STATE OF CALIFORNIA GAVIN NEWSOM, *Governor*

DEPARTMENT OF INDUSTRIAL RELATIONS
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To All Interested Parties:

Re: Public Works Case No. 2011-021
Westrust Nut Tree Project
City of Vacaville and Vacaville Redevelopment Agency

The Decision on Administrative Appeal, dated June 25, 2015, in PW 2011-021, *Westrust Nut Tree Project – City of Vacaville and Vacaville Redevelopment Agency*, was affirmed in an unpublished First District Court of Appeal opinion issued on March 15, 2019. (See *Nut Tree Holdings, LLC v. Baker* (Mar. 15, 2019, A150087) 2019 WL 1219454 [nonpub. opn.].)

STATE OF CALIFORNIA

DEPARTMENT OF INDUSTRIAL RELATIONS

DECISION ON ADMINISTRATIVE APPEAL

RE: PUBLIC WORKS CASE NO. 2011-021
WESTRUST NUT TREE PROJECT
CITY OF VACAVILLE
AND VACAVILLE REDEVELOPMENT AGENCY

I. INTRODUCTION

On August 8, 2014, the Director of the Department of Industrial Relations (the "Director") issued a public works coverage determination (the "Determination") in the above-referenced matter finding that the Westrust Nut Tree Project was funded in part with public monies and is therefore a public work subject to the California prevailing wage requirements. On September 4, 2014, Nut Tree Holdings, LLC ("Nut Tree Holdings") timely filed a notice of appeal of the Determination ("Appeal"), which included a request for a hearing. All interested parties were thereafter given an opportunity to provide legal argument and any additional supporting evidence. Nut Tree Holdings filed opening and reply submissions in support of the Appeal, and the Northern California Carpenters Regional Council ("NCCRC") filed an opposition.[1]

The Director has sole discretion to decide whether to hold a hearing. (Cal. Code Regs., tit. 8, section 16002.5, subd. (b).) Because the material facts are not in dispute and the issues raised on appeal are solely legal, the request for a hearing is denied.

All of the submissions have been reviewed in detail and given careful consideration. For the reasons set forth in the Determination, which is incorporated into this Decision on Administrative Appeal ("Decision"), and for the additional reasons set forth and discussed in detail below, the Appeal is denied and the Determination is affirmed.

[1] Nut Tree Holdings filed its Reply memorandum on December 23, 2014. Thereafter, Nut Tree Holdings filed two additional submissions in support of its appeal – a further legal memorandum, titled "DIR Determination – Legal Overview," submitted via email on March 11, 2015, and email correspondence with an attached "consultation report" submitted on May 12, 2015. Each of these further submissions operated by statute to extend the time for this Decision. (See Labor Code §1773.5(c).)

II. SUMMARY OF RELEVANT FACTS.

The development project at issue in this proceeding, hereinafter referred to as the "Westrust Nut Tree Project," is an approximately 76-acre mixed use development located near the Interstate 505/Interstate 80 interchange within the City of Vacaville. From the early 1920's, there were family-friendly road-side attractions at the site, including gift shops selling dried fruit, nuts and souvenirs, an ice cream pavilion, and a miniature railroad. The genesis of the project at issue here was in November of 2000, when the Vacaville Redevelopment Agency ("the Redevelopment Agency") purchased a 76-acre site (the "Nut Tree Site"), which was within a Redevelopment Project Area and subject to a Redevelopment Plan, for approximately $7,880,000. The purpose was to rejuvenate the historic attractions, many of which were in disrepair or vacant, and to further develop and to modernize the site in order to benefit the economic development of the City of Vacaville as a whole.

On February 4, 2003, the Vacaville Redevelopment Agency entered into a Disposition and Development Agreement ("the Original DDA") with the City of Vacaville ("the City") and an entity known as Nut Tree Associates, LLC, a Delaware limited liability company ("Nut Tree Associates") for development of the Nut Tree Site. In general terms, the Original DDA contemplated a long term, multi-phase, mixed use development project that would ultimately include substantial retail uses, a public attraction area that would incorporate the historic Nut Tree Train, a carousel, landscaping and other attractions (commonly referred to as the "Family Park"), the historic Harbison House (operated as a museum), high-end restaurants, offices, a business hotel, residential units, and a conference center/hotel. To facilitate the development and to fund the infrastructure improvements necessary to serve the project, the Original DDA provided for the formation of the Nut Tree Assessment District, through which infrastructure costs would be assessed among the various property owners. In exchange for the agreement of Nut Tree Associates to develop the Nut Tree Site according to the terms of the Original DDA, and the development plan incorporated therein, the Agency and the City agreed to sell parcels within the property to Nut Tree Associates, in portions over time, at a uniform cost of $2.20 per square foot (later increased to $2.34 by amendment), plus the costs of assessments, which was expressly recognized within the Original DDA to be less than the price that could potentially be obtained for some portions of the land. In addition, the Agency agreed, *inter alia*, to pay all Development Impact Fees for the non-residential components, agreed to pay $3,000,000 of Nut

Tree Associate's share of the Assessment District assessments, and sold Nut Tree Associates the historic Nut Tree Train for $1.00.

Over the next five years, the Original DDA was amended four times – on February 23, 2005 (Amendment No. 1), July 26, 2005 (Amendment No. 2), November 15, 2007 (Amendment No. 3) and September 24, 2008 (Amendment No. 4). Although the Amendments made various changes with respect to the timing and phasing of the development, and with respect to some of the planned uses (e.g., Amendment No. 4 replaced the planned business hotel with attraction retail and restaurant uses), the long term master plan for the Nut Tree Site remained essentially the same. Overall, under the terms of the Original DDA and its Amendments, the Vacaville Redevelopment Agency contributed approximately $16.7 million of public funds to the Nut Tree project and prevailing wages were paid for much of the construction work on the site.[2]

Commencing as early as 2005, an additional developer entity, Nut Tree Retail, LLC ("Nut Tree Retail"), became involved in the project. Nut Tree Retail purchased certain parcels of the Nut Tree Site from Nut Tree Associates, which had purchased the parcels from the Redevelopment Agency pursuant to the terms of the Original DDA. Nut Tree Retail was also a named party to Amendment No. 4 of the Original DDA. Yet another entity, Westrust Nut Tree, LLC ("Westrust Nut Tree"), was in turn identified as a member of Nut Tree Retail on the development documents. Mr. Ricardo Capretta was the individual who signed documents on behalf Westrust Nut Tree and Nut Tree Retail, including a 2005 Grant Deed for Parcels 6 and 12 within the Nut Tree Site, and Amendment No. 4 to the Original DDA, signed by Mr. Capretta on November 12, 2008.

In approximately 2008, the original developer, Nut Tree Associates, defaulted on its obligations under the Original DDA. By that time, Nut Tree Associates had purchased several parcels of land within the Nut Tree Site from the Redevelopment Agency, accounting for approximately half of the overall project area, and an initial phase of development had occurred, including substantial development on a retail center by Nut Tree Retail. In 2009, the Family

[2] (See Amended and Restated Summary Report Pursuant to Section 33433 of the California Community Redevelopment Law Regarding an Amended and Restated Disposition and Development Agreement, as Amended, By and Between the Vacaville Redevelopment Agency, City of Vacaville, Nut Tree Holdings, LLC, and Nut Tree Retail, LLC, and Related Transactions, ("the Section 33433 Report"), Exhibit C (summarizing total costs incurred by the Redevelopment Agency under the Original DDA).)

Park portion of the project closed due to the inability of Nut Tree Associates to operate the facility and to re-pay an approximately $7.9 million loan that encumbered the property.

In June of 2009, Nut Tree Associates assigned to WW Nut Tree, LLC all of its rights, interests and duties under the Original DDA. WW Nut Tree, LLC, in turn, assigned all of its rights, interests and duties under the Original DDA to a new entity, Nut Tree Holdings, LLC, the appellant herein.[3] WW Nut Tree, LLC was an affiliate of Westrust Ventures, LLC and Westrust Nut Tree, LLC, which in turn was a member of Nut Tree Retail, LLC. Mr. Ricardo Capretta identified himself as a managing member of all of these LLC entities, including Nut Tree Retail and Nut Tree Holdings, and characterized his companies as the "master developer" for the Nut Tree project.

Prior to its default, Nut Tree Associates had taken out an approximately $7.9 million loan from Wells Fargo Bank, which was secured by property within the Nut Tree Site (specifically, the parcel that included the Family Park and the Harbison Event Center) that had been purchased and was owned by Nut Tree Associates. In conjunction with the assignment of rights and obligations under Original DDA from Nut Tree Associates to WW Nut Tree, LLC, Wells Fargo Bank, the lender on initial phases of development that had occurred under the Original DDA, provided a modification and extension of an existing loan to Nut Tree Retail. In addition, as part of the parties' negotiations and agreements undertaken to re-work the project in light of the default by Nut Tree Associates, Nut Tree Holdings executed new loan documents with Wells Fargo in the approximate amount of $7.9 million, the same amount as the loan that had originally been taken out by Nut Tree Associates, i.e., in practical effect, Nut Tree Holdings assumed the $7.9 million Wells Fargo loan owed by Nut Tree Associates.

