STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS
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Arnold Schwarzenegger, *Governor*

June 20, 2005

Richard M. Freeman
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12544 High Bluff Drive, Suite 300
San Diego, CA 92130-3051

Re: Public Works Case No. 2004-019
Strand Redevelopment Project
Redevelopment Agency of the City of Huntington Beach

Dear Mr. Freeman:

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 entire Strand Redevelopment Project ("Project") is a public work subject to the payment of prevailing wages.

SUMMARY OF PROJECT

On July 9, 1999,[1] the Redevelopment Agency of the City of Huntington Beach ("Agency") entered into a Disposition and Development Agreement ("DDA") with the CIM Group, LLC (later succeeded by CIM/Huntington LLC and collectively designated herein as "Developer") to consolidate certain parcels bordering the Pacific Highway and thereon to construct a public parking facility, leaseable space for retail, offices and restaurants, and a hotel. The site ("Site") is composed of 2.97 acres of land divided between two city blocks and including a right-of-way between those blocks. Agency owns thirteen of the fourteen parcels included in the Site, and Developer has a long-term lease for the one remaining private parcel. The DDA contemplates that the land will be conveyed to Developer, who will build structures that ultimately have three vertical tiers of ownership: (1) a two-level subterranean public parking facility with up to 500 parking spaces, to be owned by Agency; (2) 100,000 to 110,000 square feet of leaseable space above the parking facility, consisting of ground level restaurants and

[1] The date stated in the preamble was June 17, 1999, but section 900 of the DDA provides that the date of the agreement was the date of execution by Agency, which was July 9, 1999.

retail on both sides of a central street with offices above the retail structure on one side of the street, to be owned by private interests; and (3) an approximately 150 room hotel above the retail structure on the other side of the street, to be owned by other private interests. In addition to building these structures, Developer is also responsible for related on-site and off-site improvements and utility relocation costs.

In addition to conveying most of the land for the development, Agency is required to pay Developer approximately $9,400,000 (the "Agency Obligation" and also referred to as Feasibility Gap Payments).[2] Paragraph (b) of Revised Attachment No. 8 (Third Implementation Agreement) states as follows.

> The Agency Obligation represents reimbursement to Developer for construction and installation of public infrastructure within dedicated public rights-of-way and the public parking facilities, clearance of existing improvements on the portion of the Site located within dedicated public rights-of-way and publicly owned public parking facility area, excavation, grading and other activities necessary to prepare said public rights-of-way and public parking facility area for development of said public infrastructure and public parking facilities, and acquisition and relocation costs in connection therewith. In no event shall Developer be entitled to payment or reimbursement from Agency for any 'construction, alteration, demolition, or repair work' (as said phrase is defined in Labor Code Section 1720(a)) other than for said public infrastructure and public parking facilities which are to be constructed and installed by Developer within dedicated public rights-of-way and publicly owned public parking facility area.

The Agency Obligation is to be paid over a 25-year period at 10 percent interest, with payment made from prescribed percentages of property taxes, occupancy taxes, and net parking revenues generated by the Project. Agency also is required to pay the cost of performing its affordable housing obligations, if any,

[2] The Agency Obligation originally was a variable sum with an estimated present value of $8 million. The figure was fixed at $7.9 million in the Third Implementation Agreement and then increased by up to an additional $1.5 million for additional parking spaces required under the Fourth Implementation Agreement.

under the Community Redevelopment Law.[3] In addition, the parties agreed to use their best efforts to get City to issue Community Facilities District bonds, secured by a special tax on Developer's title to the Site, to finance construction of the public parking facility. Besides obtaining a public parking facility, Agency will participate in a percentage of Project revenues that exceed a 12 percent return on Project costs allowed Developer for a period of 40 years, subject to an earlier buyout if specified conditions are met ("Agency Participation Payment").[4]

Except for Agency's payments and obligations, Developer is to bear the costs of otherwise developing the Site and constructing all improvements thereon.

