

DEPARTMENT OF INDUSTRIAL RELATIONS

Office of the Director

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To All Interested Parties:

Re: Public Works Case No. 2011-021
 Westrust Nut Tree Project
 City of Vacaville and Vacaville Redevelopment Agency

The Decision on Administrative Appeal, dated June 25, 2015, in PW 2011-021, *Westrust Nut Tree Project – City of Vacaville and Vacaville Redevelopment Agency*, was affirmed in an unpublished First District Court of Appeal opinion issued on March 15, 2019. (See *Nut Tree Holdings, LLC v. Baker* (Mar. 15, 2019, A150087) 2019 WL 1219454 [nonpub. opn.])

DEPARTMENT OF INDUSTRIAL RELATIONS

Christine Baker, Director

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August 8, 2014

Ricardo Capretta
Westrust Ventures, LLC
100 Shoreline Highway, Building B, Suite 310
Mill Valley, CA 94941

Re: Public Works Case No. 2011-021
Westrust Nut Tree Project
City of Vacaville and Vacaville Redevelopment Agency

Dear Mr. Capretta:

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 Labor Code section 1773.5¹ and California Code of Regulations, title 8, 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 Nut Tree Ranch Planned Development (Project) in the City of Vacaville (City) is a public work subject to prevailing wage requirements.

Facts

On February 4, 2003, the Vacaville Redevelopment Agency (Agency) entered into a Disposition and Development Agreement (the Original DDA) with Nut Tree Associates, LLC (NTA) and the City to construct a 76-acre mixed-use development, located within the Vacaville I-505/80 area. Between 2003 and 2008, the DDA was amended four times. Under the Original DDA and its amendments, NTA facilitated the construction of off-site infrastructure including the creation of an assessment district to pay for new public streets, off-site utilities and Interstate 80 improvements. NTA purchased approximately 38.50 acres of land from Agency to facilitate the first phase of a multi-phase development.² Agency contributed \$16.7 million to the project and prevailing wages were paid for many of the improvements constructed under the Original DDA. In approximately 2008, NTA defaulted on its obligations under the Original DDA. NTA subsequently assigned its rights under the Original DDA to WW Nut Tree, LLC (WWNT), which, in turn, assigned its rights to Nut Tree Holdings, LLC (NT Holdings).

¹ All citations are to the California Labor Code, unless otherwise specified.

² According to Westrust, the Nut Tree Retail Phase 1 project is 331,000 square feet and is currently anchored by Best Buy, Sport Chalet, HomeGoods, PetSmart, Old Navy and BevMo.

On April 1, 2010, Agency, City, WWNT and CT Stocking, LLC (CT)³, entered into an Amended and Restated Non-Binding Letter of Intent (LOI) that set forth the preliminary terms with respect to development of the Project. To facilitate the Project, Agency, CT and NT Holding engaged in a three-way land swap that resulted in a mixed-use office, residential and hotel center complex. When completed the five phase Project will include 395,000 square feet of retail space, 216 multi-family units, 140,000 square feet of office area, a 1.8 acre amusement park, and a 3.3 acre event center. The City will control an adjacent 13.6 acres where a 220 room hotel and 30,000 square foot convention center are planned.

On November 10, 2010, NT Holdings and Nut Tree Retail, LLC (NT Retail) entered into an Amended and Restated Disposition and Development Agreement (Amended DDA) regarding the Project that incorporated the terms of the LOI. Pursuant to the Amended DDA, the Project will consist of the following:

1. Property Exchange.

The Agency will transfer the following parcels to NT Holding for \$1.00: 1, 2A, 2B, 2C, 10, 11A, 11B, 11C, 11D, 11E, and 13. The square footage of the Agency's parcels is approximately 1,426,665. The value of the Agency parcels at their highest and best use is \$12,051,439.⁴ In exchange, NT Holding will transfer Parcels 4, 9(a), 9(b) to Agency for \$1.00. The value of NT Holding's parcels that will be transferred to Agency is \$3,736,263.⁵ Agency will lease back the Harbison Event Center property for three years with an option to extend for additional 40 years for \$1 per year plus 25% of net profits, if any as well as use of the event center for 36 hours per year. Pursuant to Agency's report under Health and Safety Code section 33433 (hereafter "33433 Report"), the total consideration received by Agency for the property transfers and lease agreement is less than the fair market value for such real property.⁶

The highest and best use (or fair market value) of the parcel referred to as the "View Corridor" is \$786,688 per the 33433 Report. Agency will lease the View Corridor to NT Holding for three years with an option to extend for additional 40 years for \$1 per year. NT Holding agrees to maintain the parcel. NT also assumed a \$7,894,615 million loan from Wells Fargo Bank that was defaulted on by the prior developer for the parcels it acquired. This loan assumption agreement was not a condition of regulatory approval.

The "Post Exchange" developer parcels consist of approximately 34 acres and generally surround the retail component of the development. The parcels are currently vacant and are included in the

³ CT previously entered into various agreements with the City and Agency regarding the development of Parcels E and F. CT intends to reconvey those parcels back to Agency. (See Amended DDA, p. 3).