In April, 2010, the Redevelopment Agency, the City, WW Nut Tree, LLC and CT Stocking, LLC entered into a non-binding Amended and Restated Letter of Intent, the purpose of which was "to set forth the preliminary terms of a series of land transactions, based on the agreed-to business points among the parties that would be beneficial to all parties and achieve the following objectives: . . . ." (See April 1, 2010 Amended and Restated Non-Binding Letter of Intent ("ARLOI"), at page 1.) The ARLOI superseded and replaced an earlier Letter of Intent that was executed in September of 2008. In general terms, the ARLOI outlined a proposed set of

[3](See Amended and Restated Disposition and Development Agreement, November 10, 2010, ("ARDDA"), at page 1.)

"land transactions" whereby properties respectively owned by the Redevelopment Agency, WWNT, and CT Stocking would be exchanged, with additional and attendant agreements, to allow development of the Nut Tree Site to continue. Ricardo Capretta signed the Amended and Restated Letter of Intent on behalf of WW Nut Tree, LLC.

Effective November 10, 2010, the City, the Redevelopment Agency, Nut Tree Retail, LLC, and Nut Tree Holdings, LLC, entered into an Amended and Restated Disposition and Development Agreement (the "ARDDA"), which set forth the terms and conditions for the continued and renewed development of the Nut Tree Site. This project, hereinafter referred to as the "Westrust Nut Tree Project," addressing the disposition and development of the approximately 76-acre site described in the ARDDA, and all of the parcels identified as part of the site within the ARDDA, constitutes the project to which the Determination and this Decision apply. The ARDDA expressly provided that it amended and restated in its entirety the Original DDA and all amendments thereto, and that upon recordation of the ARDDA, the Original DDA was null and void and of no further force and effect.[4] The ARDDA also provided that its purpose was to implement the parties' prior Amended and Restated Letter of Intent, and accordingly, that on the effective date of the ARDDA, the ARLOI was terminated and of no further force and effect.[5] Thus, ARDDA by its own terms expressly subsumed and/or rendered null and void all prior agreements as between the parties.

At the core of the ARDDA was a property exchange arrangement, the purpose of which was to provide for the exchange of specific parcels within the Nut Tree project area, between the Redevelopment Agency and Nut Tree Holdings, in order to facilitate the renewed and continued development and operation of the overall project. To that end, the ARDDA provided that certain properties that were owned by the Redevelopment Agency at that time would be conveyed to Nut Tree Holdings (the "Agency/NT Holdings Conveyance Parcels"), and certain properties that were owned by Nut Tree Holdings at that time would be conveyed to the Redevelopment Agency (the "NT Holdings/Agency Conveyance Parcels"). The purchase price for each of these conveyance transactions was $1.00, reflecting the exchange or "swap" nature of the transaction.

The ARDDA identified the specific parcels of land within the Nut Tree project area that were owned, *prior to* the Effective Date of the ARDDA, by each of the parties to the agreement,

[4] ARDDA, at p. 1, para. B; p. 15, para. 2.1.
[5] ARDDA, at p. 2, para. D; p. 15, para. 2.2.

as well as the parcels owned by CT Stocking, LLC, another company that was involved in the overall project, but that was not a party to the ARDDA itself. These parcels, identified by letters A through T, were depicted on an Existing Site Map, which was attached to and incorporated into the ARDDA, as Exhibit B (and a copy of which is attached hereto as Exhibit 1). This *pre-exchange* ownership of the parcels was set forth in the ARDDA as follows:

***PRE*-ARDDA EXCHANGE OWNERSHIP**

Parcels Owned by the Redevelopment Agency	A, B, C, I, J, O, Q, R and S
Parcels Owned by the City of Vacaville	T ("the City Parcel")
Parcels Owned by NT Retail	K, L, M
Parcels Owned by NT Holdings	D, G, H, N and P
Parcels Owned by CT Holdings[6]	E and F

The ARDDA also identified the specific parcels that were to be exchanged between the Redevelopment Agency and Nut Tree Holdings in the property exchange transaction, as well as properties that were to be exchanged between the Redevelopment Agency and CT Holdings under a separate agreement. Exhibit C to the ARDDA, titled "Amended Site Map," depicted the ownership of all parcels within the Nut Tree Project *after* the land swap transaction, identified by parcel numbers 1 through 14.[7]

The following chart summarizes the property exchange:

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[6] CT Holdings was not a party to the ARDDA, but the agreement referenced parcels owned by the entity, and addressed the property exchanges that would occur by separate agreement between the Redevelopment Agency and CT Holdings. The Redevelopment Agency/CT Holdings exchanges were an express "condition precedent" to the Redevelopment Agency/Nut Tree Holdings exchanges. ARDDA, Recital L, page 3; Section 3.6(b)(22), page 29.

[7] This Exhibit C to the ARDDA was amended slightly in the parties' First Implementation Agreement to Amended and Restated Disposition and Development Agreement, dated December 15, 2010. The changes were non-material to the issues herein. Both the original Exhibit C and the Replacement Exhibit C are attached hereto as Exhibit 2.

PROPERTY EXCHANGE TRANSACTION

Properties conveyed:	**The Exchanged Parcels as identified on the "Existing Site Map" (*Pre*-Exchange)**	**The (same) Exchanged Parcels as identified on the "Amended Site Map" (*Post*-Exchange)**
By the Redevelopment Agency *to* Nut Tree Holdings	A, B, a portion of C, I, J, O, a portion of Q, and S (the "Agency/NT Holdings Conveyance Parcels", Section 1.1(l) of the ARDDA)	1, 2(a), 2(b), 2(c), 10, 11(a), 11(b), 11(c), 11(d) (part), 11(e) (part) and 13
By Nut Tree Holdings *to* the Redevelopment Agency	G, H, and a portion of D (the "NT Holdings/Agency Conveyance Parcels," Section 1.1(aaa) of the ARDDA)	9(a), 9(b), and 4.

The parcel boundaries, post-exchange, did not line up exactly with the pre-exchange boundaries, in that – per the terms of the ARDDA – only a portion of some of the parcels were exchanged. In addition, the Amended Site Map reflects some realignment of the parcel boundaries that was not related to the property exchange (e.g., the realignment of some parcels within property owned by NT Retail that was not part of the property exchange, and realignment of boundaries of NT Holdings parcels that became adjoining as a result of the exchange).

In general terms, however, close review of the Existing Site Map and Amended Site Map demonstrates that the parcels identified by letters in the pre-exchange column above became those identified by numbers in the post-exchange column. In particular for purposes of the issues here, a portion of Parcel D, owned by Nut Tree Holdings pre-exchange, became Parcel 4, owned by the Redevelopment Agency post-exchange.

Parcel D/Parcel 4 is of particular significance because, as noted above, prior to the property exchange transaction, this parcel – owned by Nut Tree Holdings pre-exchange – was subject to a Well Fargo loan encumbrance and Deed of Trust. The approximately $7.9 million Wells Fargo loan was assumed by Nut Tree Holdings in 2009 (through the execution of new loan documents with Wells Fargo), well before the Effective Date of the ARDDA, pursuant to agreements between and among Nut Tree Holdings, Wells Fargo and the prior developer, Nut Tree Associates. Neither the Redevelopment Agency nor the City of Vacaville was a party to the 2009 Wells Fargo loan agreement, and neither the Redevelopment Agency nor the City was a debtor, at any time, under the Wells Fargo loan.

Under the terms of the ARDDA, the Wells Fargo Deed of Trust was (1) subordinated to the ARDDA; (2) reconveyed as against the parcels that were owned by Nut Tree Holdings prior to the exchange, but that were conveyed to the Redevelopment Agency in the exchange, and (3) recorded against properties that were owned by Nut Tree Holdings after the exchange.[8] As stated in the ARDDA, "As of the Effective Date, the Wells Fargo Deed of Trust encumbers Parcel D on the Existing Site Map attached hereto as Exhibit B. Following the Agency/NT Holdings Property Exchange the Wells Fargo Deed of Trust shall encumber no longer encumber [sic] Parcel 4 on the Amended Site Map attached hereto as Exhibit C." ARDDA, Section 1.1(zzzz). Stated more directly, the $7.9 million Wells Fargo debt encumbrance was *removed* from a property that was owned by Nut Tree Holdings before the property exchange and that was being conveyed to the Redevelopment Agency, and it was transferred *onto* properties that were to be owned by Nut Tree Holdings after the exchange. The debt was Nut Tree Holding's debt *before* the exchange, and it remained Nut Tree Holding's debt *after* the exchange.

In addition to the property exchange agreements, the ARDDA also provided for the following specific monetary contributions to the Westrust Nut Tree Project by the Redevelopment Agency:

-- The Redevelopment Agency was required to pay Development Impact Fees in an amount not to exceed $2,449,000 (ARDDA, Section 1.1(d); page 4; Section 4.2(a), page 31);

-- The Redevelopment Agency was required to reimburse Nut Tree Holdings for the actual costs and expenses, in an amount not to exceed $85,000, for the construction of certain public improvements that were required as part of the conditions of approval for the Policy Plan (ARDDA, Section 1.1(d); page 4; Section 4.2(b), page 31);

-- The Redevelopment Agency was required to pay the City $417,037 in satisfaction of Nut Tree Holdings' obligation to reimburse the City for approximately 167,300 square feet of City excess right of way (ARDDA, Section 3.6(a)(9), page 27);

-- The Redevelopment Agency was required to pay $65,325 as its contribution to the formation of a benefit district for the Solano Irrigation District (SID) pump station, which was to be built on a parcel within the project area on land to be conveyed by the Redevelopment Agency to the SID (ARDDA, Section 6.1(d), page 38); and

[8] ARDDA, Section 2.2, at page 15.

