

DEPARTMENT OF INDUSTRIAL RELATIONS

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To All Interested Parties:

Re: Public Works Case No. 2012-008

Ensemble Theatre Company, Inc.

City of Santa Barbara/Santa Barbara Redevelopment Agency

The Decision on Administrative Appeal, dated June 25, 2013, in Public Works Case No. 2012-008, *Ensemble Theatre Company, Inc., City of Santa Barbara/Santa Barbara Redevelopment Agency*, was reversed by the Santa Barbara Superior Court on May 5, 2015 in *Ensemble Theatre Company, Inc. v. Christine Baker, et al.*, Case No. 1468066. The Court found that the project was not a public work and therefore not subject to prevailing wage requirements.

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS

DECISION ON ADMINISTRATIVE APPEAL

RE: PUBLIC WORKS CASE NO. 2012-008
ENSEMBLE THEATRE COMPANY, INC.
CITY OF SANTA BARBARA/SANTA BARBARA REDEVELOPMENT AGENCY
CITY OF SANTA BARBARA

I. INTRODUCTION

On May 1, 2013, the Director of the Department of Industrial Relations (“DIR”) issued a public works coverage determination (“Determination”) in the above-referenced matter finding that the renovation of the Ensemble Theatre (“Project”) in the City of Santa Barbara (“City”) was a public work subject to prevailing wage requirements.

On May 30, 2013, Ensemble Theatre Company, Inc. (“Ensemble”) timely filed an Appeal of the Determination pursuant to section 16002.5(b) of title 8 of the California Code of Regulations (the “Appeal”). In responding to this appeal and to avoid repetition, the original Determination is incorporated by reference.

Ensemble is a professional theater company which is organized as a 501(c)(3) nonprofit corporation. Ensemble originally entered into a long term lease dated October 5, 2010, (the “Lease”), for an existing approximately 300-seat theater located at 33 West Victoria Street, Santa Barbara, California. Ensemble is renovating the Theater to construct new seating, restrooms, dressing rooms, and a stage house. Ensemble has privately raised funds for the Project to date.

Although the Determination stated the facts that were accurate at the time of the determination, those circumstances have changed. Thus, Ensemble’s Appeal is based upon the following factual and legal grounds:

Since the Determination was made, Ensemble has raised substantial additional funds toward renovation and remodeling of the theater. It projects that by year's end it will have raised \$11,500,000 toward the renovation portion of the campaign and \$4,500,000 for endowment, for a total of \$16,000,000.

Luria-New Vic, LLC, a California limited liability company, has purchased the Victoria Theater and has amended Ensemble's 30-year Lease to extend the term to 99 years. The amended lease obligates Ensemble to purchase an undivided 50% interest in the building for \$2,025,000. No portion of that purchase price has been paid by Ensemble. In exchange for favorable rent and increase of the term to 99 years, Ensemble agreed to purchase a 50% interest.

The Determination does not address the central contention made in Ensemble's letter that Ensemble's performance of the theater renovation is not a "public work" within the meaning of Labor Code Section 1720(a) because Ensemble is not required by the City to perform any physical work of construction on the theater. The renovation of the theater is not required consideration for the Grant. Ensemble's only obligation and requirement, in consideration for the Grant, is to provide services consisting of performing arts venue programming during a six year period.

II. RELEVANT FACTS AND CONTENTIONS

There is a Restated Grant Agreement ("Agreement") between the Successor Entity to the Redevelopment Agency, the City of Santa Barbara (City)¹ and Ensemble. Ensemble has now commenced renovations of the Theater to reconfigure the seating, restrooms, dressing rooms, and to improve the stage house. According to Ensemble's website, the work is expected to be done in October 2013.

City, through its City Council, has determined that there would be a substantial benefit to have the Agreement amended and restated to direct that \$950,000 be granted to Ensemble. It is presumed that the Agreement is now or will be amended to require only the provision of services as discussed below, as contended in Ensemble's Appeal. According to Ensemble, the Agreement does not require Ensemble to make any renovations to the Theater, or to purchase or install any furnishings and equipment for the Theater, and prohibits it from expending any grant funds for those purposes. Disbursement of the City grant funds will not be conditioned upon performing or

¹ The Redevelopment Agency was dissolved with the passage of AB1X26. The Agency is being wound down by its Successor Entity, City.

completing the Theater Renovations or upon the installation of any furnishings and equipment for the Theater. The Agreement does not grant City any right to review or approve plans for construction work.

As in the original agreement discussed in the determination, certain services to the community, pursuant to operating covenants set forth in the Agreement, require that Ensemble offer itself as a Performing Arts Venue for at least 100 days per year for a six-year period. Ensemble's obligations are defined to include:

- The operation of a multipurpose venue for performances of live theater, music, dance, dramatic productions and readings, and similar live performances;
- Local and regional performing arts presenters;
- National and international touring performing arts groups ranging from theatrical and musical performances, comics, contemporary pop acts and performance artists;
- Film presentations and festivals;
- Educational and outreach components for local youths and youth theater programs; and
- Making the Theater available to nonprofit and government agencies for civic events, and
- Meetings, conferences and conventions, performances, rehearsals and other community uses.

