STATE OF CALIFORNIA

DEPARTMENT OF INDUSTRIAL RELATIONS

DECISION ON ADMINISTRATIVE APPEAL

RE: PUBLIC WORKS CASE NO. 2001-008

ESPLANADE SHOPPING CENTER REDEVELOPMENT PROJECT

CITY OF OXNARD

I. INTRODUCTION AND PROCEDURAL HISTORY

On March 6, 2002, the Director of the Department of Industrial Relations ("Director") issued a public works coverage determination ("Determination") finding that the construction of the Esplanade Shopping Center Redevelopment Project ("Project") is a public work subject to the payment of prevailing wages. Developer M&H Realty Partners IV, L.P. ("M&H Realty" or "Developer") timely filed a Notice of Appeal, as did its prime contractor, Lusardi Construction Company ("Lusardi"). Both appellants submitted several exhibits with their appeals. M&H Realty subsequently served notice that it joined in the appeal of Lusardi.

Both appellants requested a hearing. On June 26, 2002, counsel for the Director notified the parties that, in his discretion pursuant to Title 8, California Code of Regulations ("CCR"), the Director would not conduct a hearing on the appeals. In lieu of a hearing, the parties were invited to submit in writing any further evidence or

argument no later than July 26, 2002. No further evidence was submitted. Neither the Center for Contract Compliance (the party requesting the coverage determination) nor the Oxnard Community Development Commission ("Commission"), an interested party, made any submissions regarding the appeals.

II. CONTENTIONS AND CONCLUSIONS ON APPEAL

Contentions on Appeal

The Developer's principal arguments are as follows:

1. The tax rebates provided by the Agency do not bring the project within the expanded definition of public works included in the new version of Labor Code section 1720(b), effective January 1, 2002:

(a) They are not payments for the types of work enumerated in section 1720(a).

(b) They are *de mimimis* in the context of the project.

(c) The new statutory definition of "paid for ... out of public funds" cannot be retroactively applied.

2. The tax rebates do not constitute payment for construction or demolition out of public funds within the meaning of the pre-2002 version of Labor Code section 1720, as interpreted in *McIntosh v. Aubry* (1992) 14 Cal.App.4th 1576.

3. Prevailing wages should apply, if at all, only to demolition, clearance and site preparation on the project.

Lusardi makes the following arguments:

1. The Determination was based on incorrect factual information concerning the OPA.

2. Even if the tax rebates are deemed to be an expenditure of public funds for demolition and site clearance, the construction work performed by Lusardi is separate and distinct from such work and is not subject to the prevailing wage laws.

3. The equitable principles of laches and estoppel must be applied as to both the Determination and subsequent enforcement activity.

4. The Determination, as a quasi-legislative act, impairs the obligations of the contract between Lusardi and the Developer in violation of Article I, section 9 of the California Constitution.

5. Labor Code sections 1720-1815 do not apply to the private construction work on the Project because no "awarding body" has let a contract for such work.

Conclusions on Appeal

As to Developer's contentions:

1. The version of Labor Code section 1720(a) in effect in November 2000, applies to this Project.

2. The tax rebates constitute payments for demolition and construction within the meaning of the pre-2002 version of Labor Code section 1720.

3. There is no basis for limiting prevailing wages to certain preliminary activities in the redevelopment process.

As to Lusardi's contentions:

1. Neither Lusardi nor the Developer has offered any evidence of material factual inaccuracies in the Determination.

2. The construction work performed by Lusardi on the Project is not exempt from prevailing wage requirements on the basis that it is separate and distinct from demolition and site clearance work.

3. The equitable principles of laches and estoppel do not require reversal of the Determination.

4. There is no unconstitutional impairment of Lusardi's contract, and the Department is not responsible for erroneous representations allegedly made to Lusardi by other parties.

5. Section 1720 does not require that a construction contract be let by an awarding body for a project to constitute a public work.

III. RELEVANT FACTS

In November 2000, the Commission entered into an Owner Participation Agreement ("OPA") with M&H Realty for the

Project on property described as the Sears Parcel, Mall Parcels and Robinson's May Parcel.[1] Under the OPA, M&H Realty is to construct and maintain a retail shopping center consisting of a new 136,000 square-foot Home Depot with a 28,000 square-foot garden center and a minimum of 200,000 square feet of commercial retail and restaurant space on the Sears and Mall Parcels, and 100,000 square feet of commercial retail space on the Robinson's May Parcel.