-- The Redevelopment Agency was required to pay one-half the cost of employing a Restaurant Consultant, up to a maximum of $1,500 per month (Nut Tree Holdings as required to pay the other half) (ARDDA, Section 6.3(b), page 39).

In addition, and among other provisions, the ARDDA provided, and expressly listed as one of the pre-conditions for close of escrow on the property exchanges, that Nut Tree Holdings and the Redevelopment Agency would execute a lease agreement for the Harbison Event Center. (ARDDA, Section 3.6(b)(12), page 28.) The Harbison Event Center, located on Parcel D/Parcel 4, was owned by Nut Tree Holdings pre-exchange, and was conveyed to the Redevelopment Agency as part of the property exchange. Under the lease agreement, which was agreed to effective June 24, 2011, the Redevelopment Agency, as owner/landlord, leased the Event Center back to Nut Tree Holdings, as tenant, for a Base Rent of $1.00 per year, plus Additional Rent based on 25 percent of the net operating revenue (less Nut Tree Holding's operational costs) generated through operation of the Event Center. In general terms, the rent due under the lease was 25 percent of the profits generated through operation of the facility.[9]

Section 5.4 of the ARDDA expressly required the payment of prevailing wages on work performed under contract on the Westrust Nut Tree Project. As stated in the agreement: "For construction work performed prior to the issuance of a Certificate of Completion (hereinafter the "Prevailing Wage Improvements") by, or on behalf of, an Owner of a Post-Exchange NT Holdings and NT Retail Parcel, including, but not limited to construction work performed by, or on behalf of, a tenant (an "Applicable Tenant"), of such Owner prior to the issuance of a Certificate of Completion, such Owner shall, and shall notify any Applicable Tenant, or any general contractor retained by the Owner, to pay prevailing wages in the construction of the Prevailing Wage Improvements as those wages are determined pursuant to Labor Code Sections 1720 et seq." (ARDDA, Section 5.4, page 34.) Although the Prevailing Wage provision had an escape clause stating that it would not apply if the Department of Industrial Relations, or a court of competent jurisdiction, determined that the work did not constitute a public work, there is no question that the developer and appellant herein, Nut Tree Holdings, had full and explicit notice from the inception of the project that the work was presumptively subject to prevailing wage requirements unless and until there was an administrative or judicial determination to the

[9] See Lease Agreement By and Between the Vacaville Redevelopment Agency and Nut Tree Holdings, LLC For the Harbison Event Center, Dated as of June 24, 2011.

contrary. The ARDDA also expressly required a "Prevailing Wage Monitor" "to assure compliance with the provisions of this Section, and to respond, in writing, to reasonable requests from the Agency and other interested parties regarding prevailing wages and compliance with this Section." (ARDDA, Section 5.4(b), page 35.)

The ARDDA specified that the Redevelopment Agency and the City Council needed to approve the agreement pursuant to Health and Safety Code section 33433, and were also required to make certain findings pursuant to Health and Safety Code section 33445 in connection with the Agency Contribution. (ARDDA, Section 4.1, page 31.) Consistent with and pursuant to these provisions, the Redevelopment Agency issued an Amended and Restated Summary Report Pursuant to Section 33433 of the California Community Redevelopment Law (the "Section 33433 Report"),[10] which among other provisions, estimated the value of property to be conveyed by the Agency under the ARDDA, and also estimated the total cost to the Agency of the agreements and commitments set forth in the ARDDA.

The Section 33433 Report valued the properties to be exchanged between the Redevelopment Agency and Nut Tree Holdings as summarized in the chart below:

PROPERTY EXCHANGE TRANSACTION
SECTION 33433 VALUATION

Properties conveyed:	**The Exchanged Parcels as identified on the "Existing Site Map" (*Pre*-Exchange)**	**The (same) Exchanged Parcels as identified on the "Amended Site Map" (*Post*-Exchange)**	**Estimated Value Per Section 33433 Report (at "highest and best use")**
By the Redevelopment Agency *to* Nut Tree Holdings	A, B, a portion of C, I, J, O, a portion of Q, and S (the "Agency/NT Holdings Conveyance Parcels," Section 1.1(l) of the ARDDA)	1, 2(a), 2(b), 2(c), 10, 11(a), 11(b), 11(c), 11(e) (part) and 13	Parcel: 1: $3,406,719 2(a) – (c): $4,229,897 10: $1,298,907 11(a)-(c): $1,522,576 11(d), (e) (part): $ 372,727 13: $1,220,524 **Total: $12,051,349**

[10] The full title of the document was "Amended and Restated Summary Report Pursuant to Section 33433 of the California Community Redevelopment Law Regarding an Amended and Restated Disposition and Development Agreement, as Amended, By and Between the Vacaville Redevelopment Agency, City of Vacaville, Nut Tree Holdings, LLC, and Nut Tree Retail, LLS and Related Transactions."

By Nut Tree Holdings *to* the Redevelopment Agency	G, H, and a portion of D (the "NT Holdings/Agency Conveyance Parcels," Section 1.1(aaa) of the ARDDA)	9(a), 9(b), and 4.	Parcel: 9(a) and (b): $1,296.525 4: $1,175,135 **Total: $2,471,660**

The "highest and best use" valuation in the Section 33433 Report is recognized as representing fair market value. (See Section 33433 Report, at 12 ("These amounts are equivalent to the 'fair market value' of each . . .[parcel].") As acknowledged in the Report, and as is obvious from the chart above, the total consideration received by the Redevelopment Agency for the parcels conveyed to Nut Tree Holdings was substantially less than fair market value. Specifically, the fair market value of the parcels conveyed by the Redevelopment Agency to Nut Tree Holdings was approximately $9.6 million greater than the fair market value of the parcels conveyed from Nut Tree Holdings to the Redevelopment Agency.

Contemporaneous with the parties' finalization of the ARDDA and approval of the Section 33433 Report, Wells Fargo also obtained an appraisal of the properties to be exchanged under the agreement, presumably to protect its own financial interests in the overall development project. The Wells Fargo appraisal, dated October 7, 2010, was prepared by Webster & Company, LLC, "in conformance with the Uniform Standards of Professional Appraisal Practice (USPAP) and the Financial Institutions Reform, Recovery and Enforcement Act (FIRREA)."[11] The following chart summarizes the conclusions of the Webster Appraisal with respect to the value of the properties exchanged between the Redevelopment Agency and Nut Tree Holdings under the ARDDA.

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[11] See Webster & Company LLC Real Estate Appraisers, Consultants and Advisors, Appraisal of: Commercial and Residential Land, Vacaville, California, October 2010, at page 2.

PROPERTY EXCHANGE TRANSACTION
WEBSTER APPRAISAL

Parcels Conveyed	**Parcels as Identified in Webster Appraisal (and Alignment with Parcels as Identified in ARDDA)**	**Fair Market Value Per Webster Appraisal**
By the Redevelopment Agency *to* Nut Tree Holdings	**Lot 1**(same as Parcel A pre-exchange/Parcel 1 post-exchange) **Lot 2** (same as Parcels B, C (part) pre-exchange/Parcels 2 (a) – (c) post-exchange) **Lot 10** (same as Parcels B (part), J pre-exchange/Parcel 10 post-exchange) **Lot 11** (same as Parcels O, R, S, Q pre-exchange/Parcels 11(a), 11(b), 11(c) (part), 11(e) post-exchange) **Lot 13A** (same as Parcel Q (part) pre-exchange/Parcel 13 post-exchange)	Lot 1: $1,370,000 Lot 2: $2,350,000 Lot 10: $1,230,000 Lot 11: $2,600,000 Lot 13A: $1,410,000 **Total: $8,960,000**
By Nut Tree Holdings *to* the Redevelopment Agency	**Lot 4** (same as Parcel D pre-exchange/Parcel 4 post-exchange in ARDDA) **Lot F/Flag Lot** (same as Parcels G and H pre-exchange/Parcels 9a, 9b post-exchange	Lot 4: $1,520,000 Lot F: $930,000 **Total: $2,450,000**

Although the Webster appraisal valued two of the parcels to be conveyed by the Redevelopment Agency to Nut Tree Holdings (Lots 1 and 2) at somewhat lower fair market values than had been found in the Section 33433 Report, the valuation of the Nut Tree Holdings properties to be conveyed *to* the Redevelopment Agency was almost identical to the Section 33433 Report. The Webster appraisal, even with its lower valuation of some of properties conveyed by the Redevelopment Agency, plainly confirmed that the properties conveyed *by* the Redevelopment Agency to Nut Tree Holdings had *significantly* greater fair market value than the properties conveyed by Nut Tree Holdings to the Redevelopment Agency.