The Restated Grant Agreement will be secured with a deed of trust encumbering Ensemble's interest in the Theater. If Ensemble violates the Restated Grant Agreement, it must repay the grant funds to City.

Ensemble asserts that although the facts were correctly recited in the summary of facts in the Determination, the Determination then ignores those facts in reaching its conclusions. Ensemble argues that the grant funds are not assisting Ensemble "in obtaining the property" because it already controls the property. Therefore, there is no factual basis on which it can be concluded that "the grant funds ... assist Ensemble in obtaining the property that is being renovated or improved." With or without the grant funds Ensemble controls the theater and is obligated under its lease to effectuate the renovations. The grant funds do not reduce Ensemble's cost for the renovation of the

Theater either directly or indirectly. Therefore, there is simply no factual basis on which it can be stated that the grant funds "reduce Ensemble's cost for the renovation of the Theater ... "

Ensemble further claims that the Determination erroneously ignores an undisputed fact-a fact that is recited in the Determination's statement of facts-that with or without the grant funds Ensemble already controls the theater and with or without the grant funds Ensemble has already raised far more than the total cost of the renovations. The ultimate effect of the grant funds is not to assist Ensemble in acquiring the theater or making the renovations, but to ensure Ensemble has permanent ownership, as opposed to ownership "only" for 30 years, to create a sense of permanent presence and stability.

III. DISCUSSION

Labor Code section 1771² generally requires the payment of prevailing wages to workers employed on public works. Section 1720, subdivision (a)(1),³ defines "public works" generally under a three pronged definition: [c]onstruction, alteration, demolition, installation, or repair work done under contract, and paid for in whole or in part out of public funds...." Section 1720(b) states in relevant part: "[f]or purposes of this section, paid for in whole or in part out of public funds" means all 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" It is undisputed that the Project meets the first and second requirements for public works coverage, in that it constitutes "construction, alteration, demolition, installation, or repair work" and it is "done under contract." The last requirement is that it is "paid for in whole or in part out of public funds." The statutory requirement that the construction be performed "under contract" does not mean that the construction must be contractually required by a public entity. All that is required is that the Project is being subsidized, in part out of public funds, no matter how the parties to the agreement characterize the purpose of the funding. *Hensel Phelps Construction Co. v. San Diego Unified Port*

² All subsequent references are to the Labor Code unless otherwise specified.

³ Subsequent subdivision references are to section 1720.

District, (2011), 197 Cal. App. 4th 1020 (“*Hensel Phelps*”); *Azusa Land Partners, LLC v. Department of Industrial Relations* (2010) 191 Cal.App.4th 1 (“*Azusa*”)

Ensemble argues that the fact that the public funds will not be used to pay for the actual construction work is sufficient to avoid the requirement to pay prevailing wages. Under the restated facts that Ensemble has presented, now the grant funds will assist Ensemble in the provision of services required by the Agreement. This, as before, does not change the fact that the Project is receiving a substantial subsidy no matter how the funds are characterized or how the money is spent. As with the rent credits at issue in *Hensel Phelps* , the grant funds are designed to assist Ensemble in the Project and its operation. As a factual matter, both the rent credit in *Hensel Phelps* and the payment of grant funds here occur after construction but in either case they constitute a subsidy to the Project.

Ensemble argues that established law holds that construction which is incidental to the performance of services of behalf of a public agency, but which is not contractually required, is not a public work. Its letter analogized the Ensemble obligations to other cases in which incidental construction work was performed in connection with the provision of services for a public agency, including the services to emotionally disturbed minors discussed in *McIntosh v. Aubry* (1993), 14 Cal. App. 4th 1576, (“*McIntosh*”) and the community health care services provided in *Southwest Community Health Center, Construction of Tenant Improvements at 3569 Round Hill Circle, County of Sonoma*, Public Works Case No. 2010-008, April 8, 2010 (“*Southwest*”). Ensemble contends that in those cases it was held that there was no contract for construction within the meaning of Labor Code Section 1720(a). Likewise, Ensemble further contends that it is choosing to undertake the construction of facilities in order to perform public services required by a governmental grant agreement. Ensemble also states that it is under no contractual obligation to the City to undertake any construction and therefore is not undertaking a public work.

Both *McIntosh* and *Southwest Community Health Center*, however, have something in common as to the provision of services. Both cases were specifically decided with reference to Government Code section 26227. As noted in *Southwest*:

Particularly relevant to this case is *McIntosh's* discussion of Government Code section 26227. The court noted it is "arguably inconsistent" for counties to encourage private development of projects to provide public services of a type specified in that section and then to "subject such development to the financial disincentive of public works status." (*Id* at p. 1587.) The court concluded that the prevailing wage law "in its present form" excludes from "public works" "private construction needed to provide the services for which the public entity has contracted."