The OPA recites that, due to the substantial costs for demolition, clearance, site preparation, land acquisition and relocation costs, the Project is not feasible in the absence of financial assistance from the Commission. Therefore, under the OPA, to induce M&H Realty's development of the Project, the Commission agreed to rebate to M&H Realty 75 percent of the new redevelopment property tax increment generated from the Project on an annual basis for a period of 20 years or until the rebate totaled a net present value of $1.7 million, whichever occurs first. Payment is to begin when construction is complete and the facilities are operational.

The Commission estimates that the Project will generate $1.5 million in annual sales tax beginning in 2002. It estimates that the newly constructed shopping center will

[1] M&H Realty holds title in the Sears and Mall Parcels and a sublease interest in the Robinson's May Parcel.

add approximately $34.8 million in increased property valuation, generating a new redevelopment tax increment of approximately $200,000 beginning in 2002.

IV. ANALYSIS

1. The Version Of Labor Code Section 1720(a)[2] In Effect In November 2000 Applies To This Project.

The OPA for the Project was signed in November 2000. For this reason, the version of Labor Code section 1720(a) in effect in November 2000 applies to this Project. Accordingly, there is no need to determine whether the tax rebates fall within the expanded public funds definition that became effective on January 1, 2002 as the current section 1720(b).

2. The Tax Rebates Constitute Payment For Demolition And Construction Within The Meaning Of Labor Code Section 1720(a).

In November 2000, section 1720(a) defined "public works" as: "Construction, alteration, demolition or repair work done under contract and paid for in whole or in part out of public funds . . .." M&H Realty asserts that the tax rebates will not be paid until all construction is finished, and that "[n]o public money will be paid to any provider of '[c]onstruction, alteration, demolition or repair work' on the Project." (M&H Realty appeal, p.9.) M&H Realty further

[2] Unless otherwise indicated, all section references are to the Labor Code.

argues that the rebates are not payment for construction, alteration, demolition or repair work under the interpretation of section 1720(a), articulated in *McIntosh v. Aubry* (1993) 14 Cal.App.4th 1576.

What is significant, however, is the purpose of payments of public funds, not their timing. (*See Tustin Fire Station*, PW 93-054 (April 14, 1994).) Similarly, section 1720(a) does not require that the public funds actually go to a contractor. Money is fungible, and the mere fact that M&H Realty paid Lusardi out of its own funds does not mean that the subsequent tax rebates, which will partially reimburse M&H Realty's costs, are not payments for construction.

The purpose of the tax rebates is explicitly stated in Recitals G and H of the OPA:

> G. Developer and the Commission acknowledge and agree that due to substantial project costs in the areas of demolition, clearance, site preparation, land acquisition and relocation costs, the redevelopment of the Developer Parcel, the Home Depot Parcel and the Robinson's May Parcel as contemplated under this Agreement would not be feasible in the absence of financial assistance from the Commission.
>
> H. Therefore, in order *to induce Developer to redevelop the Developer Parcel and the Robinson's May Parcel* and open a new retail shopping center for business . . . the Commission and the Developer desire to enter into this Agreement in order to provide certain financial assistance to the Developer subject to the terms and

> conditions of this Agreement. (Emphasis supplied.)

Article 3 of the OPA sets forth in detail the redevelopment obligations of M&H Realty. Section 3.1(a) provides that: "Developer shall cause the design and construction of both the Developer Parcel Work of Improvement and the Robinson's May Parcel Work of Improvement in accordance with this Article . . .." Article 10 sets forth the obligation of the Commission to provide financial assistance. Section 10.1(a) states in part:

> *In consideration of Developer's obligations undertaken pursuant to this Agreement* in connection with the Developer Parcel, until the Commission Assistance Termination Date, so long as [Developer or Home Depot complies with certain conditions set forth in Article 10], *the Commission shall make the Developer Parcel and Home Depot Parcel Annual Disbursement Payment to Developer* by the Developer Parcel and Home Depot Parcel Annual Disbursement Date in accordance with the provisions of this Section 10.1. (Emphasis supplied.)

