STATE OF CALIFORNIA Arnold Schwarzenegger, *Governor*

DEPARTMENT OF INDUSTRIAL RELATIONS
OFFICE OF THE DIRECTOR
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To All Interested Parties:

Re: **PW Case 2005-016**, **Oxnard Marketplace Shopping Center - Fry's Electronics - City of Oxnard**

The Decision on Administrative Appeal re Public Works Case No. 2005-016 was rescinded and vacated on or about March 4, 2009 pursuant to the order of the State Superior Court in Ventura, California in the action entitled Fry's Electronics, Inc. v. Department of Industrial Relations, et al., bearing Case No. 56-2007-00309431-CU-PT-VTA.

STATE OF CALIFORNIA

DEPARTMENT OF INDUSTRIAL RELATIONS

DECISION ON ADMINISTRATIVE APPEAL

RE: PUBLIC WORKS CASE NO. 2005-016

OXNARD MARKETPLACE SHOPPING CENTER – FRY'S ELECTRONICS

CITY OF OXNARD

I. INTRODUCTION

On January 30, 2007, Quality Real Estate Management, LLC ("QREM") filed an administrative appeal ("Appeal") from a public works coverage determination issued by the former Acting Director on December 1, 2006 ("Determination"). The Determination found that the rehabilitation of a vacant HomeBase store in the Oxnard Marketplace Shopping Center with the construction of a Fry's Electronics store ("Project") is a public work subject to prevailing wage requirements.

QREM was invited to provide any additional documents that it wished to be considered in connection with the Appeal. Interested parties were invited to file briefs in support of or in opposition to the Appeal. No documents were provided and no briefs were filed.

For the reasons set forth in the Determination, which is incorporated herein, and for the additional reasons stated below, the Appeal is denied and the Determination is affirmed.

II. CONTENTIONS ON APPEAL

QREM alleges that the Acting Director "erroneously" discusses draft documents and treats *proposals* as final agreements in the Determination and that therefore the Determination contains "factual error." In addition, QREM contends that the

requirements for finding the Project to be a public work under Labor Code section[1] 1720(a)(1) are not met for the following two interrelated reasons: (1) the "under contract" element of section 1720(a)(1) is not met because the party to the construction contract, Fry's, is not the recipient of the public funds; and (2) the "paid for in whole or in part out of public funds" element of section 1720(a)(1) is not met because the public funds will not directly pay for actual construction or offset the cost of construction. The Loan from the City of Oxnard ("City") will be made not to Fry's but to QREM, the owner/developer of the Project.[2]

III. DISCUSSION

Regarding QREM's assertion that the Determination contains factual error, the Acting Director did not treat proposals exchanged by the parties as final, signed agreements. To the contrary, as the Determination states on page 1, the economic assistance package was *negotiated* over a period from prior to November 1, 2003 to September 2004 when the Loan Documents were finalized. The discussion of the *draft* documents generated by the parties and the manner in which the structure of the economic assistance package changed over time merely provides background information about the Project and sheds additional light on the intent, understanding and expectations of the parties to the Loan Documents, including the "operative agreement," the Loan Agreement dated September 21, 2004. (See, Determination, p. 7, fn. 29.) As such, the Determination contains no factual error.

As the final documents show, City's commitment of economic assistance is premised on QREM and Fry's committing to rehabilitate the site of the vacant Homebase store by increasing the square footage of the space from 103,904 square feet to 135,000 square feet. A condition of the Loan closing is that this construction be completed. Thus,

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1 All statutory references herein are to the Labor Code, unless otherwise specified.

2 QREM argues that *City of Long Beach v. Department of Industrial Relations* (2004) 34 Cal.4th 942 and *Greystone Homes, Inc. v. Chuck Cake* (2005) 135 Cal.App.4th 1 "rejected" the "fungible money theory" QREM argues is being advanced by the former Acting Director. As discussed in the Determination, under current law the public subsidy need not pay for actual construction or offset the cost of construction in order to find coverage and, therefore, the cases cited by QREM are inapposite. That discussion will not be repeated here. QREM also argues that the Determination "ignores" section 1720.2, which applies only where there is construction performed in connection with the lease of building space by a public entity. That issue is not present here.

the Loan Documents establish the essential elements of a public work under section 1720(a)(1), namely, a public subsidy contributed to a development project in which there is a construction obligation.[3]

Regarding QREM's argument that the "under contract" element is not met, there is no requirement in section 1720(a)(1) that public funds go directly to the entity that entered into the construction contract. Section 1720(a)(1) requires only that the work be done under contract as one element and that it be paid for in whole or in part out of public funds as another. In *Bishop v. City of San Jose* (1969) 1 Cal.3d 56, 63-64, the Court explained that the "under contract" language in section 1771 (the section imposing prevailing wage obligations on public works projects over $1,000) refers to work done under contract as opposed to work carried out by a public agency with its own forces. The work involved in this Project was performed under contract and falls within the proper ambit of the prevailing wage laws. Under the contractual agreements between City and QREM (Loan Agreement, Covenant Agreement) and between City and Fry's (Covenant Agreement), both QREM and Fry's agree to use the site for the "operation" of a 135,000 square foot Fry's retail store. Implementing these agreements, Fry's entered into construction contracts that would increase the square footage of the site of the vacant store by 30 percent. (See, e.g., Agreement Containing Covenants, Sections 1 and 1(a).) As such, the "under contract" element of section 1720(a)(1) is met.

Similarly, there is no requirement that the public subsidies listed in section 1720(b) pay for actual construction or offset the cost of construction under the "paid for in whole or in part out of public funds" element in section 1720(a)(1). As discussed in the Determination, under Senate Bill 975, the public subsidy need not pay for actual construction for the project to be a public work.[4] The public subsidy in this case is a loan within the meaning of section 1720(b)(4) and section 1720(b)(5). Neither section 1720(b)(4) nor section 1720(b)(5) specifies to whom the loan must be made. By contrast,

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[3] "Development project" is used in the Determination to refer to a project undertaken by a developer involving construction or other types of covered work enumerated under section 1720(a)(1), not to give "project" some "new, undefined meaning" as QREM argues in the Appeal.

[4] For example, a land transfer by a public entity at less than fair market price under section 1720(b)(3) is a "payment of public funds" for construction. Yet such transfer, which may reduce or offset overall Project costs, neither pays for construction nor offsets the cost of construction.

section 1720(b)(1) specifies that the "payment of money or the equivalent of money" goes "directly to or on behalf of the public works contractor, subcontractor, or developer." Assuming, *arguendo*, that the more restrictive condition in section 1720(b)(1) as to whom the public subsidy goes to were to apply here, that condition would be satisfied because the Loan is to QREM, whose role in the Project is that of owner/developer. Accordingly, the work involved in this Project is "paid for in whole or in part out of public funds" within the meaning of section 1720(a)(1) because the Loan to QREM qualifies under section 1720(b)(4) as a loan that is forgiven and under section 1720(b)(5) as a loan that is to be repaid on a contingent basis.

IV. CONCLUSION

In summary, for the reasons set forth in the Determination, as supplemented by this Decision on Administrative Appeal, the Appeal is denied and the determination that the Project is a public work is affirmed. This Decision constitutes final administrative action in this matter.

Dated: 10/18/07

John C. Duncan, Director