

DEPARTMENT OF INDUSTRIAL RELATIONS

Christine Baker, Director

Office of the Director

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To All Interested Parties:

Re: Public Works Case No. 2012-037
Cinema West Movie Theater and Related Facilities
City of Hesperia

The Decision on Administrative Appeal, dated July 15, 2013, in PW 2012-037, *Cinema West Movie Theater and Related Facilities – City of Hesperia*, was affirmed in a published First District Court of Appeal opinion dated June 30, 2017. See *Cinema West, LLC v. Baker* (2017) 13 Cal.App.5th 194.

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March 8, 2013

Ray Van der Nat, Esq.
Law Offices of Ray Van der Nat
1626 Beverly Blvd.
Los Angeles, California 90026

Re: Public Works Case No. 2012-037
Cinema West Movie Theater and Related Facilities
City of Hesperia

Dear Mr. Van der Nat:

This constitutes the determination of the Director of Industrial Relations regarding the 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 theatre and related facilities (Project) is a public work subject to prevailing wage requirements.

Facts

Since 2000, the City of Hesperia (City) has endeavored to build a movie theater within the city limits. In March of 2010, Hesperia Community Redevelopment Agency (Redevelopment Agency) Staff met with representatives of Cinema West, LLC, (Cinema West or Developer) regarding the City's desire to build a cinema within the City limits. Cinema West submitted a proposal to the Redevelopment Agency outlining plans for a 36,000 square foot, twelve screen digital theater on land that was owned by the Redevelopment Agency. Cinema West proposed building the theater on 54,248 square feet of a 4.86 acre section of land owned by the Redevelopment Agency (Project). The proposal outlined the following actions: 1) the Redevelopment Agency would sell 54,248 square feet of land to Cinema West for fair market value; 2) Cinema West would develop a 36,000 square foot, twelve screen theater on the land; 3) The Redevelopment Agency would build a parking lot on the remainder of the 4.86 acres for use by theater patrons; 4) The Redevelopment Agency would develop a water retention system for the theater and parking lot and would install off-site improvements to curbs, gutters and sidewalks.

On September 10, 2010¹, the Redevelopment Agency and Cinema West entered into a Disposition and Development Agreement (DDA) for the purpose of developing the Project. The DDA specified that Cinema West purchase 54,248 square feet of land from the Redevelopment Agency for its fair market value of \$1.89 per square foot or \$102,529.² Under the DDA, Cinema West would bear all costs related to improvement of the purchased property and construction of the

¹ DDA is dated September 7, 2010, but was not signed by Cinema West until November 2, 2010, or by the City until November 5, 2010.

² An appraisal was conducted by Thompson Appraisals, Inc. on July 26, 2010.

theater, with the exception of removing an existing stockpile of dirt, which was to be performed by the City. Under the DDA Cinema West was required to adhere to the Operating Covenant. In return, the Redevelopment Agency granted to Cinema West a forgivable loan in the amount of \$1,546,363.00 and agreed to repay the price of the purchase of the land. The Redevelopment Agency would be responsible for construction of a parking lot adjacent to the theater site for use by theater patrons on the remainder of the 4.86 acres not purchased by Cinema West. The Redevelopment Agency would retain possession of the parking lot after construction; however Cinema West would be responsible for its maintenance. The Redevelopment Agency assumed responsibility for implementing a water retention system that would serve both the parking lot and theater, as well as curb, gutter and sidewalk improvements. The parties also executed a Reciprocal Access and Parking Easement, which stated that the Redevelopment Agency would provide access to the parking lot to theater patrons. The parties agreed to use the same architect to coordinate the design and construction of the theater and the parking lot.

On December 20, 2011, City staff issued a report directed to the Mayor and the City Council.³ The Report urged the adoption of Resolution No. 2011-068, which authorized the execution of the Operating Covenant. The Resolution also granted Cinema West another \$250,000 forgivable loan. The loan was granted to partially cover a \$700,000 budgetary shortfall for the construction of the Project. It states that the City would forgive the \$250,000 loan after a 10 year period, during which time Cinema West must comply with the terms of the Operating Covenant. The revised Operating Covenant is dated December 12, 2011, and was executed in January 2012. Cinema West began construction on February 23, 2012, and the Cinema opened to the public on December 14 of that year.

