

DEPARTMENT OF INDUSTRIAL RELATIONS

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September 26, 2002

Patricia M. Gates, Esq.
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180 Grand Avenue, Suite 1400
Oakland, CA 94612

Re: Public Works Case No. 2001-044
Soledad Canyon Center Shopping Center
City of Santa Clarita

Dear Ms. Gates:

This constitutes the determination of the Director of Industrial Relations regarding coverage of the above-referenced project under California's prevailing wage laws and is made pursuant to Title 8, California Code of Regulations, section 16001(a). Based on my review of the facts of this case and an analysis of the applicable law, it is my determination that the construction of Soledad Canyon Center, including the Canyon County Library, in the City of Santa Clarita ("City") is a public work subject to the payment of prevailing wages.

Factual Background

Pursuant to an Option and Agreement ("Agreement") dated August 4, 1999, between TCP Management, LLC ("Developer") and City, Developer agreed to develop a 70,533 square-foot shopping center, Soledad Canyon Center ("Center"), on unimproved property within City. According to Developer, the Center includes buildings for the following business establishments: Chuy's, Wendy's, IHOP and the Santa Clarita Athletic Club. Also included is a "Shop building," which appears to refer to a building that houses other retail shops. Developer also agreed to construct within the Center a 17,000 square-foot public library facility known as the Canyon Country Library. The development also involves the construction of off-site improvements, which include utilities, sewers, curbs and gutters, street improvements and traffic controls.

Under the Agreement, City was given the option to purchase or lease the library after final inspection of the completed structure in exchange for City's advance to Developer of \$3 million in "construction funds" to build the library. In addition, City also agreed to advance \$500,000 for the construction of the off-site improvement serving the Center as a whole. If City chose to purchase the completed library instead

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of leasing it, the Agreement provided that the purchase price would be \$5.1 million, with City receiving a credit for the \$3.5 million in construction advances.

The Agreement also called for the parties to enter into a "reciprocal parking agreement respecting the library and the balance of the center."¹

On July 10, 2001, City and Developer entered into a Purchase and Sale Agreement whereby City exercised its option to purchase the library, its furnishings and the real property upon which it was constructed. The parties agreed that the purchase price was \$5.1 million per the Agreement, with the \$3.5 million advances applied to the purchase, leaving a balance of \$1.6 million to be paid at closing.²

Discussion

What is now Labor Code³ section 1720(a)(1) (as amended by statutes 2001, chapter 938, section 2) generally defines public works to mean: "Construction, alteration, demolition, installation or repair work performed under contract and paid for in whole or in part out of public funds..." The Center constitutes construction done under contract. The issue is whether it was built in whole or in part from public funds.

Here, City paid \$3.5 million toward the construction of the library and the off-site improvements to the Center. A determination whether the entire Center is deemed to have been constructed with public funds and is therefore a public work depends upon whether the construction of the Center is a single, integrated project or a set of separate projects, consisting of, for example, the library, off-site improvements or retail portion of the Center construction. Under section 1720(a)(1), if there is a single project involving the payment of public funds, prevailing wages will apply to the entire project. If there are multiple projects, prevailing wages may apply to one project but not another, depending on the circumstances of each project.

¹ An interim lease agreement had provided that the employees and patrons of the library could use the parking area of the shopping center.

² Pending the close of escrow, City and Developer entered into an Interim Lease Agreement whereby City "leased" a portion of the 17,000 square-foot library, rent-free.

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

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*Vineyard Creek Hotel and Conference Center, Redevelopment Agency, City of Santa Rosa, PW 2000-016 (October 16, 2000).*⁴

The inquiry whether a particular construction undertaking is a single or multiple projects is analyzed under the factors articulated in *Vineyard Creek*. They include: (1) the manner in which the construction is organized in view of, for example, bids, contracts and workforce; (2) the physical layout of the project; (3) the oversight, direction and supervision of the work; (4) the financing and administration of the construction funds; and (5) the general interrelationship of the various aspects of the construction. In making this finding, it is the analysis of the above factors, not the labels assigned to the various parts of the project by the parties, that controls.

