

DEPARTMENT OF INDUSTRIAL RELATIONS

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Paul Talbot, City Manager

City of Monterey Park

320 West Newmark Avenue

Monterey Park, CA 91754

RE: Public Works Case Number 2012-045  
Monterey Park Towne Centre  
City of Monterey Park

Dear Messrs. Talbot and Weiner:

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 the Monterey Park Towne Centre in the City of Monterey Park (Project) is not a public work subject to prevailing wage requirements.

### Facts

The proposed Project, commonly referred to as the Monterey Park Towne Center, is a proposed mixed-use development in the City of Monterey Park (City) comprised of six contiguous parcels, owned in fee by Magnus Sunhill, LLP (Developer) and consisting of approximately 2.15 acres. The Project will consist of seventy-one thousand (71,000) square feet of leasable retail space and one hundred and fourteen thousand (114,000) square feet of rental residential condominiums.

The parties entered into a Development Agreement (Agreement) on August 17, 2012. Under the terms of the Agreement, Developer will effectuate the financing, permitting construction, completion, leasing and maintenance of the Project and shall bear all costs relating thereto. As a condition of regulatory approval<sup>1</sup> for the Project, City is requiring the Developer to perform and construct certain public improvements and infrastructure work currently estimated to cost \$650,000.

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<sup>1</sup> Pursuant to Section 1720(c)(2), the City may use public funds for "public work of improvement [required] as a condition of regulatory approval of an otherwise private development project" but has explicitly declined to do so.

The Agreement provides that no public funds may be used toward any aspect of this privately-funded Development, including the contractually required public improvement work. "The Developer shall be responsible for any and all costs, including change orders, for the Public Improvements Construction." In addition, Developer has waived all claims against the City associated with all "costs and delays attributable to City requirements and administration .... and recognizes that it is the Developer's responsibility to obtain all financing for the Project.. " As noted in the City staff report concerning the Agreement, "the City is not . . . contributing any financial support to the project or development agreement."<sup>2</sup>

#### Previous Agreement and Project

##### A. 2006 Owner Participation Disposition and Development Agreement

The Development Agreement references a 2006 Owner Participation Disposition and Development Agreement (OPDDA) between the Developer and the Monterey Park Redevelopment Agency (Agency.). During the planning of construction of the Project commercial real estate development experienced an economic downturn. These economic conditions, in addition to Developer's pending payments of relocation expenses to tenants at the proposed project site, resulted in the Agency extending a Bridge Loan (Loan) for six months. The Promissory Note was negotiated by Developer and Agency. It set the interest rate at the sum of the "Prime Rate" plus one and one half percent (1.50). The Loan was personally guaranteed by David Wan and David Tsai, Developer's managers. The project was not able to move forward before the Agency was dissolved pursuant to the redevelopment agency dissolution legislation, AB 1x 26, enacted in 2011.<sup>3</sup> As a result the OPDDA was fully terminated and the Promissory Note was eventually repaid in full with all accrued market rate interest.<sup>4</sup>

The OPDDA also set forth conditions under which City would acquire the parcels that comprised the Project and transfer them to Developer. However, the conditions did not come to pass and

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<sup>2</sup> City Staff Report, "Consideration of Towne Center Development Agreement between City and Magnus Sunhill.

<sup>3</sup> California municipal redevelopment agencies were dissolved by the enactment of Assembly Bill ABX1 26 which became effective February 1, 2012. City now acts in the capacity of and as a successor agency to the former Monterey Park Redevelopment Agency.

<sup>4</sup> The relevant discussion centers on the Second Amended and Restated Promissory Note ("Bridge Loan") dated August 6, 2008, which states that interest shall accrue at the Prime Rate as quoted in the Wall Street Journal on August 6, 2008 plus 1.5%. The Second Amended and Restated Continuing Guaranty ("Guaranty") dated November 5, 2008, states that the Guarantors are responsible for "the full and prompt payment of all ... late charges, Default Rate interest ..."

As noted in the Agreement executed by Developer, City, and Agency on January 30, 2012, Magnus agreed to pay the total amount of the Bridge Loan. As part of the Agreement, the City and Agency agreed to accept payment of the principle amount of the Bridge Loan plus interest, without any late fees, as settlement of the City's claim against Magnus for the outstanding amount owed. According to the terms of the Bridge Loan, the interest was calculated at prime plus 1.5%. The Agency's calculation of the amount owed equaled \$3,053,529.54 in principal plus \$404,251.40 in interest, for a total of \$3,457,780.94. Magnus paid the full amount calculated by Agency.

Developer acquired all the parcels itself from willing sellers at fair market value. In February 2012, Developer proposed the current Project to the City.

#### B. The Parking Lot Parcel

On January 30, 2012, City sold the sixth and final parcel, which it used as a parking lot, to Developer (parking lot parcel). City had been utilizing the parcel as a parking lot. Negotiations for the parcel were conducted by the parties at arm's length and the price paid by the Developer was at Fair Market Value as determined by an independent third party appraiser.<sup>5</sup>

Section 4 of the Agreement of Purchase and Sale and Escrow Instructions (PSA) expressly conditioned the sale of the parcel on the City's approval of the Development Agreement, which was then being negotiated between the Parties. Consequently, the City continued to use the parcel as a parking lot until May of 2012, when the Agreement was approved. The Developer did not wish to use the parking lot and expressed to the City that the parking lot would be closed, torn out, and the parcel fenced off. At that time, the City requested and Developer agreed to a Lease Agreement<sup>6</sup> (Lease) whereby the City would continue to have full use of the parcel as a public parking lot and to pay an annual rent until the Developer obtained all building permits and commenced construction. City would also hold an exclusive right, but not an obligation, to repurchase the parcel if Developer failed to commence construction by May 2013.