Section 10.2 sets forth certain conditions precedent to the Commission's payment of the tax rebates. In particular, Section 10.2(j) provides that:

> 1. Developer shall have commenced construction of the Developer Parcel Work or [sic] Improvement substantially consistent with the approved Basic Concept Drawings within the time set forth in the Schedule of Performance.
>
> 2. Developer shall have completed construction of the Developer Parcel Work of Improvement substantially consistent with the approved Basic Concept Drawings within the time set forth in the Schedule of Performance.

Thus, the parties expressly agreed that the tax rebates were an "inducement" and "consideration" for the Developer to, *inter alia*, undertake and complete the construction. The rebates, therefore, were payment for construction within the meaning of section 1720(a). This conclusion is further reinforced by section 3.22 of the OPA, which provides in part: "Developer, without cost or expense to the Commission, shall provide, periodically update . . . and maintain construction site signs identifying the development, giving recognition to the Commission, the City Council and their members." The Commission's primary obligation under the OPA is to provide the tax rebates. Hence, what they are being given recognition for at the construction site is helping to pay for the construction.

In attempting to harmonize the facts of this case with those in *McIntosh, supra*, M&H Realty asserts that: "[T]he rebate payments are really a return for operation of the Center, not its construction. As a result, no public money will be spent for construction, alteration, demolition, installation or repair work." (M&H Realty appeal at 12.) While it is true that M&H Realty is obligated to operate the Center as a condition of receiving the rebates, there is no basis for saying that this is all the rebates are paying for. The OPA requires M&H Realty to *both* construct and operate the Center.

Contrary to M&H Realty's assertions, *McIntosh* does not support its position. *McIntosh* distinguishes forbearance from payment, holding that a mere forbearance of rent or construction-related fees is not a payment for construction. This case does not involve such forbearances; it involves actual monetary payments. *McIntosh* also holds that: "[P]aying public funds for public services does not make incidental construction work done by a private provider of those services 'public works' under section 1720, subdivision (a). The statute requires payment for 'construction;' to take that as meaning "services" would violate plain, unambiguous language, which we cannot do." (*Id.*, 14 Cal.App.4th at 1586.)

Here the Commission is not purchasing any services from M&H Realty. Instead it agreed to make payments in consideration for M&H Realty's agreement to construct and operate a shopping center. Under these facts, it would violate the plain, unambiguous language of section 1720(a) to conclude that this is not construction paid for in part out of public funds.

M&H Realty also claims support for its position in *International Brotherhood of Electrical Workers v. Board of Harbor Commissioners* (1977) 68 Cal.App.3d 556 ("*IBEW*"). It correctly states that the court in *IBEW* held that a private entity's development of an oilfield belonging to the city

did not constitute a public work under section 1720. What M&H Realty does not state is that the reason the oilfield development was not a public work is that instead of public funds flowing to the developer, the developer was required to pay royalties to the city. The significance of the IBEW case is its recognition that the test under section 1720(a) is not who owns the property being developed, but whether public funds are being paid for the development. Since public funds are being paid in this case, *IBEW* provides no support for M&H Realty's position.

3. The OPA Expressly States That The Commission's Financial Assistance Is Provided "In Order To Induce The Developer To Redevelop" The Parcels At Issue; There Is Therefore No Basis For Limiting Prevailing Wages To Certain Preliminary Activities In The Redevelopment Process.

Finally, M&H Realty argues that, if prevailing wage requirements apply at all, they should only apply to demolition, clearance and site preparation on the Project because paragraph G of the OPA recitals lists these costs as being so substantial that the Project would not be feasible without the Commission's financial assistance. In so arguing, M&H Realty ignores the fact, discussed above and in the Determination, that the very next paragraph of the OPA states that the financial assistance was agreed to "in order to induce Developer to redevelop the Developer Parcel and the Robinson's May Parcel . . . ." The word "redevelopment" clearly includes construction, as well as demolition,

clearance and site preparation. Moreover, the other provisions of the OPA discussed above make it clear that the financial assistance is consideration for the construction.

