STATE OF CALIFORNIA

DEPARTMENT OF INDUSTRIAL RELATIONS

DECISION ON ADMINISTRATIVE APPEAL

RE: PUBLIC WORKS CASE NO. 2010-005

ATLANTIC TIMES SQUARE
MONTEREY PARK REDEVELOPMENT AGENCY

I. INTRODUCTION

On June 15, 2010, the Director of the Department of Industrial Relations ("Department") issued a public works coverage determination (the "Determination") in the above-referenced matter finding that the construction of Atlantic Times Square, a mixed use development encompassing a shopping center and residential facility (the "Project") in the City of Monterey Park ("City") was a public work because it was paid for in part out of public funds in the form of a contingent loan under Labor Code section 1720, subdivision (b)(5).[1]

On July 14, 2010, developer, Atlantic Times Square II, LLC ("ATS"), along with Monterey Park Redevelopment Agency ("Agency") (collectively the "appealing parties") timely filed an administrative appeal (the "Appeal") of the Determination and requested a hearing. Southern California Labor/Management Operating Engineers Contract Compliance Committee ("Operating Engineers") filed an opposition to the Appeal on July 27, 2010, and the Los Angeles and Orange Counties Building and Construction Trades Council filed an opposition on August 11, 2010. On August 13, 2010, the appealing parties replied to the opposition of the Operating Engineers.

With regard to the request for a hearing, section 16002.5(b) of title 8 of the California Code of Regulations provides that the decision to hold a hearing on appeal

[1] All references to sections are to sections of the Labor Code, unless otherwise specified. All references to subdivisions are to subdivisions of section 1720 unless otherwise specified.

from a determination of coverage is within the Director's sole discretion. Here, the facts set forth in the Determination that are material to the coverage question are not in dispute. Because the issues raised on appeal are solely legal, no hearing is necessary. The request for a hearing is denied.

All of the submissions have been considered carefully. For the reasons set forth in the Determination, which is incorporated into this Decision on Administrative Appeal (the "Decision"), and for the additional reasons stated below, the Appeal is denied and the Determination is upheld.

II. FACTS

The facts as set forth in the Determination are not contested. In summary, ATS and Agency entered into three agreements: the Disposition and Development Agreement (the "DDA"), the Second Amendment to the DDA ("Second Amendment"), and the Mezzanine Loan.[2] Prior to the Second Amendment and the Mezzanine Loan, the parties properly treated the Project as a public work; and prevailing wages were paid under previously awarded contracts. In the Second Amendment and the Mezzanine Loan, the parties agreed that the prior public subsidies and anticipated future fee and cost waivers agreed upon in the DDA would be replaced by a market-rate loan, with full repayment due within 15 years of the Certificate of Occupancy. The Second Amendment incorporates the terms of the Mezzanine Loan and specifically provides:

> The Agency agree [sic] to:
>
> (1) eliminate the requirement that each and every part of the work for the Project be performed as a "public works" ...,
>
> and
>
> (2) provide a loan to the Developer on arms' length, market rate terms,...

(Second Amendment, p. 4.)

The Second Amendment then provides for the reinstatement of public funding and:

[2] The Mezzanine Loan is a loan from Agency to Developer that is repayable at market rate interest.

> the automatic (a) reinstatement of the requirement that each and every part of the work for the Project be performed as a "public works" and the Agency's agreement to provide certain financial assistance to the 'Developer for the Project, and (b) modification of such loan by the Agency to the Developer,... prior to the first anniversary (the "**Reinstatement Event Deadline**") of the latter to occur of (i) the issuance of a final certificate of occupancy for each of the Residential Units, and (ii) the issuance of either· a temporary or final certificate of occupancy for each of the other buildings constituting the Project time being strictly of the essence, either of the following events (each, a **"Reinstatement Event"**) occurs: ...

