STATE OF CALIFORNIA EDMUND G. BROWN JR., *Governor*

DEPARTMENT OF INDUSTRIAL RELATIONS
OFFICE OF THE DIRECTOR
1515 Clay Street, 17th Floor
Oakland, CA 94612
(415) 703-5050

To All Interested Parties:

Re: Public Works Case No. 2010-005
Atlantic Times Square, Monterey Park Redevelopment Agency

By mutual agreement to resolve the petition for writ of mandate in *Atlantic Times Square II, LLC v. Dept. of Industrial Relations, Christine Baker, et al.,* Los Angeles County Superior Court Case No. BS134212:

"In consideration of the settlement between Petitioners Atlantic Times Square II, LLC and the Successor Agency to the Monterey Park Redevelopment Agency ("Petitioners") and the DIR Division of Labor Standards Enforcement (DLSE) in Department of Industrial Relations Case No. 11-0211-PWH and all related DIR administrative prevailing wage enforcement cases stemming from the Coverage Determination underlying Petitioners' Writ Petition, the unique facts leading to the determination, and the dismissal of this action without prejudice, Petitioners and DIR stipulate that the Coverage Determination is vacated. Both parties expressly acknowledge that this stipulation to vacate the Coverage Determination is due to a settlement of the administrative proceedings between DLSE and Petitioners as well as a settlement of the Writ Petition between DIR and Petitioners, and that this stipulation is not an admission by Petitioners that the work at issue in this litigation was a public work or an admission by the DIR that the Coverage Determination was erroneous."

STATE OF CALIFORNIA Arnold Schwarzenegger, *Governor*

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

June 15, 2010

John S. Miller, Jr.
Cox, Castle & Nicholson LLP
2049 Century Park, East, 28th Floor
Los Angeles, CA 90067-3284

Re: Public Works Case No. 2010-005
Atlantic Times Square
Monterey Park Redevelopment Agency

Dear Mr. Miller:

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 Atlantic Times Square (the "Project") in the City of Monterey Park ("City") is a public work subject to prevailing wage requirements.

Facts

On or about November 17, 2004, Atlantic Times Square, LLP ("Developer")[1] entered into a Disposition and Development Agreement (the "DDA") with the City of Monterey Park Redevelopment Agency ("Agency") to undertake the Project: a mixed use development encompassing a shopping center and residential facility in City. Agency agreed to provide Developer with public subsidies including a below-market transfer of two parcels of land for $1 per parcel, payment of fees and costs imposed by City on Developer up to a maximum of $3.1 million, and a $3.5 million payment on completion of the Project. Developer agreed to dedicate 10 percent of the housing units to moderate income residents. The first construction contracts for site preparation work called for payment of prevailing wages.[2]

Developer obtained bids for further work and determined that the continuation of prevailing wage obligations would be economically infeasible. Consequently, in 2007, Developer renegotiated the public subsidy component of the DDA with Agency. The parties memorialized their new agreement in the Second Amendment to the Disposition and Development Agreement ("Second Amendment"). Under the Second Amendment, the description of the Project remained unchanged, but the public subsidies were converted into a market-rate loan referred to as the Mezzanine Loan. Also, the affordable housing requirement was eliminated. The Second Amendment and the Mezzanine Loan were entered into by Developer and Agency on June 29, 2007.

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[1]On January 11, 2007, Developer's interest was transferred to Atlantic Times Square II, LLP. All references to "Developer" are to Atlantic Times Square, LLP and Atlantic Times Square II, LLP.

[2]According to Developer, the work paid for with prevailing wages included site demolition and clearing, soil testing and temporary shoring.

The Mezzanine Loan does not provide that Developer will receive any funds. The Mezzanine Loan balance increases as Developer incurs expenses under the DDA, as amended. Developer's obligation under the Mezzanine Loan is to repay all public funds expenditures on the Project. The loan amount is capped at $8 million, which is itemized as follows:

- $1.15 million, the fair market value of the parcels transferred to Developer from Agency;
- $4.7 million in prior and future payments of fees and costs by Agency to City; and
- $2.15 million prior payment by Agency to Developer for infrastructure improvements.

The Mezzanine Loan is repayable at market rate interest, 1.5 percent above the Wall Street Journal Prime Rate. Interest accrues during construction. The accrued interest is due and payable one year after completion of construction. Interest continues to accrue until the principal is repaid. The principal is due and payable 15 years from the date of the Certificate of Occupancy.

Under the terms and conditions of the Second Amendment, in the event the Director of Industrial Relations or a court were to determine that the Project is a public work, Developer's repayment obligations under the Mezzanine Loan would be eliminated and Developer also would be eligible for an additional $8 million in public funds. In short, the Mezzanine Loan would become a grant of $16 million. As Developer describes this term and condition:

> [T]he parties have agreed to a nonpreferred, "fallback" position. The Redevelopment Agency has agreed to re-commit the public funds and to add material subsidies to the original agreement between the parties. The total subsidies to be provided by the Agency will exceed $16 million. If DIR determines that the Project is a public work, then the Mezzanine Loan is converted to a zero percent interest loan and repayment is waived.