4. Neither Lusardi Nor The Developer Has Offered Any Evidence Of Material Factual Inaccuracies In The Determination.

Lusardi argues that in the Determination the Director made erroneous findings of fact concerning the OPA. First, Lusardi asserts that while the OPA was entered into between the Commission and M&H Realty Partners IV L.P., a different entity, M&H Realty Partners, LLC, entered into the construction contract with Lusardi. Lusardi further asserts that it is "unaware of any information in the Director's files . . . which suggests that the owner which contracted with Lusardi . . . is to be the recipient of any 'public funds.' From all that appears, Lusardi's Construction Contract is not now, and will not be, funded from any public funds." (Lusardi Appeal, p. 3.)

Lusardi has revealed some additional facts, but has not shown any inconsistency between those facts and the facts recited in the Determination. M&H Realty and M&H Realty Partners, LLC appear to be related entities.[3] It is very

[3] Section 2.2 of the OPA identifies the Developer as follows:

> Developer is M&H Realty Partners IV L.P., a California limited partnership. The general partner of Developer is MHRP IV L.P., a California limited partnership. The general partner of MHRP IV L.P. is Merlone/Hagenbuch IV L.P. Inc., a California corporation. The principals who control and manage Merlone/Hagenbuch IV, Inc. are Peter J. Merlone and John J. Hagenbuch.

common for two or more related entities to be involved in various aspects of a redevelopment deal such as this. Moreover, Lusardi seems to assume erroneously that in order for construction to be paid for out of public funds, the construction contractor itself must actually and directly receive public funds. There is no authority for this assumption, which is contrary to the plain language of section 1720(a). The OPA is a contract between the Commission and M&H Realty, which requires the Commission to provide financial assistance to induce M&H Realty to construct the project. Lusardi is performing the construction under contract. The only required statutory elements are [a] construction [b] done under contract and [c] paid for in whole or in part out of public funds. All three elements are present, and the fact that Lusardi's contract is with a different entity than the Developer who signed the OPA is immaterial.

Lusardi proceeds to make several assertions of which it was "advised by M&H Realty [Partners IV]." First, it asserts that:

> The tax increment rebates, if any, are not going to M&H Realty, but rather to Home Depot, pursuant to an agreement with Home Depot, under which M&H Realty is simply acting as a conduit for the money transfer, which, thus, benefits only Home Depot, and that such funds will be in the future utilized by Home Depot

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Accordingly, the OPA was signed on behalf of the Developer by the managing director of Merlone/Hegenbuch IV, Inc.

> to offset Home Depot's then existing operational costs or property tax assessment burdens[.] (Lusardi Appeal, p.3.)

No party has submitted any evidence supporting Lusardi's assertion, which is contrary to the language of the OPA itself. Article 10 of the OPA expressly provides that the Commission will provide financial assistance to both the Developer and Home Depot, and specifies how the assistance is to be allocated between the two.[4] The OPA constitutes the entire agreement between the Commission and the Developer, and it can only be amended as provided therein. (*Id.*, section 9.13.)

Lusardi next asserts that:

> No payments or the tax increment rebates have been made, because they are not due, [and] M&H may forego receipt of such monies in order to ensure that the entire Center project is not considered to be a "public works" within the meaning of Labor Code section 1720(a). (Lusardi Appeal, p.3.)

While Lusardi seems to be saying that the above statement demonstrates some factual error in the Determination, such is not the case. The Determination specifically stated with respect to the tax rebates: "Payment is to begin when construction is complete and the facilities are operational." (Determination, p.2.) There

[4] Section 10.1(b)(2) sets forth one scenario in which the Commission would pay directly to the Developer funds due Home Depot. With respect to these funds, it may be true that the Developer has agreed to act as a conduit for funds going to Home Depot, but this does not mean that funds due the Developer *itself will ultimately go to Home Depot*.

is no requirement in section 1720(a) that the payment of public funds be contemporaneous with construction; what is required is that the construction gives rise to an obligation to pay. (*See Tustin Fire Station*, PW 93-054 (April 14, 1994).) With regard to Lusardi's speculation that the Developer may forego receipt of public funds, coverage must be determined according to the facts existing at the time the work is performed. *(Downtown Redevelopment Plan Projects, City of Vacaville*, PW 2000-015 (March 22, 2001).)