In Senate Bill 975 (stats. 2001, chapter 938), effective January 1, 2002, the Legislature overturned parts of *McIntosh*. For example, section 1720 now provides that rent forbearance and other rent subsidies constitute payment out of public funds for construction. (§ 1720, subd. (b)(4).) The Legislature did not expressly overturn the holding in *McIntosh* that payment of public funds for public services for which a county has contracted under Government Code section 26227 does not make incidental construction by a private provider of those services "public works."⁴ (Emphasis added.)

Ensemble claims that the Determination mischaracterizes the purpose for its citation of *McIntosh*, with regard to construction that is merely incidental to the provision of services. Ensemble also claims that the Determination's citation of *Hensel Phelps* as support for the contention that *Mcintosh* has been superseded by current law is irrelevant, as *Hensel Phelps* involved a contract between a public agency and a private party that required the private party to perform construction under a lease agreement, not a contract for public services.

Ensemble submits that *McIntosh* supports the conclusion, under all of the facts of this case, that the renovation of the theater is not a public work because it is not required pursuant to a contract with a public agency, and is only incidental to Ensemble's provision of performing arts programming services pursuant to the Agreement.

In *Hensel Phelps*, the Court found that public subsidies for a project did not have to be payment for actual construction but included a broad variety of subsidies specified

⁴ Government Code section 26227 provides, in pertinent part, the following:

The board of supervisors of any county may appropriate and expend money from the general fund of the county to establish county programs or to fund other programs deemed by the board of supervisors to be necessary to meet the social needs of the population of the county, including but not limited to, the areas of health, law enforcement, public safety, rehabilitation, welfare, education, and legal services, and the needs of physically, mentally and financially handicapped persons and aged persons. The board of supervisors may contract with other public agencies or private agencies or individuals to operate those programs which the board of supervisors determines will serve public purposes. . . .

in section 1720(b). As explained by the Court:

We also find no support in the statutory language for Petitioners' contention that a project does not constitute " 'construction ... done under contract' " unless the public agency pays the actual costs of construction rather than providing a different type of subsidy to the project. Indeed, the language of section 1720, subdivision (b) suggests that the opposite is the case. In defining the type of public subsidies that will render a project " 'paid for in whole or part out of public funds,' " the statute specifies numerous types of subsidies that, as a practical matter, cannot be used to pay the actual construction costs, but that can serve to reduce a developer's project costs. Among such subsidies are a public entity's (i) performance of construction work (§ 1720, subd. (b)(2)); (ii) transfer of an asset for less than fair market price (§ 1720, subd. (b)(3)); (iii) payment, reduction, forgiveness or waiver of fees, costs, rents, bond premiums or interest rates (§ 1720, subd. (b)(4)); and (iv) allowance of credits against payment obligations. (§ 1720, subd. (b)(6).) The Legislature's inclusion of these items would serve no purpose if the phrase "[c]onstruction ... done under contract" is understood to mean that the public agency must contract to pay the *actual costs* of construction. We will not adopt a statutory interpretation that renders meaningless a large part of the statutory language. (*Id.* at p. 1034.)


As noted, the funding of actual construction is not necessary to create a public work, only the payment of public funds to assist the viability of the Project. Ensemble contends that the use of public funds must be traced to the payment for construction work. The statutory scheme no longer requires such tracing, as was the case in *City of Long Beach v. Department of Industrial Relations* (2004) 34 Cal.4th 942, 954, and *Greystone Homes. v. Cake* (2004) 135 Cal.App.4th 1, 11. If this were the case, the new statutory scheme would be undermined. As noted in *Hensel Phelps* (at page 1032), "requiring the payment of public funds to be applied to the actual costs of construction would nullify many of the types of payments of public funds identified in section 1720, subdivision (b). We thus reject Greystone's approach in light of the current text of section 1720." Also, as presciently observed in *McIntosh*, "Legislators could easily express an intent to bring waived costs (or rent) within the concept of payment with 'public funds'

but have not done so.” (Id. at p. 1590.) The Legislature did this with the passage of SB 975 and SB 972.⁵

IV. CONCLUSION

In summary, for the reasons set forth in the Determination and in this Decision on Administrative Appeal, the Appeal is denied and the Determination affirmed. This Decision constitutes the final administrative action in this matter.

Dated: 7/25/2013


Christine Baker, Director

⁵ *Long Beach, Greystone and McIntosh* were all decided under the old version of Section 1720 that was supplanted by SB 975 and SB 972. As observed in *Hensel Phelps*, their holdings are based on the old statute, not the new one (at pp. 1030-31). As observed in *State Bldg. and Construction Trades Council v. Duncan* (2008) 162 Cal.App.4th 289, *McIntosh* in particular “generated repeated attempts in the Legislature to modify or overturn it. These efforts culminated in the passage of Senate Bill 975 in 2001. (Stats.2001, ch. 938, § 2.)” (Id. at p. 307.)