(Second Amendment, pp. 3-4.) The Second Amendment defines "Reinstatement Event" as occurring when either the Director issues a public works coverage determination "to the effect that the Project ... is a public work" or someone sues in a court of competent jurisdiction claiming that the Project is a public work. (*Id.* at pp. 4-5.) The Second Amendment provides that should a Reinstatement Event occur, all repayment obligations under the Mezzanine Loan would be waived, the interest rate would be reduced to zero percent, and ATS would be entitled to an additional $8 million from Agency. Agency, in effect, would be providing Developer with a $16 million subsidy to the Project. Also, upon occurrence of either Reinstatement Event, the Mezzanine Loan would be automatically modified to reflect the new repayment and public assistance terms. (See Mezzanine Loan, fns. 2, 3.)

The appealing parties state that the intention of the Second Amendment was to eliminate all public funding and thereby avoid the requirement to pay prevailing wages on future construction on the Project. "Nonetheless, the Parties had some concern that, because the Project was initially conceived as a public work, the DIR might somehow conclude that it could not be converted to a non-public work Project." (Appeal, July 14, 2010, p. 3.) Their solution was to create what they now call a "fall-back provision" that would automatically convert the Project back to a public work, with guaranteed public funding, including the elimination of payment obligations under the Mezzanine Loan.

III. CONTENTIONS ON APPEAL

There is no dispute that the Mezzanine Loan standing alone does not entail a payment out of public funds within the meaning of subdivision (b). The dispute here centers on the effect of the Second Amendment. The Determination found that the Second Amendment's "fall-back" provision created a repayment contingency within the meaning of subdivision (b)(5). Appealing parties take issue with this characterization of the "fall-back" provision and make the following three arguments in support of their appeal:

1. Principles of statutory construction support appealing parties;

   A. According to the plain language of subdivision (b)(5), a contingent loan is only that whose repayment was unlikely to occur: "For example, if a public agency provides money to a developer that only needs to be repaid *if* the developer makes a specified profit on the project…" (Appeal, page 7);

   B. The Legislature's intent in passing SB 975 was to stop parties from evading the obligation to pay prevailing wages on publicly funded construction. "Thus, to assess whether a project is a public work, the crux of a section 1720 analysis is looking at the project as a whole to determine whether it is subsidized by public funds, whether by direct payment or otherwise." (Appeal, page 6);

2. Under the facts of this case, the Mezzanine Loan is **not** to be repaid on a contingency basis because the contingency is not tied to the payment obligation. Rather, the contingency simply causes the Project funding to revert to the original agreement (Appeal, page 7); and

3. The Determination is contrary to principles of contract interpretation because it ignores the intent of the contracting parties. (Appeal, page 9.)

IV. DISCUSSION

1. The Principles of Statutory Construction Support the Conclusion that the Second Amendment and Mezzanine Loan Combined Constitute the Payment of Public Funds.

The primary task is to determine the legislative intent of section 1720 by an analysis of the language in the statute itself, and the Legislature's expressed intent:

> The fundamental rule of statutory construction is that a court should ascertain the intent of the legislature so as to effectuate the purpose of the law. In construing a statute, our first task is to look to the language of the statute itself. When the language is clear and there is no uncertainty as to the legislative intent, we look no further and simply enforce the statute according to its terms.

(*DuBois v. Workers' Compensation Appeals Board* (1993) 5 Cal.4th 382, 387-388 (internal citations omitted); *State Building and Construction Trades Council of California v. Duncan* (2008) 162 Cal. App. 4th 289, 311 (*SBCTC*).) When examining the language of a statute itself, consideration must be given to the context of the entire statute within which the language is used and the statutory scheme of which it is a part.