Discussion

Labor Code section 1720, subdivision (a)(1)[3] defines "public works" as "[c]onstruction, alteration, demolition, installation, or repair work done under contract and paid for in whole or in part out of public funds ... ." There is no dispute that the Project entails "construction" "done under contract." The sole issue to be determined is whether the Mezzanine Loan is a payment of public funds.[4]

Subdivision (b)(1) defines "paid for in whole or in part out of public funds" to mean "[t]he payment of money or the equivalent of money by the state or political subdivision ... ." Subdivision (b)(4) defines "paid for in whole or in part out of public funds" to mean "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." Subdivision (b)(5) defines "paid for in whole or in part out of public funds"

[3]All further section references are to the Labor Code, unless otherwise specified. All further subdivision references are to the subdivisions of section 1720 unless otherwise specified.

[4]Because the Determination finds that the Mezzanine Loan entails a payment of public funds, it is unnecessary to address Developer's other question whether prevailing wage obligations on a public works project continue after the funding source for the project becomes wholly private.

to mean "[m]oney loaned by the state or political subdivision that is to be repaid on a contingent basis."

The Mezzanine Loan is a loan from Agency to Developer that is repayable at market rate interest. Based **solely** on consideration of the terms of the Mezzanine Loan, neither the loan nor the interest rate is charged at less than fair market value within the meaning of subdivision (b)(4) and, therefore, the Mezzanine Loan does not entail a payment of public funds.

Under the terms of the Second Amendment, however, if the Director or a court were to find that the Project is a public work, then the Mezzanine Loan's repayment obligations would be eliminated. The interest rate would be reduced to zero percent and repayment would be waived. By waiving repayment on the Mezzanine Loan and committing an additional $8 million to the Project, Agency in effect would be providing Developer with a $16 million grant.

The issue to be determined is whether the Mezzanine Loan is money loaned by Agency "that is to be repaid on a contingent basis" within the meaning of subdivision (b)(5). This determination turns on the provision of the Second Amendment that conditions repayment of the Mezzanine Loan on there being no finding by the Director or a court that the Project is a public work.

In determining the meaning of subdivision (b)(5), there is only some guidance from the courts. In *State Building & Construction Trades Council of California v. Duncan, et al.* (2008) 162 Cal.App.4th 289 ("*Trades Council*"), the Court briefly commented on subdivision (b)(5): "[W]hen the Legislature meant to refer to an exchange occurring in the future, it used language to reflect that expectation, as in subdivision (b)(5), which places within the definition 'Money loaned by the state or political subdivision *that is to be repaid on a contingent basis*.' (Italics added.)" (*Id.* at pp. 311-312 (citations omitted).)

Rules of statutory construction require that subdivision (b)(5) be given its plain meaning. (*McIntosh v. Aubry* (1993) 14 Cal.App.4th 1576, 1588-1589.) Merriam-Webster defines "contingent" as "dependent on or conditioned by something else <payment is *contingent* on fulfillment of certain conditions>." (Merriam-Webster Online Dictionary at <http://www.merriam-webster.com/dictionary/contingent> [as of June 10, 2010], italics added; see also, Webster's New World Dict. (3d college ed. 1989), p.301. ["dependent (*on* or *upon* something uncertain); conditional", original italics].) Repayment of the Mezzanine Loan is "dependent on or conditioned by something else [the Director's public works determination]." Therefore, according to the plain meaning of the phrase "contingent basis" in subdivision (b)(5), the Mezzanine Loan constitutes a payment out of public funds because Developer's repayment obligation is *dependent* on the Director's public works coverage determination.

It is important to note that subdivision (b)(5) does not have any limitations or restrictions. Its breadth appears to include any contingency tied to repayment. It is not for the Director to question the wisdom of the Legislature's word choice. The plain language of subdivision (b)(5) controls. As the Court in *Trades Council* cautioned, "[i]f there are blanks or gaps in section 1720, it is not for us to fill them." (*Trades Council, supra,* 162 Cal.App.4th at p. 323.) It should be underscored that Developer and Agency had absolute control over the terms of the Second Amendment and Mezzanine Loan and therefore had the ability to avoid this result by structuring their loan without a repayment contingency.

The repayment contingency here is in marked contrast to the contingency provision in PW 2004-035, *Santa Ana Transit Village* (June 25, 2007). In that case, the parties agreed that the developer could withdraw from the entire project if the Director determined the project to be a public work. While *Santa Ana Transit Village* involved a contingency that was dependent on a coverage determination by the Director, the contingency was not related to the developer's repayment obligation. It simply allowed the developer to back out of the project. Here, the contingency is directly related to Developer's repayment obligation.

For these reasons, and based on dictionary definitions of "contingent," the Project is "paid for in whole or in part out of public funds" because repayment of the Mezzanine Loan is contingent on the outcome of the Director's coverage determination or a similar decision by a court. Therefore, the Project is a public work subject to the payment of prevailing wages.

I hope this determination satisfactorily answers your inquiry.

Sincerely,

John C. Duncan
Director