III. DISCUSSION.

Under Labor Code section 1720, subdivision (a), a "public work" is any "construction, alteration, demolition, installation, or repair work done under contract and paid for in whole or in part out of public funds, ..." The statute further defines the phrase "paid for in whole or in part out of public funds" in subdivision (b) as meaning "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) Transfer by the state or political subdivision of an asset of value for less than fair market price.
> (4) Fees, costs, rents, insurance or bond premiums, 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.
> (5) Money loaned by the state or political subdivision that is to be repaid on a contingent basis.
> (6) Credits that are applied by the state or political subdivision against repayment obligations to the state or political subdivision.

(Labor Code §1720(b).)

The overall purpose of the prevailing wage law is to benefit the public and to protect and benefit employees on public works projects. (*City of Long Beach v. Department of Industrial Relations* (2004) 34 Cal.4th 942, 950.) "As such, it is to be liberally construed to further its purpose." (*Azusa Land Partners v. Department of Industrial Relations* (2010) 191 Cal.App.4th 1, 15 ("*Azusa*").) In determining whether construction or other work done under contract constitutes a public work, the focus is on "the complete integrated object," i.e., the project as a whole, not on individual parts. (See *Oxbow Carbon & Minerals, LLC v. Department of Industrial Relations* (2011) 194 Cal.App.4th 538, 549.) The parties to a development agreement may not contract around the prevailing wage law, and any attempt to parse the allocation of public funds to particular structures, phases or portions of a development project in order evade reach of the statute will be rejected. (See, e.g., *Lusardi Construction Co. v. Aubry* (1992) 1 Cal.4th 976, 987-988; *Oxbow Carbon & Minerals, supra,* 194 Cal.App.4th at p. 550; *Azusa,* 191 Cal.App.4th at p. 32.) Once a determination is made that a project is a public work under Labor Code section 1720, subdivision (a)(1), the entire project is subject to the prevailing wage law,

unless the exemption under Labor Code section 1720, subdivision (c)(2) applies. (*Azusa*, 191 Cal.App.4th at p. 30.)

It has been undisputed throughout the Determination process that the Westrust Nut Tree Project involves "construction, alteration, demolition, installation or repair work done under contract;" the issue presented has been whether that construction was "paid for in whole or in part out of public funds." (Labor Code §1720(a)(1).) The Director's Determination found that the project constitutes a public work because it was paid for "in part" out of public funds in at least two ways. First, in the property exchange transaction between the Redevelopment Agency and Nut Tree Holdings set forth in the ARDDA, the value of the property conveyed *from* the Redevelopment Agency to Nut Tree Holdings (for a consideration of $1.00) substantially exceeded the value of the property conveyed from Nut Tree Holdings *to* the Redevelopment Agency (also for consideration of $1.00). Based on the Section 33433 Report, the Redevelopment Agency conveyed properties to Nut Tree Holdings that had total fair market value of almost $9.6 million *greater* than the fair market value of the parcels received by the Agency in exchange. Accordingly, the property exchange constituted the "[t]ransfer . . . of an asset of value for less than fair market price." (Labor Code §1720(b)(2).)

Second, the ARDDA provided that the Redevelopment Agency would pay approximately $2.5 million in Development Impact Fees that would otherwise be payable by Nut Tree Holdings to the City, pay approximately $417,037 to the City for excess right of way that would otherwise have been payable by Nut Tree Holdings, pay up to $85,000 in reimbursement to Nut Tree Holdings for the cost of certain public works of improvement, and contribute $65,325 to the formation of the SID assessment district. These payments by the Redevelopment Agency, to which it was committed under the terms of the ARDDA, constituted the "payment of money or the equivalent of money by [the Redevelopment Agency] . . . to *or on behalf of* the public works contractor," pursuant to Section 1720, subdivision (b)(1), and also, with respect to the Development Impact Fees and contribution to the SID assessment district, constituted "[f]ees, costs, rents, ..., 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" pursuant to Section 1720, subdivision (b)(4).

Further examination of the record on these issues proves the Determination to be entirely correct.

A. NUT TREE HOLDINGS' CLAIM THAT THE DETERMINATION IS BASED ON "FACTUAL ERRORS AND OMISSIONS" IS WITHOUT MERIT.

Nut Tree Holdings lists what it claims are 13 "factual errors or omissions" in the Determination that it contends resulted in incorrect conclusions. A close examination of these alleged "factual errors," however, reveals that they constitute nothing more than quibbling as to word use, or argument as to interpretation or characterization. For example, Nut Tree Holdings identifies as its first "factual error" the fact that the Determination was addressed to Mr. Ricardo Capretta at "Westrust Ventures, LLC." Nut Tree Holdings claims this is an error because Westrust Ventures no longer exists. Mr. Capretta, however, is and/or was the self-identified managing member of Nut Tree Holdings, Nut Tree Retail, and various other "Westrust" entities that were involved in the project, including Westrust Ventures LLC. Indeed, the original request for the Determination was submitted by Westrust Ventures, which is why the Determination was addressed to that entity in response. More importantly, the reference to Westrust Ventures in the address is completely irrelevant to any issue of substance in the Determination.

Nut Tree Holdings also contends the Determination made a "factual error" in characterizing the property exchange transactions in the ARDDA as a "three-way land swap," asserting that this is error because CT Holdings was not a party to the ARDDA. While it is correct that the land swap transactions between the Redevelopment Agency and CT Holdings were memorialized in a separate agreement, such that, technically, there were two, two-way, land swaps, the Agency/CT Holdings property exchanges are expressly addressed in the ARDDA, and were specified as a "condition precedent" to the Agency/Nut Tree Holdings exchanges. (See ARDDA, Recital H, page 3.) Moreover, all of the parties to the ARLOI, ARDDA and related agreements regularly referred to the transactions, over the course of many months, as a "tri-party" or "three-way" property exchange.

Nut Tree Holdings also objects to the way in which the Determination summarizes the general purpose of the parties' April, 2010 Letter of Intent, but then offers its own interpretation of the Letter of Intent in terms that are entirely consistent with Director's characterization. Similarly, Nut Tree Holdings claims the Director made a "factual error" in stating the Nut Tree Holdings "assumed a $7,894,615 million loan from Wells Fargo Bank . . . ." According to Nut Tree Holdings, "NTH did not assume the prior Developer's loan. NTH executed new loan

documents for the same amount of the loan as the prior owner's defaulted loan . . . ." This is nothing more than semantics, and is particularly disingenuous in that Nut Tree Holdings itself expressly characterized the transaction as a loan "assumption" in communications with the DIR that are part of the record herein. (See, e.g., Letter of Ricardo Capretta, June 10, 2013 ("NTH assumed the defaulted $7,900,000 NTA Loan.")

All of the other so-called "factual errors" claimed in the Appeal are in a similar vein, reflecting nothing more than non-substantive, immaterial objections to general characterizations, differences in interpretation, or self-serving argument on legal issues. No actual, material, errors of fact are identified.

B. THE DETERMINATION PROPERLY CONSIDERED THE VALUATIONS IN THE SECTION 33433 REPORT IN DETERMINING THAT THE REDEVELOPMENT AGENCY CONVEYED AN ASSET FOR LESS THAN FAIR MARKET VALUE.

Nut Tree Holdings contends that the Determination erred in concluding that the Redevelopment Agency transferred assets for "less than fair market price," pursuant to Labor section 1720, subdivision (b)(3),[12] because the Section 33433 Report should not have been used to determine the value of the properties exchanged between the Redevelopment Agency and Nut Tree Holdings. In support of this contention, Nut Tree Holdings offers several arguments, including that Section 33433 valuations should not be used "when MAI appraisals are available," that "California Codes and Regulations require appraisals to be completed by licensed appraisers," that the valuation should have taken into account the overall "cost" of all of Nut Tree Holdings' obligations under the development agreement and the "net benefit" to the Redevelopment Agency, that the value of the $7.9 million Wells Fargo loan encumbrance should have been taken into account in the Section 33433 Report, and that, in general, the Section 33433 valuation was not accurate. (See Nut Tree Holdings' Appeal Letter of September 26, 2014 ("9/26/2014 Appeal Letter"), at pp. 5-20.)

All of these arguments fail. First, the Department of Industrial Relations ("DIR") has consistently determined that in public works cases where the transfer of real property is involved, the term "fair market price" as used in Section 1720, subdivision (b)(3) is synonymous with fair market value, and further, that fair market value in these circumstances is determined by the

[12] All further section references are to the Labor Code, unless otherwise indicated.

highest and best use of the property. (See, e.g., Public Works Case No. 2012-041, *Volkswagen of Palm Springs; City of Cathedral City* (May 1, 2013) ("*Volkswagen*"), p. 2*;* Public Works Case No. 2003-040*, Sierra Business Park/City of Fontana* (January 23, 2004) ("*Sierra Business Park*"), p. 3; Public Works Case No. 2004-035*, Santa Ana Transit Village/City of Santa Ana* (December 5, 2005) ("*Santa Ana Transit*"), p. 2.) The case law similarly defines the concept of "fair market value" for purposes of determining real property values as based on the highest and best use for which the property is geographically and economically feasible. (See, e.g., *San Diego Gas & Elec. Co. v. Schmidt* (2014) 228 Cal.App.4th 1280, 1288; *San Diego Metropolitan Transit Development Bd. v. Cushman* (1997) 53 Cal.App.4th 918, 925.) Indeed, "highest and best use" has been described as "perhaps the most fundamental concept in real estate appraisal." (*San Diego Gas & Elec., supra,* 228 Cal.App.4th at 1289, *citing* Section 501 of the State Board of Equalization Assessors' Handbook, at page 48.[13]) The values determined for the exchanged parcels in the Section 33433 Report were expressly based on a "highest and best use" analysis, and as such were entirely consistent with the type of valuation that occurs in real estate appraisals.