⁴ Pursuant to Exhibit E of Amended and Restated Summary Report Pursuant to Section 33433 of the California Community Redevelopment Law (33433 Report), the highest and best use value of the Agency's parcels is \$12,051,439. In addition, another appraisal by Webster & Co. in 2010 values the parcels transferred by Agency to Developer at approximately \$8.1 million and the value of the parcels received by Agency at \$3.75 million.

⁵ See p.11 of the 33433 Report.

⁶ Pursuant to a separate agreement, CT will transfer Parcel 8, which has a fair market value of \$3,920,523 to Agency and, in exchange, Agency will transfer parcel 3, to CT.

Nut Tree Assessment District and the Nut Tree Landscaping and Light District. Pursuant to the Amended DDA, Agency and/or City will retain ownership of parcels 4 (Harbison Event Center), 8, 9A-B (proposed Hotel and Conference Center) and 13B. The Solano Irrigation District will own the SID Pump Station. CT Realty will own parcels 3 and 5 for planned commercial development.

2. Agency/City Contributions to the Project.

Pursuant to the Amended DDA, WWNT may apply \$2,500,000 in development impact fees (DIF) to any fees payable to the City or Agency for any development within the Project, including residential and office parcels. The eligible DIF are for water connection, sewer connection, general facility impact, police and fire development impact, traffic impact, drainage detention zones and drainage conveyance. DIF are capped at \$2,500,000.

Agency agrees to pay for WWNT's obligation of reimbursing the City \$417,037 for 167,300 square feet of City excess right of way.

Pursuant to Section 4.2 (b), NT Holdings shall perform construction of various public improvements required by City/Agency. Following the completion of construction of such public improvements, Agency shall reimburse NT Holding for actual costs of construction not to exceed \$85,000. NT Holdings shall pay for all other costs associated with the required public improvement work.

3. Assessment Districts.

There are four known assessment districts that encumber the Project. The Nut Tree Assessment District (NTAD) and the Nut Tree Landscape and Lighting District (NTLLD) were formed prior to the Amended DDA; however, pursuant to the Amended DDA, both will encumber the parcels within the Project that are owned by NT Holding, Agency and CT. CT will apply to the City to form a "CT Benefit District" (CTBD). Neither NT Holding nor NT Retail will receive any direct benefit from CTBD. Finally, NT Holding commenced the process of forming a district to fund the construction of the Solano Irrigation District (SID) Pump Station⁷ (SID District). Agency will contribute \$65,325 to the formation of the SID District.

The overall cost of the Project undertaken by NT Holding under the Amended DDA is \$91,244,395.

Discussion

Labor Code section 1720(a)(1)⁸ generally defines "public works" to mean: "Construction, alteration, demolition, installation, or repair work done under contract and paid for in whole or in part out of public funds" Section 1720(b) defines "paid for in whole or in part out of public funds" to mean the following: "[t]he payment of money or the equivalent of money by the state or

⁷ SID District will fund construction of a pump station for non-potable water that will distribute the water to the Project for irrigation use.

⁸ All section references are to the Labor Code, unless otherwise provided.

political subdivision directly to or on behalf of the public works contractor, subcontractor, or developer” (§ 1720(b)(1)); a “[t]ransfer by the state or political subdivision of an asset of value for less than fair market price” (§ 1720(b)(3)); “[f]ees ... loans ... or other obligations that would normally be required in the execution of the contract, that are paid, reduced, charged at less than fair market value, waived, or forgiven by the state or political subdivision” (§ 1720(b)(4)); and “[c]redits that are applied by the state or political subdivision against repayment obligations to the state or political subdivision” (§ 1720(b)(6)). Lastly, section 1720, subdivisions (c)(2) and (c)(3), sets forth the following exemption:

(c) Notwithstanding subdivision (b):

- (2) If the state or a political subdivision requires a private developer to perform construction, alteration, demolition, installation, or repair work on a public work of improvement as a condition of regulatory approval of an otherwise private development project, and the state or political subdivision contributes no more money, or the equivalent of money, to the overall project than is required to perform this public improvement work, and the state or political subdivision maintains no proprietary interest in the overall project, then only the public improvement work shall thereby become subject to this chapter.
- (3) If the state or a political subdivision reimburses a private developer for costs that would normally be borne by the public, or provides directly or indirectly a public subsidy to a private development project that is de minimis in the context of the project, an otherwise private development project shall not thereby become subject to the requirements of this chapter.

It is undisputed that the Project involves construction done under contract. The issues are whether the above-described Agency contributions constitute payments of public funds as defined by section 1720(b) and, if so, whether any exemptions apply.

Agency’s payment of \$2,585,000 (\$2,500,000 in DIF’s and \$85,000 reimbursement for public improvement work) is the “[t]he payment of money ... by the state or political subdivision directly to or on behalf of the ... developer” within the meaning of section 1720, subdivision (b)(1)). In addition, Agency’s transfer of land with a fair market value of \$12,051,439 to NT Holding for \$1.00 constitutes a transfer of an asset for less than fair market price under section 1720, subdivision (b)(3). Regarding the various assessment districts, the only clear subsidy appears to be \$65,325 that the Agency will contribute to the formation of the SID District. There appears to be no payment to NT Holding from any of the other districts. Therefore, Agency appears to be subsidizing the Project in the amount of \$10,965,501 after subtracting the value of the land conveyed to Agency.