To perform this analysis, a considerable number of documents must be reviewed, including bids from contractors, construction contracts and subcontracts, plans and specifications, site map and financing documents.⁵ In this case, the facts drawn from the submissions of the parties and the few documents supplied by City and Developer support the conclusion that the construction of the Center, including the library and improvements, is a single, interdependent and integrated public work project requiring the payment of prevailing wages.

With respect to the first *Vineyard Creek* factor, the Center was designed by architect, Nadel Architects, Inc. The Agreement

⁴ See also *Development of River Street Historic District, City of San Jose, PW 2001-016 (May 6, 2002)*.

⁵ These documents were requested from City on September 17, 2001, and again on April 22, 2002. City provided certain documents relating to the construction of the library, but in a letter dated May 1, 2002, stated that it was not in possession of the construction contracts entered into by Developer. City also stated that it had sent the request to Developer and asked Developer to provide City with the requested documents for forwarding to this Department. In a letter to Developer dated July 19, 2002, the Department requested that Developer provide information concerning the sequence and progress of the Center's construction, the parties involved and funding for the Center. The Department also requested copies of the contracts and subcontracts and the reciprocal parking agreement.

City has now provided a letter and attachments from Developer. Developer's letter to City bears a date of June 3, 2002, but a copy was not received by the Department until July 26, 2002. Developer has furnished a copy of the Building Construction Contract with the prime contractor as well as a copy of the Building Inspection Record. No other documents were provided. As of the date of this determination, Developer has not directly responded to the Department's letter of July 19, 2002. Developer's letter to City contains certain factual information that is discussed herein.

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recites the Developer's intent to build both the retail portions of the Center and the library, with the library to be located within the Center. This is confirmed in the Building Construction Contract ("Contract") between Developer and M.G.I. Construction ("M.G.I."), the general contractor to the project. The Contract is for the construction of a retail shopping center at 18601-18677 Soldedad Canyon Road. The address for the library building is 18601 Soledad Canyon Road. According to Developer, M.G.I. built the library, the "Shop building" and Chuy's, pursuant to the Contract, as well as the pads for Wendy's, IHOP and the athletic club. Construction of the buildings for Wendy's, IHOP and the athletic club was carried out by contractors hired by the tenants with oversight by M.G.I. The off-site improvements were also constructed by M.G.I. These facts reflect that the construction was organized in a coordinated manner by a single developer with predominant plans by the same architect and under contract with a general contractor who built or oversaw the construction for the Center.

Under the second factor, the Center is one physically integrated site consisting of 70,533 square feet of space all served by the off-site improvements. The library, for example, occupies 17,000 square feet, or 24 percent, of the area of the Center, and library patrons are allowed to use the Center's parking area.

With regard to the third factor, the Center, including both the library and retail portions, was built by Developer and constructed by or under the direction of M.G.I. over the same period of time. The Center was subject to the inspection and approval of Developer before acceptance.

With respect to the fourth factor, the Agreement provided for City's advance of construction funds to Developer. City advanced \$3.5 million for the construction of both the library and the off-site improvements, which benefit the tenants of the entire Center. In addition to the City's funds, all construction was financed by Cathay Bank.

As to the fifth factor, the discussion concerning the first four factors points to a clear, general interrelationship of the various aspects of the construction. There is no basis for segregating either the publicly funded library or public improvements construction.

In sum, an examination of the Center construction under the *Vineyard Creek* factors leads to the conclusion that the Center, including the construction of the library, retail portion and improvements, is one single, integrated project.

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Notwithstanding the fact that City has addressed in its submissions only the public works status of the library,⁶ I will address City's arguments. City asserts that prevailing wages are not required because City is not a party to a contract even though public funds financed construction. City reasons that the January 1, 2002, amendments to the Labor Code, through the vehicle of SB 975 and codified as section 1720(b), required for the first time prevailing wage payments on what it terms "private works." This, according to City, is evidence that the Legislature did not at the time of the Center's construction intend to cover contracts to which a public entity was not a party. According to City, it was not a party to any of the construction contracts and the amendments cannot be applied retroactively.