Overarching principles specific to California's prevailing wage law also apply to any statutory analysis of section 1720:

> It is the expressly stated legislative policy in California "to vigorously enforce minimum labor standards in order to ensure employees are not required or permitted to work under substandard unlawful conditions or for employers that have not secured the payment of compensation, and to protect employers who comply with the law from those who attempt to gain competitive advantage at the expense of their workers by failing to comply with minimum labor standards." (§ 90.5, subd. (a); see also § 90.3.) Several specific goals are subsumed within this general objective: "'to protect employees from substandard wages that might be paid if contractors could recruit labor from distant cheap-labor areas; to permit union contractors to compete with nonunion contractors; to benefit the public through the superior efficiency of well-paid employees; and to compensate nonpublic employees with higher wages for the absence of job security and employment benefits enjoyed by public employees. [Citations.]'" "'The overall purpose of the prevailing wage law is to protect and benefit employees *on public works projects*. [Citation.]'"The PWL is a minimum wage law. As such, it is liberally construed to further its purpose.

(*Azusa Land Partners v. Department of Industrial Relations* (2011) 191 Cal.App.4th 1, 14-15 (*Azusa*) [Mello-Roos Bond Funds entail a payment of public funds under subdivision (b)].)

A. The Plain Language of Subdivision (b)(5) Applies to the Funding of the Project.

Subdivision (b)(5) includes within the definition of public funds "Money loaned by the state or political subdivision that is to be repaid on a contingent basis." Here, the Mezzanine Loan shows that Agency loaned ATS money for the Project. The Second Amendment provides a contingency to the repayment of that loan. It is immaterial to the Determinations' conclusion that the Project is a public work whether the Second Amendment's provision eliminating ATS's repayment obligation is characterized as a "fall-back" provision or a contingent term for repayment. Either way, the Second Amendment contains a provision that Mezzanine Loan is being "repaid on a contingent basis."

Appealing parties read subdivision (b)(5) too narrowly as only applying when the contingency would create a repayment obligation rather than eliminate one. As the *SBCTC* court said: "[W]hen the Legislature meant to refer to an exchange occurring in the future, it used language to reflect that expectation, as in subdivision (b)(5), which places within the definition 'Money loaned by the state or political subdivision *that is to be repaid on a contingent basis*.' (Italics added.)" (*SBCTC, supra,* 162 Cal.App.4th at pp. 311-312 (citations omitted).)

Appealing parties fail to persuasively create a distinction between "contingent" in subdivision (b)(5) and "fall-back provision" in light of the dictionary definitions of "contingent" and "fall-back." When one looks at dictionary definitions of each, one sees that the two words are virtually synonymous.[3]

Merriam-Webster defines "contingent" as "dependent on or conditioned by something else <payment is *contingent* on fulfillment of certain conditions>." (Merriam-Webster Online Dictionary at <http://www.merriam-webster.com/dictionary/contingent>

[3] Courts have routinely sought assistance of dictionaries to interpret section 1720. (*City of Long Beach v. Department of Industrial Relations* (2004) 34 Cal. 4th 942, *Oxbow Carbon & Minerals, Inc. v. Department of Industrial Relations* (2011) 194 Cal.App.4th 538 (*Oxbow*), *McIntosh v. Aubry* (1993) 14 Cal.App.4th 1576 (*McIntosh*).)

[as of June 10, 2010], italics added; see also, Webster's New World Dict. (3d college ed. 1989), p.301. ["dependent (*on* or *upon* something uncertain); conditional", original italics].)

"Fallback" is similarly defined as a contingent situation: "A backup plan or contingency strategy; an alternative which can be used if something goes wrong with the main plan; a recourse." (Wiktionary, < http://en.wiktionary.org/wiki/fallback> [as of April 18, 2011], "Something to which one can resort or retreat." (Wordnik, < http://www.wordnik.com/words/fallback> [as of April 18, 2011], "an alternative plan that may be used in an emergency." (Oxford Online Dictionaries, < http://www.oxforddictionaries.com/definition/fallback?view=uk> [as of April 18, 2011], "something in reserve that one can turn to for help" (Your Dictionary.com, < http://www.yourdictionary.com/fallback> (quoting Webster's New World College Dictionary (2010)) [as of April 18, 2011].) Thus, the plain meaning of a loan that "is repaid on a contingent basis" includes the funding here whether one calls the operative provision a contingent or a "fall-back" provision.

