

DEPARTMENT OF INDUSTRIAL RELATIONS
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October 15, 2007

Nancy Kierstyn Schreiner
NORDMAN CORMANY HAIR & COMPTON
1000 Town Center Drive, Sixth Floor
Oxnard, California 93036-1132

Re: Public Works Case No. 2004-048
Simi Valley Town Center – First California Bank
City of Simi Valley

Dear Ms. Kierstyn Schreiner:

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 California Code of Regulations, title 8, section 16001 (a). Based on my review of the facts and an analysis of the applicable law, it is my determination that the construction of First California Bank at the Simi Valley Town Center is not a public work subject to prevailing wage requirements.

Facts

Simi Valley Town Center

Simi Valley Town Center is a mixed-use development located on an approximately 129-acre site in the City of Simi Valley ("City"). It will include a regional shopping center and a home improvement store with additional related retail.¹

On or about September 29, 2003, City and Simi Valley Town Center LLC ("SVTC"),² entered into a Development Agreement ("DA") for the development of a 55-acre parcel ("Parcel A") as a predominantly enclosed regional shopping center. The development will be built in phases. The "First Phase" involves the construction of at least 500,000 square feet of retail building area, including two major department stores and associated common areas. As a condition of subdivision or development of Parcel A, City has required Developer to construct certain off-site infrastructure improvements – principally streets, sewers, and utilities – to be paid for by City through the creation of a Community Facilities District or by some other form of public financing (the "Public Improvements").

¹Simi Valley Town Center will also include 500 luxury apartments to be built on a separate parcel overlooking the shopping center. The apartments are not encompassed by the development agreements discussed herein and construction of the apartments will be undertaken by an unrelated developer of multi-family housing. There is no apparent relationship between the construction of the apartment complex and the construction at issue. Consequently, as the apartment construction appears to have no bearing on the outcome of this matter, it will not be discussed further.

²SVTC partnered with Forest City Enterprises, Inc. ("Forest City"), ultimately through legal entities controlled by the partnership and/or Forest City. For convenience, reference to Developer includes SVTC, Forest City, the partnership, and other legal entities formed by one or more of them for purposes of this development.

Under the DA, development on Parcel A is deemed complete when the Public Improvements are completed and certificates of occupancy have issued for the First Phase development. Any additional retail and commercial development on Parcel A is at the Developer's option and is not required by the DA.

Under the DA, City agrees to a cap on fees to be paid by Developer. City has advised the Department that the cap was set sufficiently high to ensure that the fees imposed in connection with this development will not exceed the cap. Developer has advised the Department that it has paid the fees in full.

At approximately the same time that City and Developer were entering into the DA, Developer and the Simi Valley Community Development Agency ("Agency") were negotiating a Disposition and Development Agreement ("DDA"), effective October 20, 2003, for the acquisition and development of an approximately 33.1-acre parcel ("Parcel B") adjacent to Parcel A. In its Summary Report pursuant to section 33433 of the California Health & Safety Code, Agency estimates the fair market value of Parcel B to be \$4.178 million and its fair reuse value to be zero dollars.

Under the DDA, Agency agrees to transfer Parcel B to Developer at its fair reuse value. Prior to the close of escrow on Parcel B, Developer must perform certain activities with regard to First Phase development on Parcel A, such as complete the design development drawings and have them approved by City, obtain grading permits, commence grading and obtain financing. Developer also is required by the DDA to construct on Parcel B a minimum 110,000 square foot home improvement store and an additional minimum 145,000 square feet of office and retail building space.

Developer graded and performed the site preparation work on Parcels A and B at the same time, including the construction of pads and utility stubs. Developer also constructed the off-site Public Improvements. The street improvements include a ring road designed to serve both parcels. Developer represents that prevailing wages were paid for the grading, site preparation work and Public Improvements.

The major department stores purchased lots from Developer and will build their own stores on Parcel A. The remainder of the regional shopping center on Parcel A, including the common areas and a parking lot, were constructed by Developer. Three banks, including First California Bank ("Bank"), have leased lots from Developer and will build their own buildings on Parcel A. Lowe's purchased a lot from Developer and will build its own store and parking lot on Parcel B. The remaining office and retail construction on Parcel B will be done by third parties under ground leases with Developer.

The Bank Lease

On September 1, 2004, Bank entered into a ground lease with Developer for a 27,000 square foot lot ("Bank site") on Parcel A for the purpose of constructing an approximately 5,000 square foot

Bank building. The initial term of the lease is 20 years, with Bank having six options to extend for periods of five years each.

For the first five years of its lease, Bank is paying rent of \$125,000 per year. The Department has obtained information from Developer showing that the rent paid by Bank is comparable to rent paid by Wells Fargo Bank and Union Bank under ground leases with Developer for parcels comparable to the Bank site. Bank has submitted a letter dated April 28, 2006, from Vernon Martin, Director of Commercial Appraisal for PCV/MURCOR, a nationwide real estate appraisal firm, in which Martin concludes that the rental rate paid by Bank is "reasonable ... although slightly higher than market transactions up until now."

Developer has advised the Department that each of the three bank leases is a market rent lease negotiated at arm's length. None of the three banks provided any financing to Developer for any of Developer's undertakings under the DA or DDA.

The Bank Construction

Under the Bank lease, Developer is required to complete the grading and site preparation work for the Bank site, including the construction of the pad, curbs, improvements to common areas, utility lines stubbed to within five feet of the Bank building, retaining walls and drainage facilities. Bank is to design and construct at its sole cost and expense the Bank building, sidewalk, parking lot, drive thru and all landscaping on the Bank site (the "Bank construction").

