STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS
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Re: Public Works Case No. 2007-010
Movie Theater Construction at Glendale Town Center
Glendale Redevelopment Agency

Dear Mr. Van der Nat:

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 of this case and an analysis of the applicable law, it is my determination that the construction of a movie theater at the Glendale Town Center by Pacific Theatres Exhibition Corp. is a public work subject to prevailing wage requirements.

Facts

The Glendale Town Center ("Center") is a mixed-use development located on a 15.5-acre parcel ("Site") in the City of Glendale ("City") adjacent to the Glendale Galleria. It includes commercial, entertainment and residential uses. It was originally proposed in 1996 by City as part of a downtown revitalization plan. In 2001, City and the Glendale Redevelopment Agency ("Agency") selected Caruso Affiliated Holdings, LLC ("Caruso") to develop the Center. City, Agency and Caruso worked together to create the Conceptual Site Plan, which specifically required: (1) gross retail leasable area of approximately 475,000 square feet; (2) 100 market-rate for sale housing units and 238 market-rate rental housing units; (3) a 3,500 seat movie theater; (4) a parking structure; and (5) improvements for open community space including a park, pedestrian promenade, streets, sidewalks and landscaping.

The planning and development milestones include: (1) execution of an exclusive negotiation agreement between City, Agency and Caruso in 2001 following a request for proposals;[1] (2) performance of an environmental impact review under the California Environmental Quality Act in July 2002; (3) approval by City on April 20, 2004; (4) execution of the original Disposition and Development Agreement ("Agreement") between Agency and Caruso on May 14, 2004; (5) approval by voters at a citywide special election on September 14, 2004; (6) completion of grading in October 2006; (7) assignment of Caruso's rights under the Agreement to The Americana at Brand, LLC ("Developer") and execution of the Amended and Restated Disposition and

[1]Information concerning the beginning of the planning and development process in 2001 is drawn from two unpublished Second District Court of Appeal opinions arising out of lawsuits involving the Center. *Caruso v. General Growth* (Not Reported in Cal. Rptr. 3d, 2005 WL 1538210); *Glendale Mall Associates v. City of Glendale, et al.* (Not Reported in Cal. Rptr. 3d, 2005 WL 3214845).

Development Agreement ("DDA"), incorporating the assignment agreement between Caruso and Developer, on November 20, 2006; (8) performance and completion of on schedule construction activities from approximately June 2006 through March 2008; and (9) grand opening of the Center in April 2008.

Under the DDA, Agency's financial contributions, valued at $77.125 million,[2] include: (1) $62.6 million in the acquisition and assembly of 15.5 acres of land: 8.5 acres was conveyed to Developer at no cost for the development of retail, theater and housing; 4 acres was leased to Developer for 55 years at an annual rent of $1 for additional retail and housing, and a 2,700 space parking structure; 3 acres was retained by Agency for open space, including a 2-acre public park in the middle of the Center; (2) site preparation including demolition and clearing of existing structures and rough grading; and (3) reimbursement to Developer of up to $12.7 million for "public improvements" on the 3 acres retained by Agency.

The chief obligation of Developer under the DDA, in return for Agency's contributions, was to construct all improvements in accordance with the Conceptual Site Plan, and to operate and maintain the Center. The DDA's "Scope of Development" contains seven specific parts including, *inter alia*, subpart C entitled THEATRE, which states:

> The Theatre shall be a first-class, state of the art, flagship motion picture theatre containing not in excess of 3,500 seats and not exceeding 70,000 SF. The Theatre shall be located on the Theatre Pad on the northeast corner of Central Avenue and Colorado Street as illustrated on Conceptual Site Plan. All the auditoriums shall be stadium-style seating. The Theatre shall be operated as one of the operating entity's flagship theatre complexes in Los Angeles County.

Developer undertook all construction called for in the Scope of Development except subpart C. The rights and obligations of Developer under the DDA pertaining to the movie theater were respectively assigned to and assumed by Pacific Theatres Exhibition Corp. ("Lessee") pursuant to an Assignment and Assumption Agreement ("AAA") entered into between Developer and Lessee on January 18, 2007.