Under Article 4 of the Lease, the City's only other obligation as Tenant, besides paying rent, pertains to Operation and Maintenance of the Parking Lot and parcel until the Lease is terminated or expires. The cost associated with this obligation includes "all reasonable, out-of-pocket costs and expenses incurred ... in operating, lighting, providing all utility services to, insuring, repairing and maintaining the Parking Lot Parcel."

#### Discussion

Labor Code section 1771<sup>7</sup> generally requires the payment of prevailing wages to workers employed on public works. Section 1720, subdivision (a)(1) 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: "[ 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. . . .
- (3) Transfer by the state or political subdivision of an asset of value for less than fair market price. . . .

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<sup>5</sup> The purchase price was \$1,840,000.

<sup>6</sup> Lease Agreement between Magnus Sunhill Group, LLC and the City of Monterey Park.

<sup>7</sup> All citations are to the California Labor Code; all subdivision references are to the subdivisions of Section 1720 unless otherwise specified.

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 the Project be "paid for in whole or in part out of public funds" is the sole issue in this case.

The Project is not a Public Work under Labor Code Section 1720 Because  
There is No Payment of Public Funds Within the Meaning of Subdivision (b)  
Paying for the Project

The first issue is whether the parties' agreement regarding late fees or default rate interest under the agreement is the type of fee or interest waiver that is contemplated by subdivision (b)(4). As noted above, the Developer paid what appears to be market rate interest for the life of the loan while paying the principal in full. In *McIntosh v. Aubry* (1993) 14 Cal.App.4<sup>th</sup> 1576 ("*McIntosh*"), the Court addressed the issue of waived interest and fees. In that case it was contended that interest was lost on County funds because it did not charge interest for bond premiums that would be required to be repaid if the total project cost exceeded \$5 million. Also, the fees not charged in *McIntosh* were for inspection costs that the county absorbed. SB 975 was passed (Sen. Bill No. 975, Chapter 938, Statutes of 2001, §2) to address those types of fee waivers, not contractual interest and penalties related to a promissory note that were disputed between and then resolved by the parties at market rate interest as part of an overall settlement. As observed in *State Bldg. and Construction Trades Council v. Duncan* (2008) 162 Cal.App.4<sup>th</sup> 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." (p. 307.) It is reasonable to conclude that the Legislature has the types of fee and inspection costs at issue in *McIntosh* in mind when it passed the legislation. The issue of default rate interest and penalties arising from overdue promissory note payments was not addressed in the *McIntosh* opinion.

This interpretation comports with the legislative intent behind the new definition of public funds contained in SB 975. As noted in the last bill analysis prepared before the bill was passed:

This bill establishes a definition of "public funds" that conforms to several precedential coverage decisions made by the Department of Industrial Relations. These coverage decisions define payment by land, reimbursement plans, installation, grants, waiver of fees, and other types of public subsidy as public funds. The definition of public funds in this bill seeks to remove ambiguity regarding the definition of public subsidy of development projects. (Senate Rules Committee, Office of Senate Floor Analysis, Senate Bill No. 975 as amended August 30, 2001, (September 5, 2001).

The only prior coverage decision arguably dealing with the forgiveness or other resolution of penalties and interest related to a promissory note was the administrative determination leading to *McIntosh* that dealt with potential lost interest due to the loan of money to purchase a surety bond for the project.<sup>8</sup> The Court found that argument too speculative even if covered by the former version of section 1720.

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<sup>8</sup> Before 2002, and at the time of the decision in *McIntosh*, the prevailing wage law did not define the phrase "paid for in whole or in part out of public funds." It was not until the passage of Senate Bill (SB) 975 (Chapter 938, Statutes of 2001) that the Legislature more fully defined "public funds."

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In *Hensel Phelps Construction Co. v. San Diego Unified Port District* (2011) 197Cal.App.4th 1020, 1034 (*Hensel Phelps*), the public agency sought to build or have built a hotel on a waterfront parcel of land. (*Hensel Phelps*, 197 Cal.App.4th at 1024.) In furtherance of this, District entered into a lease of the land with a private tenant that would build the desired hotel, which lease provided for \$46.5 million in rent credits for the land from the public agency to the tenant. (*Id.* at 1025.) The Court of Appeals held that it need not be shown that the rent credit paid for actual construction costs in order for the project to be "paid for in whole or in part out of public funds." In the present case the loan was repaid prior to the commencement for construction so there is no evidence that the Project itself was paid for with public funds.

The Project is not receiving public funds as defined by subdivision (b). Other than the loan, at a market rate of interest which was fully repaid, neither this project nor its predecessor has any received any public funds or subsidies.

A. The Lease of the Parking Lot Parcel Does not Create a Public Work

The second issue is whether the sale and lease back of the parking lot or its continuing maintenance by City creates a public work. City sold the parking lot for \$1,840,000.00. It then leased the parking lot back, pursuant to the Agreement and the Lease between the City of Monterey Park and Magnus Sunhill, LLP dated May 29, 2012. City is leasing the parking lot parcel back from the Developer until construction begins. The Lease requires the City to pay the Developer \$1 per year in rent and to maintain the parking lot. The lease requires the City to maintain and operate the parking for the period of the lease. As such, City is paying for maintenance of property it will use and control for the lease period, as such this private development project is not subject to prevailing wage requirements.

For the foregoing reasons, the Monterey Park Towne Centre Project is not a public work within the meaning of section 1720.

I hope this letter satisfactorily answers your inquiry.

Sincerely,



Christine Baker  
Director

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