Discussion

Labor Code section 1771⁴ generally requires the payment of prevailing wages to workers employed on public works. Section 1720, subdivision (a)(1),⁵ 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...."

Subdivision (b) provides:

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

³ The Development Agency was dissolved effective February 1, 2012, with the passage of AB1X26. The Agency is being wound down by its Successor Agency.

⁴ All subsequent references are to the Labor code unless otherwise specified.

⁵ Subsequent subdivision references are to section 1720.

(5) Money loaned by the state or political subdivision that is to be repaid on a contingent basis.

The developer disputes whether the Project is a public work because it disputes whether public funds within the meaning of subdivision (b) were used to construct the Project. There is no dispute, however, that the Project involves construction done under contract. While there is little discussion by Cinema West about the scope of the Project, it is clear that the requesting party considers the theatre construction, the parking lot improvements and the related infrastructure improvements to be a single project. Given the very specific terms of the DDA and the mutual agreements of the parties to construct all these improvements in tandem to serve the theatre complex there is no doubt the "Project" includes all the elements specified in the DDA to create a single complete and integrated theatre complex. (See *Oxbow Carbon & Minerals, LLC v. Department of Industrial Relations* (2011) 194 Cal.App.4th 538, 548-550.)

There are three separate sources of public funds utilized on the Project.

First, the one-time payment of the land purchase price in the amount of \$102,529 upon the filing of a notice of completion for the theatre to Cinema West constitutes the payment of public funds. There does not appear to be any conditions for this payment other than the filing of a notice of completion. This is a section 1720(b)(1) subsidy in that it is the payment of money . . . by the state or political subdivision directly to or on behalf of the public works contractor, subcontractor, or developer.

Second, there are two forgivable loans made by City to Cinema West in the amounts of \$1,546,363 and \$250,000 for a total of \$1,796,363. The forgivable loans are made pursuant to the DDA and under the terms of two operating covenants that require Cinema West to operate the theatre for 10 years. According to the Operating Covenants, the loans are to be forgiven at the end of the 10 year period. This is a section 1720(b)(5) subsidy in that it is money loaned by the state or political subdivision that is to be repaid on a contingent basis and is, therefore, also the payment of public funds.

Third, there is the construction of the adjacent parking lot, a water retention system for the theater and parking lot, and the installation off-site improvements to curbs, gutters and sidewalks. The requirements that City build the parking lot and other improvements is found in the DDA and the Reciprocal Access and Parking Easement attached thereto as Exhibit 11. There does not appear to be any repayment obligation attached to these improvements. These improvements are squarely within section 1720(b)(2) because they amount to "performance of construction work by the state or political subdivision in execution of the project."

Even under a narrower view of the "Project," the one-time payment reimbursing the land purchase price and the two forgivable loans are sufficient to conclude that the theatre, standing alone is a public work because it is being paid for, in part, with public funds in the form of a cash subsidy. (See *Hensel Phelps Construction Company v. San Diego Port District* (2011) 197 Cal.App.4th 1020, 1034 (*Hensel Phelps*)).

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 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.

The developer disputes that it received any public funding for construction but does not discuss the one-time payments, the two forgivable loans or the concurrent construction of public improvements to serve the theatre itself. The requesting party points to all three as sources of public funds under revised code section 1720(b)⁶ defining public funds for purposes of the prevailing wage law. (See, *State Bldg. and Constr. Trades Council v. Duncan* (2008) 162 Cal.App.4th 289, 319-320 (*Trades Council*). The funding of actual construction is not necessary to create a public work, only the payment of public funds or the provision of construction services that serve to reduce the developer's costs is necessary and both are present in this case.

For the foregoing reasons, the Project is a public works subject to the prevailing wage requirements of the Labor Code.

I hope this determination satisfactorily answers your inquiry.

Sincerely,



Christine Baker
Director

⁶ Section 1720 (b) was amended by Senate Bill 975 (Chapter 938, Statutes of 2001) and again by Senate Bill 972 (Chapter 1048, Statutes of 2002).