Westrust seeks multiple determinations concerning prevailing wage requirements for various parcels depending on whether or not DIF credits are applied on those parcels. The Agency contributions, however, cannot be segregated by parcel. The issue is whether the Agency contributions render the entire Project a public work, not simply construction on individual

parcels. The DIF as well as the transfers of land for less than fair market price are contributions to the overall Project. Accordingly, the entire Project is a public work. See *Azusa Land Partners v. Department of Industrial Relations* (2010) 191 Cal.App.4th 1, 29 (*Azusa*). As noted by the Court in *Azusa*:

Once the determination is made that the Project is a “public work” under subdivision (a)(1), the entire Project is subject to the PWL. In 2001, the Legislature enacted SB 975 to partially exempt from the prevailing wage requirements certain “private development projects” that are paid for in part with public funds. That exemption, codified at section 1720, subdivision (c)(2), applies if four requirements are met: (1) the public improvement work is required as a condition of regulatory approval; (2) the project is an otherwise private development; (3) the public entity must not contribute more money, or the equivalent of money, to the overall project than is required to construct the public improvement work; and (4) the public entity must not maintain any proprietary interest in the overall project. (§ 1720, subd. (c)(2).) *Azusa, supra, at p. 29.*

Here it is conceded that City/Agency will retain several parcels in the Project as part of the land swap with NT Holdings, including a percentage of the profits earned in the operation of the Harbison Event Center. Accordingly, it appears that Agency/City will maintain a proprietary interest in the overall development.⁹ In addition, the aggregate sum of Agency’s contributions, which represents 12 percent of the total Project cost of \$91,244,395, is not de minimis in the context of the entire project and is greater than all the infrastructure costs combined. The total subsidy from Agency in relation to the overall cost of the Project is such that the availability of the subsidy significantly affects the economic viability of the Project.

Westrust argues that 1) the Director must account for the \$7.8 million debt that it assumed as part of the land swap because it was an “integrated transaction;” and 2) that City did not pay, reduce, waive, forgive or charge fees for less than fair market value under subd. (b)(4). First, Westrust contends that City, NTH and CT negotiated the land swap to avoid Wells Fargo foreclosing on the Project property and to prevent the Project was going into default. Westrust argues that the \$7.9 million debt was part of the overall transaction contemplated by the DDA and that the difference in the value of the land obtained by Westrust (approximately \$12 million) from City and of the land given to City by Westrust (approximately \$3.7 million) must be offset by Westrust’s assumption of this debt.

The statutory scheme, however, does not allow for a “credit” to the developer for this cost. The plain language of subdivision (b)(3) refers to an asset of value transferred for less than its fair market price. The Webster appraisal and the 33433 Report support the conclusions reached herein. The loan assumption agreement is irrelevant to this analysis because it was not a condition of regulatory approval. Also, City/Agency, did not own any parcels that were encumbered by the Wells Fargo loan. City/Agency did not give up anything of value when Westrust assumed the debt. The statute does not contemplate ‘benefits’ to City/Agency as part of the transaction such as tax revenue, increased tourism, etc. The statute only contemplates public subsidies as defined by

⁹ The partial exemption in section 1720, subdivision (c)(2) would not be applicable because one of the conditions is that the state or political subdivision maintain no proprietary interest in the overall project. Here, City/Agency will retain a proprietary interest in the form of several parcels that are part of the Project.

subdivision (b) by City to a developer. Further, the \$7.9 million debt was incurred by the prior developer, not City. Westrust voluntarily agreed to assume this debt apparently to save the Project and its own interests in the development.

Second, Westrust contends that its agreement to perform construction, maintenance and other work in the amount of \$4,175,464 offsets the \$2,499,000 in development impact fees that City agreed to waive. Westrust argues that City required it to construct certain public benefits and, in exchange, City agreed to provide a credit for such work. Because the credit is less than the value of the work, Westrust contends that there was no public subsidy. City's negotiated concessions from Developer in the form of construction work, however, does not offset the payment of public funds by City. The statutory scheme does not contemplate an offset against work that a developer may agree to perform. Here, there is no evidence that City "required" that this work be performed as a condition of regulatory approval of the Project. (See *Azusa Land Partners v. Department of Industrial Relations*, *supra* [City of Azusa required developer to perform public improvement work as a condition of regulatory approval of the project.]). Instead, City and Westrust negotiated over the terms and Developer agreed to perform certain work.

For the foregoing reasons, the public subsidy to the Project is not de minimis and therefore renders this development project a public work subject to prevailing wage requirements.

I hope this letter satisfactorily answers your inquiry.

Sincerely,

A handwritten signature in cursive script that reads "Christine Baker".

Christine Baker
Director