There is no authority in the provisions of the prevailing wage law, or in the case law interpreting those provisions, for the proposition that only an official "MAI appraisal" issued by a California licensed appraiser may be used to determine "fair market price" within the meaning of Labor Code Section 1720, subdivision (b)(3). As noted by Nut Tree Holdings, there is such a provision in Civil Code section 1263.025, which applies under specific circumstances in *eminent domain* cases. Rather obviously, that provision does not apply in public works cases, and there is no corollary in the prevailing wage law. The argument is particularly specious in this case in that, regardless of any claimed deficiencies with respect to the Section 33433 Report, the very substantial difference in value between the properties conveyed by the Agency and those conveyed by Nut Tree Holdings was confirmed by the Webster Appraisal described above. The Webster Appraisal was, in fact, an appraisal conducted by an MAI-certified, California-licensed appraiser. It was requested by and prepared for a highly sophisticated lender (Wells Fargo), and presumably it met all of the requirements Nut Tree Holdings claims should be met for a proper

[13] "Courts may rely upon assessor handbooks in the interpretation of valuation questions." (*San Diego Gas & Elec., supra,* 228 Cal.App.4th at 1289, *citing Prudential Ins. Co. v. City and County of San Francisco* (1987) 191 Cal.App.3d 1142, 1155.)

appraisal. It largely confirmed the estimated fair market values in the Section 33433 Report. In particular, with respect to Parcel D/Parcel 4, which was conveyed by Nut Tree Holdings to the Redevelopment Agency and which Nut Tree Holdings contends was substantially undervalued, the Section 33433 valuation ($1,175,135) and the Webster Appraisal ($1,520,000) did not significantly differ.

Further, Health and Safety Code section 33433 reflects a legislative determination that a report issued pursuant to that statute is a sufficient and appropriate vehicle for determining the value of assets to be conveyed by a redevelopment agency. The Legislature having made that decision, and in the absence of a contrary directive in the prevailing wage law, the DIR has consistently treated fair market value determinations in Section 33433 reports as reliable. (See, e.g., Public Works Case No. 2004-048, *Simi Valley Town Center – First California Bank* (October 15, 2007), p. 2; *Volkswagen*, pp. 1, 3.)

What the DIR has cautioned against in past determinations, however, is treating "fair reuse value" estimations in Section 33433 reports as the equivalent of fair market price for purposes of Section 1720, subdivision (b)(3). As the DIR has noted, "fair reuse value" is a concept specific to redevelopment projects, which takes into account all of the costs, obligations, potential profits and other benefits under a redevelopment plan, and as such, is *not* an accurate assessment of fair market value. This was explained in the *Santa Ana Transit* determination as follows:

> "Fair reuse value" is a term unique to redevelopment projects. It 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; that is, there is no "market" value. Fair reuse valuation is not a generally accepted appraisal method, and the Appraisal Institute does not recognize it as a means of determining market value. The fair reuse value is a speculative figure because it is based entirely on a set of assumptions *as to the projected income, costs and profit of the proposed development*. A change in one assumption will result in a dramatically different result. In the context of public works coverage determinations, in no section of the Labor Code is the phrase "fair reuse value" anywhere mentioned.

(*Santa Ana Transit*, p. 2 (emphasis added).)

To the extent Nut Tree Holdings suggests that the DIR has found Section 33433 reports unreliable in the past, it is apparently referring to determinations in which this issue of "fair reuse value" has been addressed. Moreover, notwithstanding that the concept of "fair reuse value" has been rejected for purposes of valuing real property conveyances under Section 1720, subdivision

(b)(3), Nut Tree Holdings argues that the Section 33433 Report was inadequate because it should have taken into account all of Nut Tree Holdings' costs and obligations under the ARDDA, and the "net benefit" to the Agency. (See September 26, 2014 Letter, at 20 ("The City/Agency required NTH to undertake construction activities , maintain certain property to the City/Agency's specifications, and manage portions of the Nut Tree operations at its own expense in exchange for its real property. These obligations have been priced at $7,278,297.") This argues for exactly the kind of "fair reuse value" analysis that has been determined to be improper; it is also obviously inconsistent with Nut Tree Holdings' other argument that only certified appraisals should be used. As discussed above, a certified appraisal would apply a fair market value/highest and best use analysis that would *not* take into account all of the obligations imposed by the development plan.

Lastly, Nut Tree Holdings' argument that the Director should have relied on a 2012 appraisal of Parcel 4 from CBRE must also be rejected. This appraisal was conducted in December of 2012, more than two years *after* the effective date of the ARDDA, and while the request for a public works determination was pending. It purported to present a "retrospective value" of Parcel 4 as of July 1, 2009, based on the assumption that the condition at the time of inspection was not materially different than on the date of value "according to discussions with" Ricardo Capretta. In other words, more than two years after effective date of the relevant development agreement (the ARDDA), Mr. Capretta solicited a "retrospective" appraisal of one of the parcels, the factual grounds and parameters of which were based on his own discussions with the appraiser. It is a sound exercise of the Director's discretion not to disregard the contemporaneous Section 33433 Report and Webster Appraisal, in favor this after-the-fact "retrospective" appraisal obtained unilaterally by one of the parties with a clear self-interest, under circumstances that were intended to influence the public works determination. Had Mr. Capretta or any other party to the ARDDA believed that the Section 33433 Report and Webster Appraisal were materially inaccurate as to the estimated property values *at the time* the ARDDA was in development and under review, and given the obvious significance of the property valuations for purposes of the ARDDA and the resulting legal obligations of the parties, it was

incumbent on that party to seek an alternative evaluation or appraisal prior to the statutorily-required approvals of the ARDDA by the involved agencies.[14]

Lastly, it is noted that after all briefing had been completed on this appeal, Nut Tree Holdings made a further submission consisting of a letter addressed to Mr. Capretta from Integra Realty Resources – Sacramento, dated April 17, 2015. This letter reflects that Mr. Capretta unilaterally solicited yet another after-the-fact "consultation report" "to determine the net exchange of value for each of the entities in" the ARDDA. (See April 17, 2015 "Integra" Letter, at p. 1.) This report concluded that the "net change of equity" was such that the Redevelopment Agency conveyed properties to Nut Tree Holdings that were worth $1,965,403 *more* than the properties conveyed to the Agency, i.e., it confirmed that the Redevelopment Agency conveyed property for less than fair market value in the exchange, albeit in a total amount less than that reflected in the Section 33433 Report. Contrary to the characterization by Nut Tree Holdings, the Integra report did not reflect any new or independent appraisal of the properties – it simply reflects a purported new analysis of the same values contained in the prior Webster and CBRE appraisals. For the reasons discussed above, the Director has rejected use of the CBRE appraisal, and accordingly, the Integra report is similarly unreliable and not germane to this Decision.

C. NUT TREE HOLDINGS WAS NOT ENTITLED TO A $7.9 MILLION "CREDIT" FOR THE WELLS FARGO LOAN IT AGREED TO ASSUME IN 2009, SECURED BY PARCEL D/PARCEL 4 OF THE PROJECT.

One of Nut Tree Holdings' primary contentions in its Appeal, and one of its primary arguments throughout the Determination process, is that the $7.9 million Wells Fargo loan, which it assumed in 2009 (or, stated alternatively, for which it signed new loan papers with Wells Fargo in the same amount as what was owed by the former developer, Nut Tree

[14] The CBRE "retrospective appraisal" inexplicably found the value of Parcel 4, which contained the Harbison Event Center, to be almost $5 million higher than was found by the Webster Appraisal and approximately $4.5 million higher than the valuation in the Section 33433 Report. The CBRE report was expressly based on "discussions with Mr. Capretta" and various assumptions conveyed by him, including that the condition of the property three years earlier in 2009 (when, in fact, the prior developer had gone into default and the Family Park was closed) was the same as it was at the time of inspection in December, 2012. Further, CBRE was apparently specifically instructed to value the Harbison Event Center *buildings*. Both the Section 33433 Report and the Webster Appraisal found, corroborating each other, that the value of the existing developments on the site, when evaluated for purposes of the ARDDA in 2010, did not materially increase the value of the land.

Associates), should operate as a "credit" to Nut Tree Holdings in the respective valuations of the properties that were exchanged under the ARDDA. As stated in the Appeal, "[l]iens and encumbrances on properties must be considered when determining value when exchanging both assets and liabilities as a condition of a transaction which the ARDDA clearly states." (9/26/2014 Appeal Letter, at p. 18.)

This contention lacks merit for a number of reasons, including those previously discussed in the Determination. First, as a matter of basic accounting and math, the $7.9 million loan encumbrance did *not* reduce the value of parcels that were conveyed *by* the Redevelopment Agency to the Nut Tree Holdings, and it did not *increase* the value of parcels that were conveyed by Nut Tree Holdings to the Agency. This is because, as addressed above, both prior to, and after, the property exchange transaction, the $7.9 million loan encumbered property that was owned by Nut Tree Holdings, *not* by the Redevelopment Agency.