We agree with City that the amendments to section 1720 cannot be applied retroactively and do not apply to this undertaking. What City overlooks, however, is the fact that the amendments, while expanding the definition of a public work, codified existing administrative law that had been embodied in prevailing wage coverage determinations designated by the Director as precedential. The Senate Floor Analysis prepared on September 5, 2001, of SB 975 specifically acknowledges that the amended definition of the term "public funds" would "conform to several precedential coverage decisions" made by this Department. The analysis prepared by the Assembly Committees on Jobs, Economic Development and the Economy echoed that SB 975 sought to codify prior Department public works coverage determinations. The Department has long held that a finding of public works coverage is not limited to situations in which the public entity is a party to a construction contract. All that is required is that there be construction done under contract and paid for with public funds: Goleta Amtrak Station, PW 98-005 (November 23, 1998). Prevailing wages can be required when the contracting parties are private organizations but the money is still public.⁷ The fact that City was not a signatory to a construction contract between private parties is not determinative.

Furthermore, this Department has also held that section 1720(a)(1) does not require a specific type of contract under

⁶ City has addressed the public works status of only the library construction despite having received various correspondence from the Southern California Painters, Drywall Finishers, Floor Layers and Glaziers Apprenticeship Trust Compliance Program asserting that the entire Center is a public work.

⁷ See, for example, Department of Corrections, Community Correctional Facilities, PW 96-006 (June 11, 1996), and Lewis Center for Earth Sciences Construction, PW 99-052 (November 12, 1999).

which construction is paid for with public funds.⁸ *Monterey Peninsula Water Management District, Improvements in Purchased Building*, PW 99-054 (November 10, 1999). Here, the Agreement, which is a bilateral instrument memorializing the terms of the construction, including the scope of the work and the financing, constitutes a contract under section 1720(a)(1).

City also claims that the library construction is exempt from the prevailing wage law because City is not an agent of Developer. This is an elaboration of the contention that a public entity must be a party to the construction contract to bring a project within the definition of "public works". City argues that, since Developer was not acting on behalf of City as City's agent, the development cannot be considered a public work under section 1720(a). As already pointed out, that argument is not supported in the plain language of section 1720 or by the precedential decisions.

Finally, City cites section 1720.2 in support of its contention that the Legislature did not intend to address construction done under "private contract" under the law governing the library construction.⁹ According to City, when the Legislature intended to include construction done under "private contract," it did so only in section 1720.2 and, because the elements of section 1720.2 are not met, the library construction cannot be a public work. City's argument ignores the fact that section 1720.2 provides that certain construction projects will be considered

⁸ See also *Riverview Business Center Office Building D*, PW 99-039 (November 17, 1999).

⁹ Section 1720.2 states:

"For the limited purposes of Article 2 (commencing with section 1770) of this chapter, "Public Works" also means any construction work done under private contract when all of the following conditions exist:

- (a) The construction contract is between private persons.
- (b) The property subject to the construction contract is privately owned, but upon completion of the construction work, more than 50 percent of the assignable square feet of the property is leased to the state or a political subdivision for its use.
- (c) Either of the following conditions exist:
 - (1) The lease agreement between the lessor and the state or political subdivision, as lessee, was entered into prior to the construction contract.
 - (2) The construction work is performed according to plans, specifications or criteria furnished by the state or political subdivision, and the lease agreement between the lessor, and the state or political subdivision, as lessee, is entered into during, or upon completion of, the construction work."

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public works in addition to the projects that come within the definition of "public works" set forth in section 1720.

Developer contends that the Center construction is a private, non-union project for which the payment of prevailing wages is not required. It states that it was not notified that it was to pay prevailing wages, and it did not expect such notice since this was a private development project. As discussed above, the Center is a public works project. The duty to pay prevailing wages is statutory and cannot be negated by the subjective understandings of the contracting parties. *Lusardi Construction Co. v. Aubry* (1992) 1 Cal.4th 976, 987-988.

Conclusion

Based on the above analysis, I find that the Center is a single, interdependent and integrated public work project for which prevailing wages must be paid on all aspects of the project.

I hope this determination satisfactorily answers your inquiry.

Sincerely,



Chuck Cake
Acting Director