

DEPARTMENT OF INDUSTRIAL RELATIONS

OFFICE OF THE DIRECTOR
455 Golden Gate Avenue, Tenth Floor
San Francisco, CA 94102
(415) 703-5050



May 13, 2003

Donald C. Carroll, Esq.
Law Offices of Carroll & Scully
300 Montgomery Street, Suite 735
San Francisco, CA 94104-1909

Re: Public Works Case No. 2002-090
Doubletree Hotel Development Project
City of Anaheim

Dear Mr. Carroll:

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 ("CCR"), 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 Doubletree Hotel Development Project ("Project") is not a public work subject to the payment of prevailing wages.

Orangewood LLC and Orangewood Hotel Corporation (collectively referred to as "Developer") entered into a Development and Economic Assistance Agreement ("DEAA") with the City of Anaheim ("City"), a charter city, dated July 23, 2002. As its title implies, the DEAA describes the terms and conditions under which City will provide Developer with financial assistance for the construction of a Doubletree Hotel, public parking facilities and necessary on- and off-site improvements near the Anaheim Convention Center.

According to the DEAA, Developer requires financial assistance from City to fund a "feasibility gap." If Developer fulfills conditions set forth in the DEAA, such assistance will be in the form of periodic monetary payments referred to as "feasibility gap payments." Said payments are to commence six months after the completion of the Project and be paid every six months thereafter for 15 years. They are to be in an amount equal to 50 percent of the transient occupancy tax collected from the hotel by City during each six-month period, and capped at a maximum of \$13 million. The payments will be made pursuant to a note

¹ As one of the conditions for receiving financial assistance from City, Developer has agreed to build a parking structure adjacent to the hotel as part of the Project. The parking facility will be open to the public, in addition to having spaces reserved for the use of hotel patrons and guests.

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obligating Developer to repay City the amount of the payments at an interest rate of 6.5 percent and under a schedule provided for in the DEAA.

In exchange for City's agreement to make the payments provided in the DEAA, Developer will grant to City a pedestrian and vehicular easement ("Convention Easement") over the Project's property for, among other purposes, assuring public access to and from the Anaheim Convention Center. Developer has also agreed to improve the easement.

Labor Code section 1720(a)(1)² generally defines public works to mean "construction, alteration, demolition, installation or repair work done under contract and paid for in whole or in part out of public funds" The Project is construction. In paragraph 4.4 of the DEAA, the parties acknowledge that City's financial assistance "is made in furtherance of Developer's construction of the Project and development of the Hotel, as provided herein." The Project will be built under contract between Developer and construction contractor(s).

Section 1720(b) generally defines "paid for in whole or in part out of public funds" as "payment of money or the equivalent of money by the state or political subdivision directly to or on behalf of the public works developer...transfer by the state or political subdivision of an asset of value for less than fair market price...fees, costs, rents,...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, waived or forgiven by the state or political subdivision...money loaned by the state or political subdivision to be repaid on a contingent basis...credits that are applied by the state or political subdivision against repayment obligations to the state or political subdivision."

Under 8 CCR § 16000, "public funds do not include money loaned to a private entity where work is to be performed under private contract, and where no portion of the work is supervised, owned, utilized or managed by the awarding body."

Here, except for the financial assistance to Developer from City, the Project construction costs will be borne by Developer from private sources. While it is clear that the financial assistance from City is an inducement for Developer to construct a first-

² Except where otherwise indicated, all "section" references are to the Labor Code.

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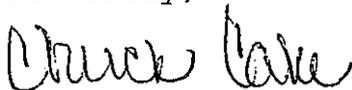
class hotel, which undertaking City has determined is in the interest of City and its citizens, the form of the financial assistance is a bona fide loan. The note securing the loan requires Developer, a private entity, to repay the principal at 6.5 percent interest, which is not "less than fair market value." Under the above regulation and Section 1720(b), market-rate interest loans to private entities are not public funds.

Furthermore, the exception contained in the above-quoted regulation is inapplicable because City will not supervise, own, utilize or manage the Project during or after construction. Although City reserves the right to approve the site plans, the construction loan and the private construction contracts, it does not supervise nor manage the construction work, nor does it own the work. Developer owns both the land on which the Project will be built, as well as the Project itself. In your request for a coverage determination you reference the Convention Easement granted to City by Developer. While an easement is an interest in the land of another, it is not an estate in property. For this reason, the easement is not a proprietary, or ownership, interest. Black's Law Dictionary (7th ed. 1999) p. 816. 4 Witkin, Summary of California Law (9th ed. 1987) p. 614. Finally, City is not utilizing the work. It is a private hotel development and the Convention Easement, even if it were to be considered part of "the work," will be used by the public. Consequently, the Project is not subsidized by funds defined as public under the Labor Code.

For these reasons and consistent with prior precedential public works determinations³, I find that the Project is not a public works project subject to the payment of prevailing wages. Because the Project is not a public work, I need not address whether the Project is a municipal affair such that City's charter city status would exempt it from prevailing wage obligations.

I hope this determination satisfactorily answers your inquiry.

Sincerely,



Chuck Cake
Acting Director

³ Silverado Creek Apartments/Napa Community Redevelopment Agency, PW 099-074 (September 27, 2000).

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