Lusardi next asserts that the tax increment rebates are not to be used for demolition or construction work, but rather to defray Home Depot's and M&H Realty's future assessment district tax burdens. (Lusardi Appeal, p.3.) Therefore, argues Lusardi, the Director incorrectly concluded that the construction and demolition work is being paid for out of public funds with respect to the Developer Parcel and the Robinson's May Parcel, and incorrectly assumed that the construction work on the Home Depot Parcel is governed by the OPA. (*Id.*, p.4.)

Lusardi is correct insofar as Article 10 of the OPA provides that the rebates will first be used to pay current assessments against the Developer and Home Depot that are due and payable to a Highway 101 Interchange assessment district, if any. However, the same article provides that

if any Annual Disbursement Payment is remaining after making such payments to the assessment district, it will be paid directly to the Developer. Not only does the OPA state that the tax rebates are an inducement to construction, but completion of construction on the Developer Parcel and the Robinson's May Parcel is a condition precedent to the payment of the tax rebates for those respective parcels. (OPA, sections 10.2, 10.6.) Therefore it is reasonable to conclude that the construction is being paid for in part out of public funds within the meaning of section 1720(a).

The OPA treats the Home Depot Parcel differently because of its different ownership status. It recites that the Developer holds fee title to the Mall Parcels, but intends to convey a portion of them to Home Depot (OPA, paragraphs A and C), and that Home Depot intends to construct, maintain and operate a Home Depot retail store on the parcel conveyed by the Developer ("Home Depot Parcel"). (*Id.*, paragraph E.) Since the Developer still owned the Home Depot Parcel when the OPA was entered into, the Developer was a signatory, but Home Depot was not.

Nonetheless, it is clear that numerous provisions in the OPA govern the Home Depot Parcel, and that the Developer's conveyance of that parcel to Home Depot carries with it obligations to develop the parcel in compliance with the OPA. Thus, the Developer agreed that any improvements

on the Robinson's May Parcel would be "a consistent extension of the Improvements constructed on the Developer Parcel and Home Depot Parcel pursuant to this Agreement, including, without limitation, consisting of similar architecture and building elevations." (*Id.*, section 3.4(c).) Developer covenants that its successors and assignees shall "develop and construct the Home Depot Retail Store in substantial accordance with all entitlements, all Government Approvals, and any applicable requirements of any Governmental Authority." (*Id.*, section 6.1(a).) The OPA further requires the Developer and its successors and assigns to enter into an Agreement Affecting Real Property governing the operation, management and maintenance of all three parcels, and this is a material inducement to the Commission to entering into the OPA. (*Id.*, section 6.1(I).)

Lusardi asserts that the factual issues it raises require a hearing to resolve. However, none of these issues is material to the outcome of the case. 8 CCR section 16002.5(b) provides that: "The decision to hold a hearing is within the Director's sole discretion. Because there is no genuine issue of material fact, and the issues raised in the instant appeals are predominantly legal ones, there are no factual issues to be decided for which a hearing is necessary.

5. The Construction Work Performed by Lusardi At The Project Is Not Exempt From Prevailing Wage Requirements On The Basis That It Is Separate And Distinct From Demolition And Site Clearance Work.

Lusardi argues that work at the project is not a single interdependent and integrated public work requiring the payment of prevailing wages to all workers, citing *Vineyard Creek Hotel and Conference Center, City of Santa Rosa*, PW 93-054 (October 16, 2000). Lusardi contends that if any of the work is subject to prevailing wage requirements, it is only the "Initial Work" of demolition, clearance and site preparation, and not the subsequent construction work done by Lusardi. (Lusardi Appeal, p.5.)

Lusardi misapprehends the Determination in this case. The Determination did not say that only the "Initial Work" is being paid for out of public funds; it simply cited the recital in the OPA that the cost of such work was so substantial that redevelopment "would not be feasible in the absence of financial assistance from the Commission." (OPA, paragraph G.) The Determination also relied upon the immediately following paragraph, which stated that the parties were entering into the Agreement to provide financial assistance "in order *to induce Developer to redevelop* the Developer Parcel and the Robinson's May parcel and open a new retail shopping center for business . . . ." (*Id.*, paragraph H.) Thus, the tax rebates will subsidize

not only the "Initial Work," but also construction on the parcels, including that done by Lusardi.