Thus, if the $7.9 million Wells Fargo loan, as an encumbrance on the relevant parcels, was factored into the valuation of properties – as Nut Tree Holdings urges – the resulting equation (using the Section 33433 valuations) would look something like this:

Value of parcels conveyed by Nut Tree Holdings to the Redevelopment Agency: $2,471,660 – ($7.9 million Wells Fargo loan encumbrance on Parcel D) =	-($5,428,340)
Value of parcels conveyed by the Redevelopment Agency to Nut Tree Holdings:	$12,051,349
Amount by which the value of parcels conveyed by the Redevelopment Agency exceeded the value of parcels conveyed by Nut Tree Holdings:	$17,479,689
Additional consideration paid to the Redevelopment Agency through transfer of $7.9 million loan encumbrance from Parcel 4 to properties owned by Nut Tree Holdings post-exchange.	-(7.9 million)
Net amount by which the value of parcels conveyed by the Redevelopment Agency exceeded the value of parcels conveyed by Nut Tree Holdings:	**$9,579,689**

As is clear, the Wells Fargo loan encumbrance was, in fact, *neutral* in terms of the determinations of property values for the exchange between the Redevelopment Agency and Nut Tree Holdings under the ARDDA.

Nut Tree Holdings apparently contends that the Director should have taken the value of the loan into account, as an encumbrance placed on Nut Tree Holdings properties *after* the exchange, but should have ignored its encumbrance effect on the value of Parcel D *before* the exchange. In other words, Nut Tree Holdings contends that it should be given a $7.9 million credit for *removing* the debt encumbrance from Parcel D which was conveyed to the Agency, but the existence of that same $7.9 million encumbrance should be ignored for purposes of determining the value of Parcel D *before* the debt was removed. As stated in the Appeal, "The Wells Fargo Debt has to be acknowledged on one side of the 'market value' ledger or the other – it cannot be ignored." This is exactly the problem with Nut Tree Holding's argument – it wants the Wells Fargo debt to be considered on only *one* side of the ledger. The argument has no merit, either from an analytical standpoint, or as a matter of simple accounting. If the value of Nut Tree Holdings' assumption of the $7.9 million loan is to be taken into account, it must be also be acknowledged that, prior to this assumption, the property that was conveyed to the Agency had $7.9 million less market value due to the encumbrance, meaning that it was not worth the estimated $2.5 million, but rather, had a *negative* value of approximately $5.4 million.[15]

Alternatively, it appears to be Nut Tree Holdings' contention that, even though the relevant agreement for purposes of the Determination is the 2010 ARDDA, the Director should nevertheless look backward to the earlier transaction, in late 2009, when Nut Tree Holdings agreed to take on the prior developer's $7.9 million loan, and accord a "credit" to the developer for this amount. (See 09/26/2014 Appeal Letter, at p. 15 (asserting that the assumption of the

[15] Nut Tree Holdings has argued repeatedly throughout the entire Determination process, including in its opening and reply submissions in support of this administrative appeal that the Director erred in not taking into account and "crediting" Nut Tree Holdings for its assumption of the $7.9 million Wells Fargo loan. Finally, in its most recent "Legal Overview" submission on March 10, 2015, Nut Tree Holdings said the following: "The appraiser decided against considering the Wells Fargo loan issue that the DIR and NTH have been haggling over and assigned no value to this loan on the assumption that it provides a 'wash' to the net value of the exchange." (Nut Tree Holdings' "Legal Overview," filed March 10, 2015, at p. 1.) This statement concedes exactly what the Director has advised Nut Tree Holdings on this issue throughout the Determination process.

Wells Fargo loan was an "integral part" of the land swap transaction, and that it was the City that received a "benefit").) This assertion must also be rejected. As is discussed above, and as Nut Tree Holdings itself has emphasized when it has suited its purposes, the relevant agreement for purposes of the Determination and this Decision is the ARDDA. That document expressly subsumed, restated and rendered null and void all prior agreements. As such, the determination as to whether the Westrust Nut Tree Project constitutes a public work must be made based solely on the ARDDA and the terms and conditions that are reflected therein. It would not be appropriate to pick and choose among the numerous events that preceded the ARDDA, and that occurred under the Original DDA, in making the determination. And indeed, if it were appropriate for the Director to look back to earlier transactions, agreements, investments and expenditures, prior to the ARDDA, so as to factor in Nut Tree Holding's 2009 assumption of the Wells Fargo loan, then it would be equally appropriate to also take into account all of the earlier payments by the Agency under the Original DDA. Those payments, per the Section 33433 Report, totaled more than $16.7 million, reflecting vastly greater investment of public funds than under the ARDDA.

Further, the record reflects that the principal of Nut Tree Holdings, Mr. Capretta, acting through Nut Tree Retail, had substantial investment in the Nut Tree Site as early as 2005. By 2009, when the prior master developer, Nut Tree Associates, had gone into default on its obligations under the Original DDA, Nut Tree Retail no doubt had extensive risk as to its own investments in the project. The agreement to take on the prior developer's loan may, in fact, have prevented the properties from going into foreclosure, and that may, in fact, have had some "benefit" for all parties concerned, *including most especially, Nut Tree Holdings*. The record reflects that, contemporaneous with Nut Tree Holdings' agreement to assume the $7.9 million loan, Wells Fargo also agreed to a modification and extension of an existing $69 million loan to Nut Tree Retail, which strongly suggests that at least one of the "benefits" of the loan assumption flowed directly to Nut Tree Retail, Mr. Capretta's own company. And while the Redevelopment Agency and the City may have "benefited" in some generic sense from the efforts to save the development project, the $7.9 million loan was never a debt incurred or owed by either of the public agencies, and the assumption of that debt was not a payment to them or on their behalf. Ultimately, it was an agreement entered into by Nut Tree Holdings, at least a year prior to the relevant ARDDA, without contractual or legal compulsion by either the

Redevelopment Agency or the City, and in pursuit and protection of Nut Tree Holdings' own financial interests.

More fundamentally, the arguments of Nut Tree Holdings on this issue reflect a basic misunderstanding the prevailing wage law. Running through all of Nut Tree Holding's arguments is the assumption that funds invested or monies spent by the *developer* on a project offset, or somehow operate as a credit against, public funds that are also invested in the project. Nut Tree Holdings expressly argues for an overall "cost/benefit" analysis for assessing the public funds invested in the project, and even attaches a "Costs and Benefits" chart to its Appeal. Throughout its Appeal, Nut Tree Holdings points out various "costs" the developer incurred for performing work that was required under the ARDDA, including a purported $2,818,118 in work for the City, $561,600 in purported costs to operate the Harbison Event Center, $2,530,008 in purported costs for operation of the Nut Tree Train, etc. Nut Tree Holdings also argues that the overall transaction was a better deal for the Redevelopment Agency that it was the Redevelopment Agency and/or the City that ultimately "benefitted" from various aspects of the ARDDA.[16]

That is not the relevant legal standard. Labor Code section 1720 does not ask whether the public entity invested *more* in a project than did the private developer, or whether it was a "good deal" for the developer, or whether developer "lost money" on the project. Nor does it ask whether the public entity benefitted from its expenditure of public funds, or whether the public entity benefited from the developer's expenditure of funds. It is of course understood that the ultimate goal in every public works project is a benefit to the public. All of these questions are irrelevant under the plain language of the statute.

The relevant analytical inquiry is simply whether the project was "paid for in whole *or in part* out of public funds." (Labor Code section 1720, subdivisions (a) and (b).) There are many public works – indeed, most – in which the public funds paid may be substantially less than the private funds invested. This is clear not only from the plain language of the statute, but also

[16] *See e.g.*, NT Holdings Letter of September 26, 2014, at page 4 (arguing that the City/Agency "received a benefit" from the Harbison Event Center lease agreement); at page 7 (arguing that the City/Agency "received a benefit" from the view corridor parcel); at page 15 ("the City was the party which received a benefit from the Land Swap transaction"); at page 22 (arguing that the City received "much more" in "construction services" from Nut Tree Holdings than the value of the Development Impact Fees credit that was given by the City).

from the case law. (See, e.g., *Hensel Phelps Construction Company v. San Diego Unified Port Dist.* (2011) 197 Cal.App.4th 1020 (court found a public works project when the parties' agreement required the developer to spend at least $220 million in improvements on a hotel project, while the public agency agreed to provide $46.5 million in rent credits).)

The amount that a developer has invested in a project, in relation to the public funds paid, is relevant only to the extent that question relates to one of the specific criteria set forth in Labor Code section 1720, subdivision (b); for example, whether there was transfer of an asset for less than fair market price. It may also be relevant to a claimed exemption under either Section 1720, subdivision (c)(2) or (c)(3) (addressed below). There is no overall cost/benefit or balance sheet analysis under Section 1720, however, and the various arguments Nut Tree Holdings has made in an attempt to portray itself as losing money on various aspects of the project, while "benefiting" the Redevelopment Agency and the City are simply not relevant.

D. THE DETERMINATION ALSO CORRECTLY FOUND THE PAYMENT OF PUBLIC FUNDS UNDER LABOR CODE SECTION 1720, SUBDIVISIONS (b)(1) AND (b)(4).