Site Development and Use requirements are set forth in sections 300-407 of the DDA. The Scope of the Development was set forth in section 302 of the DDA by reference to Attachment No. 4, and was revised by Revised Attachment No. 4 to the Third Implementation Agreement. Part I of the original Attachment No. 4 required Developer to develop the Site in accordance with plans approved by the City of Huntington Beach that cover the three elements of the Project. Part II of that Attachment, which pertains specifically to the public parking facility and other public improvements, includes the following statement:

> Because of the scope and location of such public improvements within the overall development to be constructed on the Site by Developer, there is an integral relationship between the public and the private improvements to be constructed which requires using a single plan of construction and general contractor for both public and private improvements in order to avoid disruptive and costly duplication of many necessary construction activities.

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[3] Agency reports that it incurred a replacement obligation for one unit displaced by the Project, but that it already had a surplus of affordable units and therefore did not actually have to pay for another replacement unit.

[4] The Health and Safety Code section 33433 reports prepared for the Project concluded that Agency was receiving less than "fair market value" for the parcels it conveyed to Developer, but was doing so in order to achieve the objectives of the Redevelopment Plan and Downtown Specific Plan. In light of Agency's other payments of public funds to the Project, however, it is unnecessary to address whether this particular real estate transaction would also constitute the payment of public funds.

Revised Attachment No. 4 does not include these requirements or anything other than a specification of the dimensions of the Project as modified by the Third Implementation Agreement. However, by the time the Third Implementation Agreement was adopted, plans covering the entire Project in its present form had been approved by the City of Huntington Beach. (Tentative Tract Map No. 16406/Conditional Use Permit No. 99-45/Coastal Development Permit No. 99-16.) It is not clear whether a single general contractor is still required for the entire contract. Developer reports that the same contractors will be used for concrete work for both the parking structure and retail improvements, but that a majority of the retail and commercial improvements will be of a different construction type, such as wood framing, for which different contractors will be used.

The Schedule of Performance was set forth in section 308, with specific time lines specified in Attachment No. 3. Section 308 required construction to begin promptly following the conveyance or delivery of possession of Parcel A (the publicly-held parcels) or Parcel B (the privately-held parcels that needed to be acquired), and it requires Developer to submit written progress reports on construction to Agency. In recognition of the community redevelopment purpose of the agreement and the "[s]ubstantial financing and other public aids made available by law and by the government" for this purpose (§ 315), the Developer was precluded from assigning, transferring, or otherwise conveying any part of the Site or its interest therein without Agency's approval (§ 316). The DDA prescribes the quality level of the restaurants and hotel to be developed and requires Agency's approval of any hotel management or franchise agreement (§§ 401-403).

Initially, the DDA contemplated the inclusion of additional privately-held parcels in the development, approximately 130,000-135,000 square feet of leaseable commercial space, a 115-130 room hotel, and approximately 400 parking spaces. The DDA and Project subsequently have been modified by a series of implementation agreements. Each of the implementation agreements incorporates the original DDA, including its attachments by reference (Recitals, ¶A), and each includes the following statement at or near the end:

> Except as expressly provided otherwise in this ... Agreement, ... the DDA remains in full force and effect, enforceable in accordance with its terms.[5]

The [First] Implementation Agreement adopted on April 6, 2000, and the Second Implementation Agreement, dated March 5, 2001, concern the parties' entry into a lease and option to purchase for one of the privately-held parcels. The latter agreement also extended Developer's schedule of performance in light of the length of negotiations between Developer and other property owners. Additionally, the parties entered into a separate Assignment and Assumption Agreement dated March 22, 2001, which assigned Developer's rights and obligations under the DDA to a newly formed entity named CIM/Huntington LLC.[6]

The Third Implementation Agreement dated October 30, 2002 introduced a number of modifications that Developer and Agency contend substantially changed the economics of the Project. In it, the parties abandoned efforts to acquire additional privately-held parcels within the collectively designated Parcel B and excluded them from the development. The size of the hotel was increased from a range of 115-130 rooms to a range of 145-160 rooms, and the size of the leaseable commercial area was decreased from a range of 130,000-135,000 square feet to a range of 100,000-110,000 square feet. The parties specified that the parking facility would be a two-level subterranean garage with 405 spaces plus 6 additional surface-level spaces. The parties also fixed the amount of Agency's Obligation at $7,900,000.