The movie theater architectural plan had to be approved by Developer, City and Agency. Developer approved the plan and submitted it on behalf of Lessee to City and Agency for approval in 2005. At this design review and approval stage, Lessee had the right to terminate the lease if Lessee's cost to implement "City Mandated Revisions" exceeded $125,000 and Developer refused to pay the "Incremental Excess Cost." Although both conditions were met, Lessee did not terminate the lease, agreeing to pay the full cost to implement the City Mandated Revisions. Developer approved Lessee's final plans, including the interior of the movie theater, in 2007.

The movie theater was designed as a component of the architectural plan for the Center with interconnecting public walkways, open space and shared parking facilities. The main entrance to

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[2]See, The Health and Safety Code section 33433 Summary Report prepared by Keyser Marston Associates, Inc. in March 2004.

the movie theater opens out to the public park, which is one of the improvements for open community space identified in the Conceptual Site Plan.

Lessee's monthly rent for the initial lease term of 15 years is $67,483.33,[3] which Lessee asserts is at fair market value ("FMV") according to an analysis prepared by Marshall and Stevens, a New York valuation firm. The beginning of the lease term coincided with the grand opening of the Center including the movie theater. Construction of the Center's common areas and parking structure had to be completed before the movie theater could open for business.

In accordance with the lease and AAA, on March 28, 2007, Developer delivered to Lessee a rough-graded and compacted building pad with water, sewer, electrical, gas and storm drain utility stub-outs ("Theatre Pad").[4] Thereafter, construction of the movie theater by Lessee took place contemporaneously with the construction of other components of the Center by Developer. With all construction called for by the Scope of Development under the DDA, including construction of the movie theater, completed on schedule, the Center had its grand opening in the spring of 2008, as planned.

Discussion

Labor Code[5] 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 ... ." Senate Bill 975 (Stats. 2001, ch. 938, § 2, effective 1/1/02), as amended by Senate Bill 972 (Stats. 2002, ch. 1048, § 1, effective 1/1/03) ("SB 975/972"), added section 1720(b) to the statutory scheme expanding the definition of the phrase "paid for in whole or in part out of public funds" to include:

(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.

(2) Performance of construction work by the state or political subdivision in execution of the project.

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

(4) Fees, costs, rents ... 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.

....

[3]See, Retail Center Lease Agreement between Caruso Property Management, Inc. and Lessee entered into on July 31, 2003, and amended on January 27, 2005 and August 24, 2007.

[4]See, Retail Center Lease Agreement, Schedule 1 to Exhibit "12.3" and Second Amendment to Retail Center Lease Agreement, Section 3.1.

[5]All further section references are to the California Labor Code unless otherwise indicated.

Construction of the Center is a public work in that the three elements of section 1720(a)(1) are satisfied: the work entails construction and demolition; the work is done under contract; and Agency's various contributions summarized above - free land, below-market lease of land, site preparation and cash reimbursement - constitute payment in whole or in part out of public funds. City and Agency do not dispute this conclusion. Both City and Agency also take the position that public works status attaches to the movie theater construction because Lessee assumed Developer's obligations under the DDA in regards to the movie theater portion of the Scope of Development.[6] Lessee, however, for reasons more fully described below, argues that the construction of the movie theater is a separate project from construction of the other components of the Center by Developer and is not a public work because it is privately funded.

The primary inquiry here is whether there is one project or two projects, a word left undefined in section 1720. The numerous references to the word "project" in the SB 975/972 amendments confirm that the Director's identification of the scope of the project is a necessary step in determining coverage. Certainly, at a minimum, the scope of a project should include what Developer and Agency agreed to. Under the DDA, Agency contributed $77.125 million in financial assistance in exchange for construction of the Center, not in exchange for construction of the Center without the movie theater. The movie theater has been a key feature of this development since the beginning of the planning and development process as reflected in the Conceptual Site Plan. The DDA obligated Developer to build and deliver a completed, state-of-the-art and flagship theater. Through the AAA, Lessee took over Developer's responsibility as laid down by Agency.[7] Had Lessee terminated the lease, which it could have done after Developer refused to pay the Incremental Excess Cost, Developer would have been compelled to construct the movie theater. This shows Developer was ultimately responsible for the theater's construction. That Developer met its obligation through a contractual arrangement with Lessee does not change the statutory obligations owed to workers. See, *Lusardi v. Construction Co. v. Aubry* (1992) 1 Cal.4th 976. Based on the Developer and Agency's agreement to exchange public funds for construction of certain defined elements under the DDA, the construction of the Center, including the movie theater, is a single public works project paid for "in part" out of Agency's $77.125 million contribution to the overall development. Lessee's contention that the movie theater construction is a separate project is rejected because section 1720 provides no support for finding there to be two projects.[8]