The Determination was also correct in finding, separate from and in addition to the substantial contribution of public funds that resulted from the property exchange, that the project was also "paid for in . . . part out of public funds" (Labor Code §1720(b)) consisting of, *inter alia,* the payment of Development Impact Fees in the amount of approximately $2.5 million, a $417,037 payment by the Redevelopment Agency to the City on behalf of the Nut Tree Holdings for an excess right of way, the payment of $85,000 as reimbursement for the costs of certain public works of improvement, and payment of approximately $65,325 toward the formation of the SID assessment district. Such contributions plainly fall within the definitions of "public funds" in Section 1720, subdivisions (b)(1) and (b)(4), quoted in full above.

Nut Tree Holdings has made various arguments with respect to these payments, none of which have merit. First, with respect to the Development Impact Fees ("DIF"), Nut Tree Holdings makes the argument that it actually paid the fees, in exchange for "a credit" by the City for development impact fees on future development work. Further, according to Nut Tree Holdings, the $2,449,000 million DIF "credit" given by the City was offered "on the condition" Nut Tree Holdings construct public improvements "for the City's benefit," (presumably the many agreements that were made under the ARDDA), the value of which "at a minimum

$2,818,118," and therefore the City "charged more than fair market value" for the DIF credit. The public improvement work Nut Tree Holdings claims it performed for the City includes, *inter alia,* the construction of the SID pump station, landscaping and maintenance on the freeway parcel, and construction along the Nut Tree Road. Nut Tree Holdings also points to the requirements under the ARDDA that it operate and maintain the Harbison Event Center, operate the Nut Tree Train, and provide the City an option to purchase the train. In other words, consistent with its entire "cost/benefit" strategy on this appeal, Nut Tree Holdings is attempting to claim an offset the value of the DIF credits it received by claiming it gave the City other "benefits" worth greater amounts under the terms of the ARDDA. This argument plainly lacks merit under both the terms of the ARDDA and the statute.

Under the express terms of the ARDDA, the Redevelopment Agency was required to pay $2,449,000 million to the City, which Nut Tree Holdings then had the right to allocate toward payment of Development Impact Fees that would otherwise be due and payable to the City on Nut Tree Holdings parcels. (See ARDDA, §1.1(d), p. 4; §4.2(a), p. 31.) This contribution of almost $2.5 million by the Redevelopment Agency clearly falls within the definition of "public funds" in Section 1720, subdivision (b)(1): "[f]ees, . . . 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." It also falls within the definition of "public funds" in subdivision (b)(1): "[t]he payment of money . . . by the state or a political subdivision [the Redevelopment Agency] . . . *on behalf of* the . . . developer." The basic fact is that the Redevelopment Agency paid almost $2.5 million for Development Impact Fees that Nut Tree Holdings would otherwise have had to pay to the City. The fact that Nut Tree Holdings apparently elected to pay the Development Impact Fees itself upfront, and use the DIF funds contributed by the Redevelopment Agency for *credits* on future development impact fees that it would otherwise owe – as it claims – does not negate this contribution of public funds by the Redevelopment Agency on this project.

Nor is it relevant here that Nut Tree Holdings was obligated to, and did, perform certain public improvement work and undertake other commitments under the terms of the ARDDA that may have had "value" to the City. Again, as discussed above, there is no room in the relevant statutory provisions for an analysis that balances or offsets the value of the public funds paid on

a project against the value of funds and work invested by a private developer. To the contrary, the question is simply whether the work was paid for "in whole or in part" out of public funds.

In *Hensel Phelps Const. Co., supra,* for example, the San Diego Unified Port District entered into a lease agreement with a private developer pursuant to which the Port District leased land to the developer for 66 years on terms which required the developer to construct an upscale convention center and hotel and undertake numerous other commitments and obligations toward that end. The lease provided for a "rent credit" to the developer of up to $46.5 million during the first 11 years of the project; the developer was required to spend a minimum of $220 million on improvements on the project, i.e., the value of the rent credits provided by the public entity was substantially less than the value of improvements the developer was expressly required to make on the property. (*Hensel Phelps, supra,* 197 Cal.App.4th at 1026-27.) The Court of Appeal held that the project was clearly a public work in that the rent credits fell squarely within the definition of "public funds" in section 1720, subdivision (b)(4). The amount of the rent credits was not "offset" by the amounts invested by the developer; nor was the court concerned with whether the "value" of the rent credits was greater than the "value" of the improvements the developer was required to make under contract. It is a non-issue under the applicable statutory provisions. The court squarely rejected the developer's attempt to argue for any "fair market value" analysis of the rent credits. See *Hensel Phelps, supra,* 197 Cal.App.4th at 1039: "Where, as here, the terms of a controlling contract clearly provide a reduction in the stated rent, a requirement that the parties conduct a fair market rent analysis to confirm that there has been a reduction or waiver of rent would be counterproductive to that purpose because it would create uncertainty and would greatly complicate and add additional expense and litigation to the process of determining whether the PWL applies."

With respect to the $417,037 that the Redevelopment Agency was required to pay the City in satisfaction of Nut Tree Holdings' obligation to reimburse the City for excess right of way (see ARDDA, Section 3.6(a)(9), page 27, expressly requiring this payment), Nut Tree Holdings makes the self-serving argument that this was an "internal accounting book transaction," and that despite the express terms of the ARDDA, "NTH never had an obligation to reimburse the City for the excess right of way." (9/26/2014 Appeal Letter, at p. 6.) Nut Tree Holdings further claims it "received no benefit" for this payment. Again, whether Nut Tree Holdings received a benefit from this payment of public funds is not the relevant question.

Under the plain terms of the controlling contract, this payment was required, and it clearly constituted a "payment of money or the equivalent of money by [the Redevelopment Agency] on behalf of the . . . developer." No amendment to the ARDDA as to this provision has been produced. Further, as reflected in this Decision, this payment of public funds was but one of several required under the terms of the ARDDA.[17]

With respect to the Redevelopment Agency's contributions to the project of $85,000 (for reimbursement of public improvement work) and $65,325 (for the SID assessment district), Nut Tree Holdings argues these funds did not constitute the payment of money under Section 1720, subdivision (a)(1) because the total of these two payments ($150,325) "is de minimis in the context of the Project under Labor Code Section 1720(c)(3)." (September 26, 2014 Letter, at p. 9.) This argument conflates two separate provisions and subdivisions of the statute. The question of whether the payment of public funds is "de minimis" in the context of a project is relevant only with respect to the issue of whether the exemption stated in Labor Code section 1720, subdivision (c)(3) applies to an otherwise private development project. It is not relevant to the separate question of whether particular transactions, subsidies, credits or payments fall within the definition of "paid for in whole or in part out of public funds" as set forth in subdivision (b) of section 1720. On their face, these payments required under the ARDDA meet the definition of payments of public funds under subdivision (b)(1).

E. NO EXEMPTION UNDER LABOR CODE SECTION 1720, SUBDIVISION (c) APPLIES IN THIS CASE.

Nut Tree Holdings also argues in its administrative appeal that the exemption under Labor Code section 1720, subdivision (c)(2) applies. That code section provides as follows:

(c) Notwithstanding subdivision (b):

[17] In its most recent submission, Nut Tree Holdings submitted a "consultative report" from Integra Realty Resources, in the form of a letter addressed to Mr. Ricardo Capretta, dated April 17, 2015. Addendum F attached to this letter is a copy of a loan agreement verifying the obligation of the Redevelopment Agency to pay the City for this excess right of way. The amount stated in loan agreement was reduced from $417,357 to $387,844, taking into account a prior payment of $29,513. Contrary to the self-serving characterization of Nut Tree Holdings, this was not an "internal accounting" transaction – it was a legal obligation of the Redevelopment Agency to pay the stated sums to the City *on behalf of Nut Tree Holdings* under the terms of the ARDDA, and this obligation was further stated and confirmed in the Loan Agreement between the Redevelopment Agency and the City, dated June 14, 2011, albeit in the slightly lower sum of $387,844.

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(2) If the state or a political subdivision requires a private developer to perform construction, alteration, demolition, installation, or repair work on a *public work of improvement as a condition of regulatory approval* of an otherwise private development project, and the state or political subdivision contributes no more money, or the equivalent of money, to the overall project than is required to perform this public improvement work, and the state or political subdivision maintains no proprietary interest in the overall project, *then only the public improvement work* shall thereby become subject to this chapter.

(Labor Code §1720(c)(2) (emphasis added).)

Under the plain terms of the statute, and as recognized by the court in *Azusa,* the (c)(2) exemption "applies if four requirements are met: (1) the public improvement work is required as a condition of regulatory approval; (2) the project is an otherwise private development; (3) the public entity must not contribute more money, or the equivalent of money, to the overall project than is required to construct the public improvement work; and (4) the public entity must not maintain any proprietary interest in the overall project." (*Azusa*, *supra,* 191 Cal. App. 4th at p. 29.) The purpose of the (c)(2) exemption, as is explained in *Azusa*, is to narrow the reach of the prevailing wage law on otherwise *private* development projects where the public entity has required the construction of certain infrastructure, referred to as "public improvement work," as a condition of regulatory approval, and has contributed no greater amount in public funds to the overall project than the overall cost of the required public improvement work. If the exemption applies, the public improvement work *is* subject to the prevailing wage requirements, but the remainder of the private development project is not. (*Azusa*, 191 Cal.App.4th at pp. 30-31; Labor Code §1720(c)(2).) "The exemption only applies if the public subsidy to the 'overall project' does not exceed the cost of all mandated public improvement work. If a public entity's contribution exceeds the cost of required infrastructure work, the partial exemption is nullified, and prevailing wages are required for the entire project because it is 'paid for in part out of public funds.'" (*Azusa*, 191 Cal.App.5th at p. 35.)