On September 15, 2003, the parties entered into a Fourth Implementation Agreement for the purpose of adding at least 60 spaces to the parking facility and requiring the Agency to pay up to an additional $1.5 million for those added spaces. On July 19, 2004, the parties entered into a Fifth Implementation Agreement to clarify provisions in the DDA relating to the

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[5] Implementation Agreement ¶15; Second Implementation ¶IX; Third Implementation Agreement ¶22; Fourth Implementation Agreement ¶5; Fifth Implementation Agreement ¶7. The Third and Fifth Implementation Agreements included additional language referring to revisions made to the Attachments to the DDA.

[6] Third Implementation Agreement, Recitals, ¶C. CIM/Huntington LLC is solely owned and managed by CIM California Urban Real Estate Fund, a limited partnership. *Id.* ¶B. The sole limited partners of this Fund, as of the date of the third Implementation Agreement, were the California Public Employees' Retirement System ("PERS"), the California State Teachers' Retirements System ("STRS") and two entities owned and controlled by the Developers' three principals. *Id.*

Agency Participation Payment, acquisition costs, and indemnification obligations, and to approve transfer of a portion of the property to a hotel developer under the majority control of the Developer.

In the coverage determination request letter of May 21, 2004, you estimated that the cost to Developer for public infrastructure improvements required under the DDA would be nearly $16.5 million. This figure includes approximately $9.6 million for site preparation and construction of the garage, approximately $3.2 million for other site preparation, utility relocation, and street improvements, and approximately $3.7 million in indirect or soft costs.

ANALYSIS

Under what is now Labor Code section[7] 1720(a)(1), public works is defined as "construction, alteration, demolition ... or repair work done under contract and paid for in whole or in part out of public funds ... ." The above facts demonstrate that the Project is construction done under contract and paid for in part out of public funds. None of the parties who have presented arguments dispute that the Project meets the definition of a "public work." Instead, the question raised by Developer's coverage request is whether coverage is limited, under section 1720(c)(2), to the parking facility, additional site preparation, utility relocation, and street improvements, or whether the entire undertaking is a public work.

Applicable Statutory Law Governing this Request for a Public Works Coverage Determination.

Various statutory amendments to the California prevailing wage law over the past approximately six years have made it necessary to first identify the governing law when responding to requests for public works coverage determinations. In determining what version of the prevailing wage law applies to a Project, it is necessary to identify the applicable "benchmark" event in the Project. The applicable law is that which is in effect at the time of the benchmark event. "In redevelopment cases such as this, the Department has consistently looked to the date of the development agreement to determine the applicable law." *Baldwin Park Marketplace Project, City of Baldwin Park, PW Case No.*

[7] All statutory references are to the California Labor Code unless otherwise specifically indicated.

2003-028 (October 16, 2003).[8] *See also Pleasant Hill Schoolyard Redevelopment Project, PW Case No. 2002-053 (January 16, 2003); affirmed on Administrative Appeal (July 10, 2003).*

Here, Developer and Agency both contend that the character of the Project changed fundamentally over time such that the law in effect when the Project took on its present shape and form should apply. Alternatively, Developer argues that coverage should be determined at or near the time when the actual contracts for construction go out to bid, citing Labor Code section 1773.2. Agency also makes an alternative argument that coverage is governed by new Labor Code §1720(c)(2) in light of an Important Notice posted on the Department's web site on November 5, 2001, which stated that SB 975 (which, among other things, added section 1720(c)(2)) would "be strictly enforced for all public works projects advertised for bids on or after January 1, 2002[.]"