Moreover, nothing in the *Vineyard Creek* decision suggests a basis for concluding that "Initial Work" on this Project is subject to prevailing wages, but subsequent construction on the same site is not. Section 3.1 of the OPA provides that: "Developer shall cause the design and construction of both the Developer Parcel Work of Improvement and the Robinson's May Parcel Work of Improvement . . . ." Section 3.2 of the OPA provides that:

> The Developer Parcel and Robinson's May Parcel shall be developed in accordance with and within the limitations established in the Basic Concept Drawings approved pursuant to this Agreement and the Scope of Development. For purposes of this Agreement, the terms "develop," "construct" or "improve" shall mean and refer to the redevelopment, construction and improvement of the Developer Parcel and Robinson's May Parcel described in and consistent with the approved Basic Concept Drawings and the Scope of Development.

Articles III and VI of the Scope of Development, Exhibit 4 to the OPA, in turn specify that the Developer's responsibilities include demolition and site preparation. In sum, the OPA comprehensively assigns responsibility to the Developer for all aspects of the Project, from design and site preparation through the completion of construction. There is nothing in the *Vineyard Creek* determination suggesting that under these facts, what Lusardi calls the

"Initial Work," should be treated as a separate project from the subsequent construction.[5]

The question in *Vineyard Creek* was whether the construction of two adjacent facilities should be deemed a single project or two separate ones. The Esplanade Center redevelopment is clearly a single project under *Vineyard Creek*. The OPA provides that improvements on all three parcels are to be in harmony with each other, with similar architecture and building elevations. (OPA, section 3.4(c).) Additionally, section 10.3(b) provides that as a condition of receiving the tax rebates:

> Developer shall . . . operate, or cause to be operated, the Developer Parcel, Home Depot Parcel and Developer's sublease hold estate in the Robinson's May Parcel as *an integrated shopping center development*, and with shared parking, shared access, shared ingress and shared maintenance ... . (Emphasis supplied.)

For the foregoing reasons, there is no basis for concluding that Lusardi's work is separate and distinct, and therefore not subject to prevailing wage requirements.

6. The Equitable Principles Of Laches And Estoppel Do Not Require Reversal Of The Determination.

Lusardi asserts that the equitable principles of laches and estoppel must be applied both as to the Determination

[5] Additionally, the version of section 1720(a) applicable to this Project provides that: "For purposes of this subdivision, 'construction' includes work performed during the design and construction phases of construction including, but not limited to, inspection and land surveying work." *See also, Priest v. Housing Authority of the City of Oxnard* (1969) 275 Cal.App.2d 751, 756, 80 Cal.Rptr. 145.

and to subsequent enforcement activity. Lusardi cites as its sole authority *SPCA-LA Companion Animal Village and Education Center*, PW 2000-006 (August 24, 2001). As Lusardi notes, that determination recognizes that the two main elements of the affirmative defense of laches are unreasonable delay and prejudice. The *SPCA* determination goes on to say that prejudice is never presumed, and the party asserting laches bears both the burden of producing evidence and the burden of proving that the delay was unreasonable and that it resulted in prejudice, citing *Conti v. Board of Civil Service Commissioners of the City of Los Angeles* (1969) 1 Cal.3d 351, 82 Cal.Rptr. 337.

The *SPCA* determination concluded that the appellant had not met its burden because it presented "no evidence, other than the mere passage of time, to prove that the delay was unreasonable or that the delay resulted in prejudice." The same can be said of Lusardi's argument. Lusardi has not shown that the Determination was unreasonably delayed, especially in view of the large volume of requests for coverage determinations received, and the limited number of Department personnel available to process them. Lusardi asserts, but does not prove, that: "Lusardi, and its subcontractors, and all other contractors which have performed work – some of whom are done and gone – have suffered prejudice by the 'delay' and lack of notice of the

Coverage investigation and proceedings." (Lusardi Appeal, pp. 8-9.) This claim is untenable in view of the fact that the Determination is consistent with the way the Department has interpreted section 1720(a) for more than eight years.[6]

Moreover, Lusardi's argument that the laches doctrine precludes enforcement of prevailing wage requirements is misplaced. The *SPCA* determination stressed that:

> Questions of coverage and compliance are distinct. Title 8, California Code of Regulations, section 16001 vests the Director with the quasi-legislative authority to determine questions of coverage under the public works laws. The Director's coverage determinations are legally constructed policy decisions. While City raises the issue of compliance, the matter currently being decided is coverage.