Appealing parties' other argument on this issue is that the Legislature did not intend to include within subdivision (b)(5) contingencies that depended on the occurrence of an external event, in this case a coverage determination by the Director. Appealing parties claim that subdivision (b)(5) only applies to contingencies that are anticipated in the loan documents. As seen above, there is no support for such a circumscribed interpretation of contingent; and it would be for the Legislature to create such a rule. (*McIntosh, supra,* 14 Cal.App.4th at p. 1593; see also, *Hensel Phelps v. San Diego Unified Port Authority* (July 26, 2011) --- Cal.App.4th ---, slip op. at pp. 24-25 (*Hensel Phelps*).)

B. The Legislature's Intent in Passing Senate Bills 975 and 972 Was to Expand the Definition of "Paid For in Whole or in Part Out of Public Funds."

The appealing parties argue that the amendments to section 1720 in Senate Bills 975 and 972 were intended to stop parties from obtaining public subsidies while avoiding prevailing wage obligations. (Stats 2001 ch. 938 2 (SB 975); Stats 2002 ch. 1048 1 (SB 972).) They claim that the Mezzanine Loan is not the type of loan that the Legislature

intended to cover under subdivision (b)(5). The appealing parties' description of the Legislature's intent, however, is simply conjecture. "[I]t is significant that section 1720 has no such expression...We are not authorized to rewrite section 1720 to conform to an assumed intent the Legislature did not express." (*SBCTC, supra*, 162 Cal. App. 4th at pp. 319-320.)

The Court in *SBCTC* summarized the changes brought about by SB 975 and 972:

> The statutory emphasis is very much upon the tangibility and form of the payment. The Legislature virtually adopted our *McIntosh* formulation in subdivision (b)(1), which defines "paid for in whole or in part out of public funds" as first and foremost the "payment of money or its equivalent." "Transfer ... of an asset of value for less than fair market price," and "Fees, costs, rents or bond premiums, loans, interest rates, 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" (subds.(b)(3), (b)(4)) are obviously in the same vein. So is "Money loaned" when repayment is not guaranteed. (Subd. (b)(5).) It is not hard to understand that extending "Credits that are applied ... against repayment obligations" (subd. (b)(6)) is simply money that would otherwise be paid. And there is certainly a cash value if the state actually undertakes "Performance of construction work ... in execution of the project." (Subd. (b)(2).)
>
> Moreover, subdivisions (b)(1) and (b)(3) speak to the state or political subdivision parting with a thing possessing current value. Within the definition of "paid for in whole or in part out of public funds" is "The payment of money or the equivalent of money by the state or political subdivision" specified by subdivision (b)(1). Subdivision (b)(3) includes in the same definition the "Transfer by the state or political subdivision of an asset of value for less than fair market price." It is significant that both of these provisions are couched in the present tense. By contrast, when the Legislature meant to refer to an exchange occurring in the future, it used language to reflect that expectation, as in subdivision (b)(5), which places within the definition "Money loaned by the state or political subdivision *that is to be repaid on a contingent basis*." (Italics added.)
>
> Even more significant is subdivision (b)(6), which speaks to "Credits that are applied by the state or political subdivision against repayment obligations to the state or political subdivision." "Repayment" in this context can hardly refer to a private contract where no moneys are advanced by the state that can be owing-and thus there is nothing to be "repaid."

(*SBCTC, supra*, 162 Cal.App.4th at pp. 311-312.)

Thus, the court recognized that the hallmark of SB 975 and 972 was to broaden the scope of public funds so as to capture tangible payments of money that met one of six enumerated sets of criteria. The Legislature intended to include transfers that might occur in the future, such as here where the Agency becomes responsible for providing ATS with a grant of previously advanced public funds and additional new public funds. (*SBCTC, supra,* 162 Cal.App.4th at pp. 311-312.) In essence, the Court found that if a transfer fit within one of the six enumerated categories, there was a payment of public funds. "If there are blanks or gaps in section 1720, it is not for us to fill them." (*SBCTC, supra,* 162 Cal.App.4th at p. 323.)