With respect to the first argument, the facts show that while the scope of the Project may have changed over time, its fundamental character relative to its status as a public work did not change. The parties entered into the DDA in 1999, and each subsequent Implementation Agreement referred back to and incorporated the DDA by reference. The essential nature of the Project, which was the consolidation of parcels on two city blocks and the construction thereon of a three-tier facility consisting of a public parking garage, private commercial and office space, and a hotel, did not change. The essential nature of Agency's participation in the Project, which was to provide most of the land, pay part of the costs, and receive a parking facility and potentially other revenues in return, also did not change.[9]

Because the DDA defined the parties' understanding and agreement with respect to the Project they were undertaking, and because it continued to provide a base of reference for subsequent modifications, it is the most logical point of reference for

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[8] *Baldwin Park* presented the same issue raised here, which is whether the provisions of Labor Code section 1720(c)(2) should apply to a Project in which the DDA was signed prior to the effective date of the new statute.

[9] Even the overall scope of the Project appears not to have changed significantly. The private parcels that the parties were unable to obtain appear to have represented only a small part of the total projected area of the site (*see* DDA Attachment No. 5, Exhibit B), and the loss of commercial space appears to have been offset by increases in the numbers of both the public parking spaces and the private hotel rooms.

determining legal obligations. Only if the modification to an existing agreement changes the project's character as a "public work," such as by introducing or removing the payment of public funds, would it be appropriate to determine coverage according to applicable law at the time of such modification.[10]

Developer and Agency provide no authority or persuasive analysis for their alternative arguments. Labor Code sections 1773.2 and 1772.4, by their terms, pertain to notification of prevailing rates of pay and requests for review of those rates rather than whether a project involves public work. Finally, the web site Notice expressed the Department's enforcement policy concerning projects advertised for bid by public entities, not as here, a project involving public subsidies to private developers that contract for the construction work.

Public Works Coverage Determinations on the 1999 Benchmark Date

In determining whether a project is a public work on which prevailing wages can be enforced, we also review the Director's public works coverage determinations issued by the time of the benchmark event, here the July 1999 event. At the time the parties entered into the DDA here, the potentially relevant precedential determinations were *PW 93-012, Wal-Mart Shopping Center/Lake Elsinore (July 1, 1994)*, Decision on Appeal *affirming* Determination of March 28, 1994, and *PW Case No. 94-034, Factory Outlet Center/Pismo Beach (February 28, 1995)*, Decision on Appeal *affirming* Determination of September 19, 1994.

The initial Determination letter in *Wal-Mart* included the following paragraph:

> Operating Engineers argues that if the off-site work is found to be a public works project, then the entire project may also be found to be covered on the basis that the off-site work is integral to the overall

[10] Developer makes a further argument that the DDA was "unenforceable" prior to the most recent modifications because of the inability to deliver all the privately-owned parcels as originally contemplated. However, Developer does not cite specific provisions within the DDA or provide further analysis as to why this would have made the entire agreement unenforceable. Section 308 of the DDA, which requires construction to begin promptly upon conveyance or delivery of Parcel A *or* Parcel B, tends to point toward the opposite conclusion as does the series of decisions to modify the DDA through Implementation Agreements rather than entering into a new DDA.

> project. In this case, the shopping center proper is being constructed with purely private funds. Furthermore, the improvements will be constructed under a contract let by the Developer and separate from any contracts for the construction of the shopping center itself. Consistent with past coverage determinations [fn citations omitted], the improvements project, performed under separate contract and paid for with public funds, may properly be deemed a public works project without extending such coverage to the private construction of the separate shopping center project. As such, prevailing wage requirements attach only to the off-site improvement work and not to the construction of the Wal-Mart Shopping Center.

The initial Determination letter in *Factory Outlet Center* stated in relevant part as follows.