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[6]See, Joint Report to City Council/Agency, City of Glendale, April 20, 2004, p. 7, Labor Provisions; and the letter of Gillian van Muyden, City Attorney's Office, City of Glendale, to DIR, August 31, 2007.

[7]This assignment principle is well settled. Civil Code sections 1457 and 1458 govern assumption of obligations and assignment of rights, respectively. Courts have generally noted that an assignment carries with it all the rights and obligations, particularly those obligations expressly assumed, of the assignor. "The assignment merely transfers the interest of the assignor. The assignee 'stands in the shoes' of the assignor, taking his or her rights and remedies, subject to any defenses that the obligor has against the assignor prior to notice of the assignment." *Case Eva I Homeowners Assn. v. ANI Construction & Tile, Inc.* (2005) 134 Cal.App.4th 771, 782; *Johnson v. County of Fresno* (2003) 111 Cal.App.4th 1087, 1096; *Witkin*, 1 *Summary* (10th), Contracts, § 735.

[8]Lessee emphasizes that it was unaware of any potential prevailing wage obligations because its original lease preceded the execution of the Agreement. Lessee, however, accepted Developer's obligation to construct the movie theater pursuant to the AAA, the execution of which was subsequent to the DDA.

Sections 1720(c) and 1720(d) contain the only statutory exemptions to the requirement to pay prevailing wages. *State Building and Construction Trades Council v. Duncan* (2008) 162 Cal.App.4th 289, 310. Section 1720(c) specifically addresses exemptions for an "otherwise private development project." For example, where the public agency's contribution is no more than for the cost of mandated public improvement work, only the public improvement work is subject to prevailing wage requirements under section 1720(c)(2). An "otherwise private development project" that receives only a *de minimis* public subsidy is exempt from prevailing wage requirements altogether under section 1720(c)(3). The Center, including the movie theater, is an otherwise private development project that has public works status by virtue of the fact that Agency contributed $77.125 million to its development and no statutory exemptions apply.

Lessee's first argument is that the movie theater construction is not paid for in whole or in part out of public funds because Lessee's lease is at FMV, and such a FMV transaction cuts off the flow of public subsidies from Developer to Lessee, a third-party developer that was neither a party to the DDA nor the party receiving the public subsidies. Lessee's proposition finds no statutory support. A particular project is either a public work or not. The exemptions set forth in 1720(c) and 1720(d) exempt projects or portions of projects, not parties, from application of prevailing wage requirements where the elements of a public work have been met. As stated above, none of the statutory exemptions apply. If the Legislature wanted to exempt FMV purchasers from prevailing wage requirements, it certainly knew how to do so.

Lessee relies on prior precedential public works coverage determinations to support its FMV argument. The Department no longer uses a precedential determination system.[9] Additionally, the prior determinations cited by Lessee were governed by the pre-SB 975/972 version of the statutory scheme. Moreover, the prior determinations do not stand for a general proposition that a FMV transaction automatically cuts off prevailing wage liability. Rather, in each case, the Department consistently examined the facts of each case to determine whether the construction carried out by a downstream developer who purchased land at FMV is a separate project or part of a single integrated project under the development agreement between an awarding body and the primary developer. See PW 2003-014, *Phase II Residential Development, Victoria Gardens, City of Rancho Cucamonga* (July 20, 2005); PW 2003-028, *Decision on Administrative Appeal, Baldwin Park Marketplace Project* (June 28, 2005); PW 2003-022, *Chapman Heights, City of Yucaipa* (January 30, 2004).[10] Here, the DDA obligates Developer to build a movie theater as part of its obligation to build the Center and a FMV theater lease transaction does nothing to alter Developer's obligation in any way. Defining the scope of the project as consistent with Developer's obligations under the DDA with Agency is not inconsistent with prior determinations.

