

## DEPARTMENT OF INDUSTRIAL RELATIONS

OFFICE OF THE DIRECTOR  
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September 26, 2002

Richard R. Radcliffe  
Field Representative  
Carpenters and Joiners of America  
Carpenters Local 751  
1706 Corby Avenue  
Santa Rosa, CA 95407

Re: Public Works Case No. 2002-006  
Marina Suites Hotel and Conference Center  
Suisun City Waterfront

Dear Mr. Radcliffe:

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 upon my review of the facts of this case and an analysis of the applicable law, it is my determination that the construction of the Marina Suites Hotel and Conference Center ("Project") is a public work subject to the payment of prevailing wages.

The Project is part of a redevelopment plan in Suisun City ("City") involving the revitalization of the City's waterfront. To effectuate the revitalization effort, City's Redevelopment Agency ("Agency") purchased various parcels of land from several private landowners located on its waterfront. The subject of this determination is a three-story, 100-room, all-suites hotel and an 8,000 square-foot single-story conference center built on a 3.2-acre site on City's waterfront, consisting of three parcel lots acquired by Agency. The prorated cost for Agency's acquisition of the site is approximately \$4.5 million. (Suisun Redevelopment Agency Section 33433 Report, September 18, 2000.)

On April 27, 2000, Agency and Suisun Hotel Partners, Ltd. ("Developer") entered into a non-binding Memorandum of Understanding summarizing the business terms of the proposed Project. On October 2, 2000, they entered into a Disposition and Development Agreement ("DDA") to construct the Project. Under the terms of this original DDA, the Developer was to purchase the site from Agency based on a purchase contract for \$500,000.

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On October 16, 2001, Agency and Developer executed an amended DDA. Under its terms Developer's purchase price for the site changed to \$1 "as an inducement to the project." (Amended 33433 Report, infra.) Developer's building and development fees for the Project were estimated at \$766,000. The amended DDA requires the Developer to pay \$500,000 of the fees through a note secured by deed of trust. The note carries an interest rate of six percent amortized over a twenty (20) year term, with a balloon payment of outstanding principle due in the tenth year. The remaining \$266,000 represents a portion of sewer connection fees for the Project. The amended DDA requires City to waive these fees, again as "an inducement to the project." (Amended 33433 Report, infra.)

Under the amended DDA, Agency is responsible for site clearance in the amount of \$98,000 and site fill and rough grading reimbursements in the amount of \$125,000, with any additional cost to be absorbed by Developer. Agency is also responsible for contracting for and performing demolition and reconstruction of the 32-space parking lot on the site in order to clear the development site for construction of the conference center. This work is estimated at \$250,000. The amended DDA further requires the Agency to make certain right of way improvements to Driftwood Drive at the Civic Center intersection at a cost of approximately \$117,000. (Agenda Transmittal, October 16, 2001.)

Under what is now Labor Code section<sup>1</sup> 1720(a)(1) (as amended by statutes of 2001, chapter 938, section 2), "public work" is defined as: "...[C]onstruction, alteration, demolition, installation or repair work done under contract and paid for in whole or in part out of public funds... ."

The Project clearly constitutes construction done under contract. The question whether the Project is a public work requires a resolution of the issues (1) as to which version of the Labor Code is relevant to the Project; and (2) whether the construction is paid for in whole or in part from public funds.

On the threshold issue as to which law applies, Agency and Developer executed a Memorandum of Understanding in April, 2000. In addition, both DDAs between Agency and Developer were entered into before October, 2001. The advertising for bids for any work that Agency agreed to perform would have been prior to these dates. It therefore appears that all events in relation to which we determine the applicable law took place before January 1,

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<sup>1</sup> Unless otherwise indicated all statutory references are to the Labor Code.

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2002, the effective date of Senate Bill 975. Accordingly, pursuant to the Department's enforcement policy, the version of the Labor Code in effect prior to the effective date of the Senate Bill 975 amendments controls the analysis whether the Project was paid for with public funds.

The potential sources of public funds to the Project are: the ostensible below-market value real property transfer, also known as a land write-down, from Agency to Developer; the \$500,000 loan from Agency to Developer for development fees; City's waiver of \$266,000 in sewer connection fees; and Agency's payment or reimbursements for the portion of the work on the Project for which it was responsible.

The \$1 sale price for the parcels Agency sold to Developer is well below the \$4.5 million Agency paid to acquire the property. The Agency estimates that the \$1 is "approximately equal to the fair market value of the site for the highest and best use" (Amended 33433 Report, *infra*, pg. 5). While even under prevailing wage law before January 1, 2002, we would, under some circumstances, find that a below-market sale of public property in consideration for the agreement to perform construction would constitute payment of public funds for construction, we need not examine that here in light of the finding that there are other payments of public funds to the Project.

Also under pre-SB 975 prevailing wage law, a waiver of fees does not constitute the payment of public funds. *McIntosh v. Aubry* (1993) 14 Cal.App.4<sup>th</sup> 1576, 1587. Accordingly, City's waiver of the \$266,000 in sewer connection fees for the Project does not constitute the payment of public funds.

Similarly, under the applicable regulations, at least market rate interest loans are not included in the definition of public funds. For this reason, the \$500,000 loan from Agency to Developer for the development fees would also not be a payment of public funds.

The payment of public funds to this Project takes place primarily in the form of the over \$500,000 Agency paid or reimbursed for such construction as site clearance, site fill and rough grading, right of way improvements and parking lot relocation. This work is part of and integrally connected to the construction of the hotel and conference center in that without such construction

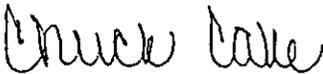
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work the Project could not have been built. As such, the Agency expenditures constitute the payment of public funds.<sup>2</sup>

For the foregoing reasons, the construction of the Marina Suites Hotel and Conference Center is a public work subject to prevailing wage requirements.

I hope this determination satisfactorily answers your inquiry.

Sincerely,



Chuck Cake  
Acting Director

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<sup>2</sup> Town Square Project, City of King, PW 2000-011 (December 11, 2000); Downtown Redevelopment Plan Projects, City of Vacaville, PW 2000-015 (March 22, 2001).