The *SPCA* determination went on to note that the statute of limitations for bringing an enforcement action allows such an action to be filed months after a project is completed, final payment on the contract has been released and the work has been accepted: "Given DLSE's indisputable authority to take enforcement action upon completion of a public works project, the Director has no less authority to issue coverage determinations within that timeframe as well." (*Id.*, citing section 1775.)

Although the heading to Lusardi's argument mentions the doctrine of estoppel, the text that follows discusses only laches. However, Lusardi has previously attempted to invoke

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[6] See *Tustin Fire Station, supra.*

the doctrine of estoppel against a coverage determination by the Department, only to have its argument rejected by the California Supreme Court:

> Generally, four elements must be present for the doctrine of equitable estoppel to apply. First, the party to be estopped must have been aware of the facts. Second, that party must either intend that its act or omission be acted upon, or must so act that the party asserting estoppel has a right to believe it was intended. Third, the party asserting estoppel must be unaware of the true facts. Fourth, the party asserting estoppel must rely on the other party's conduct, to its detriment... . Even where these elements are present, estoppel will not be applied against the government if to do so would nullify a strong rule of policy adopted for the benefit of the public. . . .
>
> Lusardi's attempt to invoke the doctrine against the Director must fail because the elements of equitable estoppel are entirely lacking against the Director. Lusardi does not and cannot claim that it justifiably relied on acts or omissions of the Director. (*Lusardi Construction Company v. Aubry* (1992) 1 Cal.4th 976, 994-995, 4 Cal.Rptr.2d 837, 848.)

The Court's analysis is equally applicable here, and Lusardi's argument must fail.

7. <u>There Is No Unconstitutional Impairment Of Lusardi's Contract, And The Department Is Not Responsible For Erroneous Representations Allegedly Made To Lusardi By Other Parties</u>.

Lusardi argues that, in violation of Article 1, section 9 of the California Constitution, the Determination unconstitutionally impairs the obligations of the contract between Lusardi and M&H Realty, which was entered into

before the Determination was requested. It further asserts that:

> Lusardi was told affirmatively that its work was not prevailing wage work, that the project was not 'public works' before it entered into the Contract, and that M&H Realty had been advised by the Commission and its attorneys that the Center project was not public works. (Lusardi Appeal, p.9.)

Lusardi's argument is strikingly reminiscent of one it unsuccessfully made to the California Supreme Court more than a decade ago. In *Lusardi v. Aubry, supra,* 1 Cal.4th at 983, 4 Cal.Rptr.2d at 840, the court discussed the representations that the public entity had made:

> The District represented to Lusardi that: (1) the Expansion Project was a private work and not a public work under the prevailing wage law, and therefore the payment of prevailing wages and keeping of payroll records was not required; (2) the District had received legal opinions determining that the Expansion Project was not a public work; and (3) Lusardi should compute its construction costs on the basis that the project was not a public work. Lusardi relied on the District's representations in calculating its construction costs.

Lusardi argued that in view of the District's representations and its reliance on them, the doctrine of equitable estoppel barred the Director from determining that the Expansion project was a public work. (*Id.* at 1 Cal.4th 994, 4 Cal.Rptr. at 848.) The Court rejected this argument:

> The acts of one public agency will bind another public agency only when there is privity, or an identity of interests between the agencies. . . .

> In this case, there is no privity or identity of interest between the District and the Director. Instead, there is a direct and palpable conflict. As its actions clearly evidence, the Direct had an interest in obtaining the lowest possible cost for construction of the hospital expansion project. The interest of the Director is in enforcing the prevailing wage laws. Contractors that do not pay the prevailing wage to their workers enjoy a competitive advantage over contractors that do, and may be preferred by local government agencies, because the construction dollar will purchase more when a contractor paying less than the prevailing wage is selected. The facts of this case illustrate this conflict of interest: the District seeks to avoid the prevailing wage law, while the Director seeks to enforce it. (*Ibid.*)

Lusardi v. Aubry held that: "[T]he Director has the power to determine that a construction project is a 'public work.'" (*Id.* at 1 Cal.4th 989, 4 Cal.Rptr.2d 845.) One of the lessons Lusardi should have learned from that case is that it is entitled to rely on only a determination by the Director, and not the opinions of another party with a vested interest, as to whether a project is or is not a public work.

