

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



May 1, 2013

John Prager
Lusardi Construction Company
1570 Linda Vista Dr.
San Marcos, CA 92078

RE: Public Works Case No. 2012-041
Volkswagen of Palm Springs
City of Cathedral City

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 construction of the Volkswagen of Palm Springs automobile dealership ("Project") is a public work subject to prevailing wage requirements. Furthermore, it is my determination that the scope of the construction subject to prevailing wage requirements is the entirety of the Project.

FACTS

The Project entails the construction of a Volkswagen automobile dealership in Cathedral City in the County of Riverside by M&M Property Company, LLC ("M&M" or "Developer"). On June 22, 2011, M&M entered into a Disposition and Development Agreement ("DDA") with the Redevelopment Agency of the City of Cathedral City ("Redevelopment Agency") for a 3.09 acre parcel of land ("the Land") located on East Palm Canyon Drive. The Redevelopment Agency placed the "fair reuse value" of the Land at zero dollars, and under the terms of the DDA, M&M was required to construct a car dealership on the property.

Prior to entering into the DDA, the Redevelopment Agency prepared a report pursuant to Health and Safety Code section 33433, finding that the fair market value of the Land at its highest and best use is \$1,077,000. The Redevelopment Agency explained that it expected to receive fair reuse value of the Land, which was substantially lower than the fair market value, because M&M and its contractors would be subject to particular obligations, limitations, and burdens in developing the Land. After executing the DDA, M&M hired Cushman & Wakefield to appraise the property. Cushman & Wakefield estimated that the Land's fair market value "as vacant and available for sale" is \$1,700,000.

The relevant terms of the DDA state that the Project consists of "the shell of a building to be utilized as an automobile showroom of not less than ten thousand (10,000) square feet, and related facilities, paved areas for automobile display and parking and landscaping, but excluding Tenant Improvements." Additionally, the DDA states that the Project is considered a public work and must comply with federal and state laws, including the payment of prevailing wages.

Cathedral City ("City"), as the successor to the Redevelopment Agency, deeded the Land to M&M on June 28, 2012, without any monetary consideration. The building construction is being financed by M&M and it does not appear that any part of the construction is financed by public funds.

M&M selected Lusardi Construction ("Lusardi") to construct the car dealership on the property. As of December 2012, Lusardi intends to designate as tenant improvement work the steel stud and drywall work, the interior plumbing and toilet partition work, air conditioning and related mechanical work, acoustical ceiling installation, inside painting, floor covering and tile work, and all other similar work inside the shell building. Lusardi began construction of the shell building on December 6, 2012 and construction of the tenant improvements were scheduled to begin in February 2013.

DISCUSSION

The Land as Payment of Public Funds

Labor Code section 1771¹ generally requires the payment of prevailing wages to workers employed on public works. Section 1720, subdivision (a)(1)² defines public works to include: "Construction, alteration, demolition, installation, or repair work done under contract and paid for in whole or in part out of public funds..." Subdivision (b)(3) provides, in part, that "'paid for in whole or in part out of public funds' means...[t]ransfer by the state or political subdivision of an asset of value for less than fair market price."

Where the transfer of real property is involved, "fair market price" is "synonymous with fair market value." (Public Works Case No. 2003-040, *Sierra Business Park/City of Fontana* (January 23, 2004), p. 3.) Fair market value is defined as "the value of the land at its highest and best use as determined by a bona fide appraisal." (Public Works Case No. 2004-035, *Santa Ana Transit Village/City of Santa Ana* (December 5, 2005), p. 2.) In contrast, "fair reuse value" is "a term unique to redevelopment projects... [and] assumes the proposed restrictions in the disposition and development agreement on the use of the property, and thereby distorts the property's value such that a market-based appraisal is not possible." (*Id.* at p. 5.) In the context of public works coverage determinations, "fair reuse value" is not mentioned anywhere in the Labor Code. (*Ibid.*)

It is undisputed that the Project is construction work being done under contract. In fact, M&M's contract with Lusardi is the only construction contract. The issue is whether the transfer of the Land from City to M&M for zero dollars constitutes a payment of public funds as defined by subdivision (b)(3).

The Project is a public work because the Land is a transfer of an asset of value for less than fair market price. Lusardi argues that the Project is not a public work because the fair reuse value of the Land is zero dollars and is therefore not "an asset of value" for purposes of subdivision (b)(3). However, fair reuse value is not equivalent to fair market price and both terms cannot be used interchangeably. In this case, the fair reuse value of zero dollars reflects the particular restrictions

¹ Subsequent statutory references are to the Labor Code unless otherwise indicated.