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[9]Public notice of the Department's September 4, 2007, decision to discontinue the use of precedent decisions can be found at www.dir.ca.gov/DLSF/09-06-2007(pwcd).pdf.

[10]The Department's evaluation of a FMV transaction as only one consideration in the project analysis is similar to a federal statute governing the imposition of trade tariffs on foreign products imported to the United States. See, 19 U.S.C.A. § 1677(5). The federal statute rejects the notion that a FMV transaction automatically extinguishes previously conferred public subsidies. In determining whether the subsidies pass through the FMV transaction, the federal Commerce Department is required to examine the facts and circumstances of the sale to make specific findings as to whether the purchaser directly or indirectly received a financial contribution or benefit from the government. *Delverde, SRL, et al. v. U. S. (Borden, Inc., et al.)* (2000) 202 F.3d 1360.

Although this matter may involve a FMV transaction, it presents other facts not present in those determinations – facts that compel a different conclusion.

Lessee relies most heavily on the prior coverage determination in PW 2000-16, *Vineyard Creek Hotel and Conference Center, Redevelopment Agency, City of Santa Rosa* (October 16, 2000) in arguing that the movie theater construction is a separate project. Both Lessee and the requesting party argue their positions based on the following factors set out in *Vineyard Creek*: organization of construction; physical layout; oversight, direction and supervision; financing and administration; and general interrelationship. Lessee argues that the existence of two general contractors (one for the movie theater construction and another for the rest of the Center); the movie theater's erection on its own building pad; the limitation on Lessee's oversight, direction and supervision to the movie theater construction only; and the financing of the movie theater construction by Lessee demonstrates why the movie theater construction is a separate project. By contrast, the requesting party's analysis of those same factors reaches the opposite conclusion that construction of the entire Center, including the movie theater, is a single integrated project because it was developed in coordination with Developer and Agency as a single design plan; the movie theater is physically interconnected with the other components of the Center by walkways, open areas and shared common parking facilities; Developer and Agency had common approval authority over the architectural and on-site development plan of the Center, including the movie theater; without the financial contribution of Agency, there would be no Center, including the movie theater; and Agency prepared the entire Site for the Center including the 8.5 acres conveyed to Developer, which includes the Theatre Pad.

Performing the *Vineyard Creek* integration analysis would not result in finding that the movie theater construction is a separate project. As for the organization factor, although the movie theater construction was carried out by Lessee under a lease it asserts is at FMV, the more salient fact is that the entire Center was developed in coordination with Caruso, City and Agency as a single development plan under a single DDA and the movie theater construction was a required and key component of the plan from the beginning of the planning process; as for the physical layout factor, the movie theater is interconnected with the other components of the Center with walkways and open space and shared parking facilities; as for the oversight, direction and supervision factor, Developer, City and Agency exercised approval authority over the architectural plan of the movie theater; as for the financing and administration factor, the development of the Center was not feasible without the $77.125 million in public financial contributions; and, as for the general interrelationship factor, the construction schedule of the movie theater was dependent on the preparation and delivery of the Theatre Pad, and the opening of the movie theater was dependent on the completion of the common area, walkways and parking structure. The coordinated flow of planning, design, review, approval and construction activities - from the creation of the Conceptual Site Plan in 2001, through the delivery of the Theatre Pad to Lessee, to the grand opening of the Center in the spring of 2008 - would lead to the conclusion under *Vineyard Creek* that the movie theater construction is not a separate project.

Lessee's final argument is that the movie theater construction is really two separate projects, one consisting of the movie theater "shell" and the other consisting of the movie theater "interior." Lessee bases this argument on portions of the DDA indicating that Developer is not responsible for any retail tenant improvement work. Lessee analogizes the interior construction of the movie

theater to the tenant improvement work referred to in the DDA. Lessee appears to be arguing that even if the shell construction is subject to prevailing wages because shell work is the obligation of Developer under the DDA, the interior construction is not. There is, however, no factual support in the DDA for the division of the movie theater construction into two separate projects. The shell of the movie theater, without the required auditoriums and stadium style seating, simply cannot be operated as a first-class, state-of-the-art and flagship theater, as Agency required in return for its investments.

I hope this determination satisfactorily answers your inquiry.

Sincerely,

John C. Duncan
Director