Lusardi argues, however, that the "unpredictable" Determination at issue here "amounts to the passage of a state law or regulation impairing the obligations of the private construction contract with M&H Realty, in violation of Article I, Section 9 of the California Constitution." (Lusardi Appeal, p.9.) Lusardi further asserts that there

has never before been a precedential determination concluding that an otherwise private project was a public work because of a "property tax increase increment rebate" to be paid years after in future years. (*Ibid.*)

Lusardi is mistaken. The Determination relied on the plain language of section 1720(a), and therefore was neither unpredictable nor tantamount to passage of a new law or regulation. Moreover, while there are no precedential determinations involving this precise type of tax rebate, it has long been the Department's view that when there is an agreement providing for a developer to construct a facility, and for a public agency to subsequently reimburse the developer, the construction is a public work. (*Tustin Fire Station, supra; Morro Bay Desalination Plant (Operative Plasterers and Cement Masons' International Association and Aqua Design, Inc.; City of Morro Bay)*, PW 91-041A (November 29, 1991).) Indeed, in this case, the Director did not designate the Determination as precedential precisely because it was simply a reiteration of longstanding Department policy. Since the Determination does not represent a change in existing law, it cannot be an unconstitutional impairment of contract.

8. Section 1720 Does Not Require That A Construction Contract Be Let By An Awarding Body For A Project To Constitute A Public Work.

Finally, Lusardi argues that previous coverage determinations finding coverage under section 1720(a) when there is no contract let by a public agency have been incorrect and should be re-examined. (Lusardi Appeal, p. 10.) Lusardi bases this argument on isolated sentences found in several court decisions and in the legislative history of section 1720.2. For example, Lusardi quotes the following statement in *Bishop v. City of San Jose* (1969) 1 Cal.3d 56, 64: "[N]othing found in section 1773 lends a scintilla of support to plaintiff's contention that the prevailing wage law was intended by the Legislature to apply to other than public work let out to contract."

The court's statement simply underscores the fact that work must be done *under contract* to satisfy section 1720(a)'s definition of public work; it says nothing to the effect that a public entity must be a party to the contract for construction for a project to constitute a public work. While section 1773 imposes certain obligations on bodies awarding contracts for public works, neither section 1773 nor the *Bishop* decision supports Lusardi's theory that section 1720(a)'s definition of "public works" includes an implied requirement that a construction contract be let by a public entity. Similarly, snippets of the legislative

history of section 1720.2 provide no evidence of what the Legislature intended when it enacted section 1720 some 40 years earlier.

There is no need to resort to extrinsic sources for evidence of that intent, because the language of section 1720(a) is plain and unambiguous. "[W]e need not go beyond the words of the statute to extrinsic aids such as legislative history ... . To do so would violate the principle that, 'When statutory language is clear and unambiguous there is no need for construction, and the courts do not indulge in it.'" (*Delaney v. Superior Court* (1990) 50 Cal.3d 785, 800, 268 Cal.Rptr. 753, *quoting Solberg v. Superior Court* (1977) 19 Cal.3d 182, 198, 137 Cal.Rptr. 460.) The three elements of the definition of "public works" therein are that the work be (1) construction, alteration, demolition or repair work; (2) done under contract; and (3) paid for in whole or in part out of public funds. Where those three elements are present, a project falls within the statutory definition whether or not the contract was awarded by a public entity.[7] This has been the longstanding administrative interpretation of the Department, and as such is entitled to deference. "An administrative application of an act is entitled to respect by the courts, and unless clearly erroneous is a

significant factor to be considered in ascertaining the meaning of a statute." (*Mudd v. McColgan* (1947) 30 Cal.2d 463, 470.)

V. CONCLUSION

For the foregoing reasons, the Project is a public work subject to the payment of prevailing wages, and accordingly the appeals are denied.

Dated:

Chuck Cake
Acting Director

[7] *See, e.g., Riverview Business Center Office Building D,* PW 99-039 (November 17, 1999).