Appealing parties' legislative intent argument proceeds from the unsupported view that the Legislature added subdivision (b) to eliminate parties' attempts to avoid prevailing wage obligations when they received public funds. Appealing parties' misdescription of the Legislature's intent leads them to the erroneous conclusion that SB 975 defined public funds more narrowly than the Legislature has in fact done. There is no legislative history to support the appealing parties' argument that because the "fallback provision" did not immediately create a right not to repay the Mezzanine Loan, the "fallback provision" was not the kind of contingency the Legislature intended to cover as a payment of public funds under subdivision (b)(5).

2. The Fallback Provision in the Second Amendment Makes Repayment of the Loan Contingent Within the Meaning of Subdivision (b)(5).

The appealing parties argue that because the "fall-back provision" is in the Second Amendment, not the Mezzanine Loan, the contingency affects the Project, not the Mezzanine Loan. Under this view, the Mezzanine Loan is a market rate loan with repayment guaranteed by the developer. The "fall-back provision" in the Second Amendment simply reverts the Project to its former funding mechanism if the Director determines the Project is still a public work. Therefore, the loan itself does not contain a repayment contingency within the meaning of subdivision (b)(5).

The parties clearly understood their attempt to avoid prevailing wage obligations might not work and thus created the "fall-back provision" should the Project be considered to be a public work. (Letter from John C. Miller, July 27, 2007, p. 2.) However, the parties' solution was to return the Project to its former funding in this

eventuality. The Second Amendment provides for this transformation through turning the Mezzanine Loan into an interest free loan that is not repayable. This is different from the original funding arrangement; in fact, the Second Amendment provides for additional funds not previously provided for in the DDA. As a result, ATS was essentially guaranteed a substantial public subsidy (up to $16 million total) should the Director determine the Project to be subject to prevailing wages.

The court of appeal recently rejected a similar attempt to parse contracts to avoid public works coverage:

> Oxbow argues that the construction of the enclosure was separate and independent from the construction of the conveyor system and so cannot be considered paid for out of public funds. Oxbow relies on the fact that its amended lease with Long Beach only referenced the planned conveyor work and stated that this work would be reimbursed by Long Beach and subject to the prevailing wage law. As correctly noted by both the Director and the trial court, however, the danger of Oxbow's argument is that if given effect, it would encourage parties to contract around the prevailing wage law by breaking up individual tasks into separate construction contracts.
>
> This sort of behavior was directly criticized in *Lusardi* [*Construction v. Aubry* (1992) 1 Cal.4th 976]. In *Lusardi,* the Supreme Court held that the obligation to pay prevailing wages may not be based solely on contractual provisions, but that the obligation instead flows from the statutory duty embodied within the prevailing wage law. (*Lusardi, supra,* 1 Cal .4th at pp. 986-988.) The *Lusardi* court reasoned that an awarding body and a contractor often have strong incentives to avoid the prevailing wage law and thus may structure their contracts to circumvent it. (*Id.* at pp. 987-988.) The court held that such circumvention conflicts with the law: "To allow this would reduce the prevailing wage law to merely an advisory expression of the Legislature's view." (*Id.* at p. 988.)

(*Oxbow, supra,* 194 Cal.App.4th at p. 550.) Appealing parties' attempt to divorce the Second Amendment from the Mezzanine Loan is simply unavailing. For example, section 5.5 of the DDA is substantially amended in the Second Amendment to incorporate the terms of the Mezzanine Loan, including how the principal will be calculated as well as repaid. (Second Amendment, pp. 31-39.) There is no question that the arrangement between appealing parties was that the market rate interest loan did not have to be repaid if the Department found that the Project was a public work. It does not matter if one of

the operative provisions is in the Second Amendment rather than the Mezzanine Loan; what matters is that repayment of the Agency loan by ATS was contingent, in part, on whether the Department found the Project was a public work. For the reasons stated above and in the Determination, this arrangement by its very nature created the public work the parties were seeking to avoid.[4]

3. Section 1720's Applicability to the Project Is Not Controlled by the Parties' Characterization of Their Contractual Intent.

