fee. If the City refuses to recognize the assignment of these credits from Agency to Kohl's, Agency becomes responsible for paying these fees on Kohl's behalf.

In addition, Agency paid \$18,359 for environmental testing and inspection work performed by professional engineers on this Project, the purpose of which was to insure that Hillwood's demolition contractors followed proper procedure for testing and inspection of construction debris. Agency is authorized to spend an additional \$11,641 for any other necessary environmental

² Hillwood purchased the Primary Parcel from Agency for \$1,939,521 plus 20 percent of the "Excess Sales Proceeds" from the subsequent sale to Kohl's. Hillwood then turned around and sold the parcel to Kohl's for \$6,564,371.40. Because this determination is being decided on other grounds, it is unnecessary to reach the issue of whether the Agency sold the property to Hillwood at less than fair market value and, if so, whether such a transfer would constitute a payment of public funds for construction.

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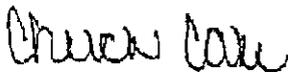
testing and inspection work identified during the demolition and abatement work.

Under what is now Labor Code section 1720(a)(1)³ (as amended by statutes of 2001, chapter 938, section 2 (Senate Bill 975)), a public work is defined 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 design and pre-construction phases of construction including, but not limited to, inspection and land surveying work."⁴

The Project involves construction, alteration, demolition and inspection. The work was performed under contract. The Project was paid for in part out of public funds, the source of public funds including the property tax rebates from Agency to Kohl's and the payment of professional engineering costs by Agency for pre-construction testing and inspection performed during demolition and abatement work by Hillwood.⁵ Therefore, the Project is a public work requiring the payment of prevailing wages.

I hope this determination satisfactorily answers your inquiry.

Sincerely,



Chuck Cake
Acting Director

³ Unless otherwise indicated, all subsequent statutory references are to the Labor Code.

⁴ The effective date of section 1720 amendments under Senate Bill 975 was January 1, 2002. The amended version of section 1720 does not apply, however, because the documents formalizing the Project, i.e., the DCA, etc., were entered into prior to the effective date of the amendments.

⁵ An additional source of expenditure of public funds would exist if City refuses to recognize Agency's assignment of vehicle trip credits and sewer treatment capacity rights to Kohl's, thereby triggering Agency's obligation to pay the required traffic and sewer impact fees on behalf of Kohl's. *Downtown Redevelopment Plan Projects, City of Vacaville, FW 2000-015 (March 22, 2001)*.