² Subsequent subdivision references are to section 1720.

on the Land as a result of the DDA. Section 2.02 of the DDA itself describes the fair reuse value of the Land as "burdened with the requirements of this Agreement." Thus, the fair reuse value is a valuation that is subject to the unique limitations that have been placed on the Land, and determined in a private negotiation between the Redevelopment Agency and M&M, not in a competitive market environment. In order for a transfer of real property to be considered at fair market price within the meaning of subdivision (b)(3), there must be evidence that the purchase price is determined by the competitive forces in the market. (*Santa Ana Transit Village, supra*, at p. 6.) In this case, the purchase price of zero dollars was not determined by competitive market forces, but rather by private parties based on the agreed-upon restrictions that were placed on the property.

The Land's fair market price, as determined by both the Agency and Cushman & Wakefield, is over \$1 million. Therefore, the deeding of the Land for no consideration is a transfer of an asset of value for less than fair market price, making the Land a payment of public funds and the Project a public work subject to prevailing wage laws.

The Scope of Construction

For purposes of subdivision (a)(1), the scope of construction includes the "complete integrated object," which is composed of individual parts. (*Oxbow Carbon & Minerals, LLC v. Dep't of Indus. Relations* (2011) 194 Cal.App.4th 538, 549.) Numerous subdivisions of section 1720 refer to construction in terms of a complete product, and never limit the term to the individual pieces of a whole. (*Ibid.*)

Parties cannot designate individual parts of a project to be a public work by breaking up the scope of construction into separate tasks and then contracting around the prevailing wage law. (*Id.* at p. 550.) The obligation to pay prevailing wages flows from the statutory duty embodied within the prevailing wage law and cannot be based solely on contractual provisions. (*Lusardi Construction Co. v. Aubry* (1992) 1 Cal.App.4th 976, 986-988.)

The Project's scope of construction consists of the shell building and the tenant improvements because both are the individual parts that form the "complete integrated object." Lusardi contends, in the alternative, that the only part of the project that is subject to compliance with the prevailing wage requirements is the shell building because the DDA specifically states that the Project consists of "the shell of a building...but exclud[es] Tenant Improvements...The Tenant Improvements are not covered by this Agreement, and the Agency will not be providing any assistance in connection therewith."

However, the problem with Lusardi's contention is that it assumes that a single construction project can be broken down into smaller tasks which can subsequently be designated as a non-public work by a contracting local public agency. For one, the scope of construction includes "the entire process, including construction of basements, foundations, utility connections and the like..." (*Oxbow, supra*, at p. 549, citing *Priest v. Housing Authority* (1969) 275 Cal.App.2d 751, 756.) The "entire process" of the Project cannot be separated into the construction of a building's structure (the shell building) and the construction that takes place within the building (the tenant improvements). According to Lusardi, the tenant improvements include the steel stud and drywall work, the interior plumbing and toilet partition work, air conditioning and related mechanical

Letter to John Prager
Re: Public Works Case No. 2012-041
Page 4

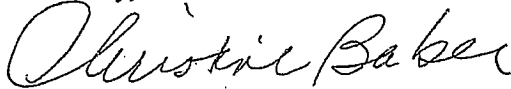
work, acoustical ceiling installation, inside painting, floor covering and tile work, and all other similar work inside the shell building. The tenant improvement work is central to the operation of the car dealership and together with the shell building, forms the "complete integrated object" – the project of constructing a car dealership. As outlined in the DDA, the purpose of the Project is the completion of a car dealership, which is not comprised merely of a vacant building structure. Additionally, both the shell building work and the tenant improvements are being completed at a single location, by the same contractor (Lusardi) and under the same contract, indicating a minimal level of integration of the work. Thus, the scope of construction includes the tenant improvements.

Secondly, Lusardi and the Agency cannot contract around the prevailing wage law. Contracting parties cannot simply determine the scope of construction and decide that one part of the construction is not subject to prevailing wage laws. As the *Lusardi* court pointed out, awarding bodies and contractors often have strong incentives to avoid the prevailing wage law and as a result, structure their contracts to circumvent it. (*Lusardi, supra*, at pp. 987-988.) In effect, the DDA does exactly that. It determined that the Project would consist only of the construction of the shell building, and not the tenant improvements. It also determined that only the shell building would constitute a public work. Lusardi's obligation to pay prevailing wages on the Project stems from the statutory requirements of the prevailing wage law, and not from the contractual provisions of the DDA.

Finally, a local public agency's decision as to whether a project is a public work is neither binding nor conclusive. (*See, e.g., Lusardi, supra*, at p. 995) ("The acts of one public agency will bind another public agency only when there is privity, or an identity of interests between the agencies.") (citing *City and County of San Francisco v. Grant Co.* (1986) 181 Cal.App.3d 1085, 1092.) In this case, the Redevelopment Agency's designation of only the shell building as a public work in the DDA is not binding on the Director, who is not in privity with the Redevelopment Agency and whose interests are divergent from the Agency.

I hope this determination satisfactorily answers your inquiry.

Sincerely,



Christine Baker
Director