The Bank building is on a peripheral pad located on the perimeter of Parcel A adjacent to the street. The Bank construction is not part of the enclosed shopping center and is not included in the First Phase development. The Bank construction will be paid for with private funds administered by Bank. Bank will be solely responsible for obtaining bids, hiring contractors and providing supervision and oversight for the construction. Bank will be required to pay City all fees customarily required for such construction.

Discussion

Labor Code section³ 1771 generally requires the payment of prevailing wages to workers employed on public works. Section 1720(a)(1) 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" Section 1720(b) provides in pertinent part that "paid for in whole or in part out of public funds" means any of the following:

- (1) The payment of money or the equivalent of money by the state or political subdivision directly to or on behalf of the public works contractor, subcontractor or developer. ...

³ Subsequent statutory references are to the California Labor Code unless otherwise specified.

- (3) Transfer by the state or political subdivision of an asset for less than fair market price.
- (4) Fees . . . 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. . . .

In section 1720(c)(2), the Legislature has created a limited exception to the application of subdivision (b) where the developer of a private development is required, as a condition of regulatory approval of the development, to construct public works of improvement.

Developer is receiving the following three potential sources of public subsidies for the development of Parcel A and the development of Parcel B: the public financing of the Public Improvements, the capped fees and the transfer of Parcel B. The public financing of the Public Improvements is the payment of money or the equivalent of money by the state or political subdivision to or on behalf of the public works contractor, subcontractor or developer under section 1720(b)(1). If the fees imposed on Developer by City were to exceed the cap, a waiver of the fee amount above the cap would fall under section 1720(b)(4). Finally, the transfer of Parcel B for its fair reuse value of zero dollars is arguably a transfer of an asset for less than fair market price under section 1720(b)(3).

The coverage request asks only whether the Bank construction is a public work subject to prevailing wage requirements. The issue is whether the Bank construction is “paid for in part” out of public subsidies contributed to the Parcel A or Parcel B development. The answer to this question depends on a threshold inquiry whether the Bank construction is an integrated part of the Parcel A or Parcel B development, or a separate project.⁴

Here, the agreements between Developer and the public entities, the DA and DDA, do not obligate Developer to construct the Bank building. As noted, the Bank construction is not included in the minimum construction required of Developer under the DA. Development on Parcel A is deemed complete when certificates of occupancy issue for the First Phase, which does not include the Bank building. The remainder of the commercial development on Parcel A, including the Bank construction, is at Developer’s option. The transfer of Parcel B to Developer is tied to construction and financing of the First Phase development on Parcel A, which as mentioned above does not include the Bank building. The other office and retail development on Parcel B also is unrelated to the Bank construction. As such, the Bank construction is correctly viewed as being undertaken independently of the other construction undertakings on Parcels A and B. It also is being

⁴Bank contends that the Bank construction is a separate project under PW 2000-016, *Vineyard Creek Hotel and Conference Center/Redevelopment Agency, City of Santa Rosa* (October 16, 2000). While this matter was pending, the Department decided it would no longer designate public works coverage determinations as “precedential” under Government Code section 11425.60. Accordingly, *Vineyard Creek* no longer has precedential effect. While *Vineyard Creek* provided a useful analytical tool to assist in ascertaining whether an undertaking such as that involved here involved one or multiple projects for the purpose of determining the scope of coverage and the extent to which prevailing wage obligations apply under section 1720(a)(1), the factual analysis set forth herein accomplishes the same purpose. Public notice of the Department’s decision to discontinue the use of precedent decisions can be found at [http://www.dir.ca.gov/DLSR09-06-2007\(pwcd\).pdf](http://www.dir.ca.gov/DLSR09-06-2007(pwcd).pdf).

undertaken independently of the construction of the adjacent Public Improvements. The Public Improvements, while physically proximate to the Bank site, were built by contractors hired by Developer under contracts let and administered by Developer.

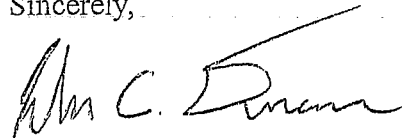
The Bank lease requires that Developer prepare the Bank site for construction and that the Bank building be architecturally and aesthetically compatible and harmonious with the other buildings in the shopping center. Otherwise, the Bank construction is a stand-alone undertaking. The Bank leased the Bank site from Developer at fair market rent in an arms-length transaction. The Bank building will be designed and constructed with bids and contracts administered by Bank, and built under different contracts with different workforces than those involved in the construction work undertaken by Developer and the other third party builders. And, as noted, the Bank construction is separately financed with private funds.

Based on the specific facts of this case, the Bank construction is sufficiently attenuated from the Parcel A development and the Parcel B development such that it should be viewed as a separate project.⁵ As a separate project, the Bank construction does not meet the definition of a public work because it will be paid for in whole with private funds. In sum, given its attenuation from the Parcel A development and the Parcel B development, it is concluded that the Bank construction is not publicly subsidized within the meaning of the prevailing wage laws.⁶

Based on the foregoing, the Bank construction is not a public work subject to prevailing wage requirements.

I hope this determination satisfactorily answers your inquiry.

Sincerely,



John C. Duncan
Director

⁵The development of Parcels A and B under the DA and DDA involves various construction undertakings by Developer and third-party purchasers and lessees. The analysis of whether any of these undertakings constitute public work, including the identification of any public subsidies that may qualify as payments out of public funds under section 1720(b), need not be performed because no matter the outcome of that analysis, the Bank construction, for the reasons provided herein, would nonetheless be viewed as a separate project.

⁶Bank also contends that while prevailing wages are required for the construction of the Public Improvements, section 1720(c)(2) otherwise exempts this development from prevailing wage requirements. Because of the conclusion reached herein that the Bank construction is a separate privately-funded project and therefore not subject to prevailing wages, the issue whether section 1720(c)(2) would otherwise apply need not be addressed.