> In this case [Owner] plans to build the Pismo Beach Factory Outlet Center, a factory outlet retail development in the City of Pismo Beach. As a condition of plan approval, Owner agrees to construct all improvements as required and set forth in the Pismo Beach City Municipal Code, Permit No. 92-020. The Owner Participation Agreement ("OPA") ... calls for the Agency to reimburse the Owner $723,059 for the construction of the public improvements required in conjunction with the project.
>
> Operating Engineers appear to assert ... that the infusion of the $723,059 in public funds into the project causes the entire outlet project to constitute a public works. In this case, the OPA clearly indicates that the public funds "represent the cost of installation of the public improvements ..." [Citation omitted]. Consistent with this Department's July 1, 1994, Decision on Appeal in [*Wal-Mart, supra*], the publicly financed improvements project is a severable project that is a public works. It does not transform the privately financed factory outlet project into a public works.

Neither of these determinations provides further information about the severability of the projects in question, and neither of the Decisions on Appeal addressed this issue at all. What guidance they provide is through use of words like "integral"

and "severable," which in turn leads to a consideration and determination whether the Strand Redevelopment Project, as set forth in the DDA, is essentially one project or a series of separate projects, some publicly funded and others privately funded.

The provisions of the DDA and subsequent Implementation Agreements all point in the direction of finding that this is a single integrated project. The Scope of Development language from Attachment No. 4 to the DDA, states that there is "an integral relationship between the public and private improvements to be constructed which requires using a single plan of construction and general contractor for both public and private improvements[.]" Although this language disappeared from the Third Implementation Agreement, the condition of having a single set of approved plans for the entire Project had already been met by then. Furthermore, Agency's rights of oversight, direction, and supervision extend as much to the private as to the public parts of the Project. With regard to financing and administration of the construction funds, Agency is providing almost all of the land for the entire Project, for which it has already paid acquisition costs, and its Agency Obligation is to be amortized over a 25-year period and paid from additional taxes raised from the entire Project as well as parking revenues.

Particularly notable is the physical layout of the Project. For example, the subterranean public parking facility, by express design and intent, is literally being constructed as part of the foundation for what will become the privately owned parts of the development sitting immediately above. Even though Developer says that it will use separate contracts for what it considers the "public" and "private" work, and that the "public" portion will be largely completed before the "private" part begins, Developer and Agency also acknowledge that there is no way to draw a line between the end of the cement work for the parking structure and the beginning of that work for the commercial space immediately above. In fact, as already noted, Developer reports that the same contractors will be used for the concrete work for both the parking structure and retail improvements. Similarly, the infrastructure work takes place on both on-site and adjoining off-site locations. From a practical and legal standpoint, therefore, it is not feasible to think of the parking facility, the infrastructure and the private structures above as separate projects.

None of the parties here has offered an argument for finding that the Project is *not* a single integrated construction project. Developer's only argument for finding that the Project was not a public work under the law that applied on the 1999 benchmark date is that the awarding body, *i.e.* Agency, will not be a party to the actual construction contract. Developer cites *PW 96-006, Department of Corrections/Community Corrections Facility (June 11, 1996)*, for the proposition that such a requirement existed, and asserts that DIR did not find it unnecessary to have an awarding body until the Decision on Appeal in *PW 2000-006, SPCA-LA Companion Animal Village and Education Center (August 24, 2001)*. In fact, the holding in *SPCA-LA* did not represent a change in the Department's position on the issue whether an awarding body must be a party to a construction contract for a public work to exist.[11] Furthermore, the *Department of Corrections* decision does not address the same issue and does not stand for the proposition cited by Developer. To the contrary, the *Wal-Mart* decision, *supra*, shows that it was not necessary for the awarding body to be a party to the construction contract (in that case, the separate contract for off-site improvements) in order for prevailing wage requirements to apply.