Finally, the appealing parties contend that the Director has not followed the parties' intention to contractually create a privately funded project, subject to a contingency should the Department find the Project is a public work. According to the appealing parties: "The unambiguous intent of the Second Amendment was to eliminate all public subsidies from the Project and create a non-contingent, market rate loan." (Reply Brief by Appealing Parties, August 13, 2010, p. 2.) As ATS's prior attorney stated: "This fall-back provision between the Agency and the Developer is a contingent agreement." (Letter from John C. Miller, July 27, 2007, p. 2.) Therefore, the Determination did not ignore the appealing parties' intent; it applied their intent to the provisions of section 1720.

As recently recognized by the Second District Court of Appeal, the Supreme Court held almost twenty years ago that public works coverage is a matter of statutory interpretation that cannot be abrogated by parties' contractual provisions.

> In *Lusardi,* the Supreme Court rejected a contract-based definition of public work, and held the statutory obligation of a contractor to pay prevailing wages may not be contracted away. The court stated: "To construe the prevailing wage law as applicable only when the contractor and the public entity have included in the contract language requiring compliance with the prevailing wage law would encourage awarding bodies and contractors to legally circumvent the law, resulting in payment of less than the prevailing wage to workers on construction projects that

[4] The contingency created here is substantially different from the one in PW 2004-035, *Santa Ana Transit Village* (June 25, 2007), contrary to appealing parties' contention. In *Santa Ana Transit Village*, the public funding consisted of a below market price transfer of land (subd. (b)(3)); it did not involve a loan. The contingency in that case allowed the developer to completely withdraw from its obligations under its Development and Disposition Agreement without incurring any penalty before construction began. In this case, the parties did not agree to allow the developer to withdraw from the Project; they agreed to give the developer $16 million in public funds.

> would otherwise be deemed public work." (*Lusardi, supra,* 1 Cal.4th at pp. 987–988, 4 Cal.Rptr.2d 837, 824 P.2d 643.)

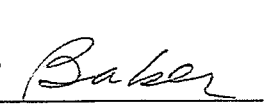
(*Azusa, supra,* 191 Cal.App.4th at p. 35.) Thus, the Acting Director is not bound by the conclusion in the contract that the Project is not a public work. The Acting Director should not ignore the realities of what the parties were attempting to accomplish; however, as the Supreme Court has said, the legal effect of the parties' agreement is a question of statutory interpretation. (*Lusardi, supra,* 1 Cal.4th at pp. 987–988; see also, *Hensel Phelps, supra*, slip op. at p. 25, fn. 16.)

Appealing parties rely on *Sayble v. Feinman* (1978) 76 Cal.App.3d 509, 515, to support their argument that the Acting Director must follow their contractual intent. ["This court has neither the power to make for the parties a contractual arrangement which they themselves did not make nor to insert in the agreement language that appellants now wish were there."] The Determination, however, did not insert or change the agreement; it interpreted it. The parties contracted to have a market rate interest loan unless the Director said the Project is a public work. Thus, the intent expressed was two-fold: the parties were hoping to avoid prevailing wage obligations and, if they could not, provide the developer with $16 million in public funds. The Determination does not alter this intent. The Determination simply finds that a consequence of the appealing parties' contract is the result the parties recognized could occur. That is, the Director has determined that the appealing parties' arrangement meets the statutory definition of public works under section 1720, subdivision (a)(1). Specifically, there is a payment of public funds in the form of a "contingent loan" under subdivision (b)(5).

V. CONCLUSION

For the reasons stated above, the administrative appeal is denied, and the Determination is affirmed in full.

Dated: 8/26/11



Christine L. Baker, Acting Director