For the above reasons, the Strand Redevelopment Project is a single, integrated construction project for which prevailing wages must be paid.

Public Works Coverage Under Senate Bill 975

Developer and Agency both argue that this determination should be made under the provisions of Labor Code section 1720(c)(2). For the reasons discussed above, that section does not apply to this determination because it did not become effective until January 1, 2002 (Stats. 2001, Chap. 938 (S.B. 975), section 2), over two years after the parties entered into the DDA.

Even if section 1720(c)(2) did apply, however, it would not lead to a different result here.

Labor Code section 1720(c)(2) states as follows:

[11] *SPCA* has been dedesignated as a precedent decision in light of its reversal on other grounds by the Supreme Court in *City of Long Beach v. Department of Industrial Relations* (2004) 34 Cal.4th 942.

> If the state or a political subdivision requires a private developer to perform construction, alteration, demolition, installation, or repair work on a public work of improvement as a condition of regulatory approval of an otherwise private development project, and the state or political subdivision contributes no more money, or the equivalent of money, to the overall project than is required to perform this public improvement work, and the state or political subdivision maintains no proprietary interest in the overall project, then only the public improvement work shall thereby become subject to this chapter.

The Project does not fit within the terms of this section because, among other reasons, the improvements are not required of Developer by a state or political subdivision "as a condition of regulatory approval." The DDA between Agency and Developer is an agreement reflecting their mutual objectives in the Project. It did not require the completion of the improvements as a condition of regulatory approval of the Project.

Further, as discussed, *supra*, there is not "an otherwise private development project" because private and public monies combine here to fund a single, integrated public works project. Section 1720(c)(2) is meant to refer to severable requirements such as the building or improvement of streets or the extension of sewer lines that a public entity might impose on a developer of an otherwise private project, similar to the situation described in *Wal-Mart, supra*. *See also PW 2003-010, Destination 0-8 Shopping Center/City of Palmdale (October 7, 2003)*, and *PW 2003-022, Chapman Heights/City of Yucaipa (January 30, 2004)*. For example, as indicated in the DDA, the parking facility is an integral part of the overall Project rather than a separable portion required to be constructed as a condition for gaining regulatory approval of the commercial space and hotel portions of the Project. The language of section 307(a) of the DDA, which defines the costs of construction as including all work described in the Scope of Development *and* all conditions of approval, infrastructure, dedications, and mitigation measures, demonstrates that the parties understood this distinction.

Finally, it also cannot be said Agency has no proprietary interest in the overall Project. The term "proprietary interest" connotes ownership or ownership rights (*cf.* Black's Law Dictionary (8th ed. 2004); Merriam-Webster OnLine) and in the case of a public entity, it refers to ownership interests or

rights that are analogous to those of private actors in the marketplace, as contrasted with governmental regulatory authority. *See Burns Intern. Sec. Services Corp. v. County of Los Angeles (2004) 123 Cal.App.4th 162, 19 Cal.Rptr.3d 776;* and *City of Palmdale, supra.*[12] Here, there is clearly a proprietary or ownership interest in the parking structure portion of the Project. In addition, the Agency Participation Payment is a right to share in a percentage of the profits generated by the Project.

Consequently, even if applicable, Labor Code section 1720(c)(2) could not be applied to limit prevailing wage requirements in the manner suggested by Developer.

CONCLUSION

For the foregoing reasons, the entire Strand Redevelopment Project is a public work subject to the payment of prevailing wages under the law applicable at the time the parties entered into their Disposition and Development Agreement. Even if section 1720(c)(2) were found to be applicable to this Project, the Project does not fulfill the elements of this section.

Sincerely,

John M. Rea
Acting Director

[12] In *City of Palmdale*, the Director found that the city's receipt of sales tax revenues from the project did not constitute a "proprietary interest;" rather, it was an exercise of City's governmental power of taxation. Further, *City of Palmdale* should not be read as limiting "proprietary interest" to ownership of real property only.