The *Azusa* decision uses the term "infrastructure" repeatedly and interchangeably in explaining what is meant by "public improvement work" under this exemption. The public improvement work at issue in that case included the construction of a school, parks, sanitation district facilities, water and sewer improvements, and park and landscaping improvements. (*Azusa*, 191 Cal.App.4th at p. 31.) It is clear the term "public improvement work" in the

exemption refers to certain types of infrastructure, not generally to any and all commitments a public agency might require. A classic example of when this exemption would apply would be if a developer applied to a city for a building and/or conditional use permit for the construction of a private housing development or private shopping center, and as a condition of granting the requested permit, the city required construction or improvement of streets, sidewalks, water and sewer lines, and contributed some amount of public funds to the project that was less than the total cost of construction for the required infrastructure improvements.

That classic example is obviously not what occurred in this case. The (c)(2) exemption does not apply here, first and foremost, because the Westrust Nut Tree Project is not – and never was – "an otherwise private development project." As is detailed at length above, the terms and conditions of the project are set forth in a detailed and complex 59-page (not including exhibits) Amended and Restated Disposition and Development Agreement (the ARDDA), negotiated in detail between and among the private developers and not one, but two, public entities – the City of Vacaville and the Redevelopment Agency. As is discussed at length above, the ARDDA involved a complex property exchange agreement whereby not only was property owned by the public entities transferred to a private developer, and vice versa, but the public entities retained ownership of certain parcels within the overall development project following the exchange. The ARDDA also provided for significant contributions of public funds, in the manner discussed above, and involved various on-going commitments, agreements and involvement between the public agency and the developer (including *inter alia* the Harbison Event Center Lease, the View Corridor Parcel Lease, and the Nut Tree Train Operating Covenant). From its inception, the Westrust Nut Tree Project has been a combination of public and private development, arising directly out of the economic development activities of the Redevelopment Agency, and infused with public funds and involvement throughout. In no sense can the overall project be considered an "otherwise private development project." (Labor Code §1720(c)(2).)

Second, the (c)(2) exemption does not apply here because the Redevelopment Agency and the City (both in its own right and later as the successor agency to the Redevelopment Agency) retained a proprietary interest in some parcels and aspects of the "overall project." Nut Tree Holdings argues that this is not the case because the City does not maintain a proprietary interest in any of the *specific parcels* there were transferred to Nut Tree Holdings under the ARDDA. In other words, for purposes of this factor, and with respect to the issue of whether

the project was an "otherwise private development project," Nut Tree Holdings argues that the relevant "project" consists *solely* of the approximately 36 acres that were the property of Nut Tree Holdings after the property exchange transaction. This argument must also be rejected. The statute itself uses the broad term "overall project," meaning that the criteria cannot be applied narrowly to only certain pieces, phases, or parcels of a development project. The Westrust Nut Tree Project consists of the entirety of the transactions, commitments, and obligations set forth, agreed to and described in the controlling ARDDA. Under the plain terms of that long term development agreement, the Redevelopment Agency acquired and retains (through its successor agency) ownership of several parcels within the overall project. Not only does the Redevelopment Agency retain ownership of several parcels within the project, it also was required to, and did, enter into the Harbison Event Center Lease Agreement with Nut Tree Holdings, which was an express condition required under the ARDDA, and pursuant to which the Agency was entitled to a share of the profits from operation of the Center. Dismissing this obvious joint public/private proprietary interest in the Harbison Event Center, Nut Tree Holdings argues that the Center was not part of its "separate project" on Nut Tree Holdings property. The case law specifically rejects this type of attempt to parse development projects into separate pieces. A developer cannot accept public funds (including the transfer of public property for less than fair market value) as part of what makes an overall development project possible – as reflected in the terms of the ARDDA – and then parse the resulting development into separate pieces so as to evade the reach of Section 1720 and the prevailing wage law. (See *Azusa*, *supra,* 191 Cal.App.4th at p. 37 (Section 1720(c)(2) and (c)(3) highlight the legislative focus "on the project as a whole, rather than individual construction contracts or components of a development project").

Further, even if these first two criteria were satisfied, it is clear that the amount of public funds contributed to the "overall project" far exceeded the cost of any infrastructure improvements required under the ARDDA. On this issue, Nut Tree Holdings argues at length that because the ARDDA required approval by the City of Vacaville and the Redevelopment Agency, *all* of Nut Tree Holdings' obligations under the ARDDA constituted "conditions of regulatory approval," within the meaning of the (c)(2) exemption. (9/26/2014 Appeal Letter, at pp. 23-27.) And because the cost to Nut Tree Holdings of *all* of its obligations under the ARDDA, according to Nut Tree Holdings, exceeds the amount of public funds contributed to the

project, again according to Nut Tree Holdings and not counting any contribution of public funds from the property exchange, the exemption applies. Again, the argument must be rejected. First, as noted in the Determination, the obligations undertaken by a developer in a disposition and development agreement are not the type of "conditions of a regulatory approval" on an "otherwise private development project" to which the (c)(2) exemption refers. They are a complex set of contractual obligations negotiated by the parties for *mutual* consideration and benefit, as reflected in the resulting, usually highly complex, DDA agreement. That the DDA is ultimately approved by one or more public entities, resulting in "regulatory approval" in some generic sense, does not transform every developer obligation in the DDA into a "conditional of regulatory approval" within the meaning of the (c)(2) exemption.

Moreover, even if the Director assumes for the sake of argument that certain infrastructure improvements were required as conditions of regulatory approval under the ARDDA for the Westrust Nut Tree Project, these infrastructure obligations clearly would not include "all" of Nut Tree Holdings' obligations under the ARDDA, and certainly would not include such obligations as operating the Nut Tree Train, running the Harbison Event Center, providing rent-free space, or forming a restaurant committee (all of which Nut Tree Holding includes in its list of "Developer Obligations" on page 30 of its 9/26/2014 Appeal Letter). These types of operational and/or financial obligations are not "public improvement work" within the meaning of (c)(2). At most, the required infrastructure improvements found in the ARDDA include the construction of the SID pump station, certain street work, and certain landscaping and maintenance work. Under Nut Tree Holdings' own calculations, the total cost of these infrastructure improvements was approximately $2.8 million. The "amount of money, or the equivalent of money" that the City and Redevelopment Agency contributed to the "overall project," taking into account the value of both the property exchange agreement, as discussed above, the Development Impact Fees, and all of the other contributions of "public funds" discussed above, *far* exceeds the cost of these improvements.[18]

[18] The public funds contributed to the overall project include at least the following:

$9,579,689.00 (property conveyed for less than fair market value in the exchange transaction)
$2,449,000.00 (development impact fees)
$ 417,037.00 (payment by Agency for right of way)
$ 85,000.00 (public improvements)

Nut Tree Holdings argues that the public funds contributed to the overall project by way of the property exchange transaction cannot be considered for purposes of the (c)(2) exemption because the statutory language in the exemption refers to "money, or the equivalent of money," not "public funds," which is the term used in Section 1720, subdivision (b) that includes within its definition the transfer "of an asset of value for less than fair market price." (Labor Code §1720(b)(3).) According to Nut Tree Holdings, neither the conveyance of real property nor the payment of the development impact fees that would otherwise be due from the developer is the "equivalent of money," and therefore, the fact that the Redevelopment Agency gave Nut Tree Holdings almost $9.6 million worth of property under the terms of the ARDDA and paid almost $2.5 million in development impact fees must be ignored. Nut Tree Holdings cites *State Bldg. & Construction Trades Council v. Duncan* (2008) 162 Cal.App.4th 289 (*Duncan*), for this improbable proposition, and in fact, the case does not support the argument. In *Duncan*, the Court held that low income housing tax credits, which it found have no present value to the public entity, do not constitute the giving of the "equivalent of money" absent a statutory expression of such. In its discussion of the issue of what constitutes the equivalent of money, the court invoked the concept of giving up something of value. (See *Duncan, supra,* 162 Cal.App.4th at p. 320, the statute speaks of "parting with a thing possessing current value.") Unlike a low income housing tax credit, the transfer of real property for less than fair market value clearly is "parting with a thing possessing current value," (*id.*, at p. 311), and certainly can be considered the "equivalent of money" for purposes of the (c)(2) exemption. Thus, the (c)(2) exemption does not apply in this case.

Nut Tree Holdings passing argument that the (c)(3) exemption applies here is also rejected. That provision states:

> (c) Notwithstanding subdivision (b):
> ***

$ 65,325.00 (SID benefit district)

Total: **$12,596,051.00**

Even if the Webster appraisal values are used, rather than the Section 33443 values, the total is at least $9,526,362.00. Obviously, either of these amounts contributed to the "overall project" far exceed the cost "to perform the public improvement work" required under the ARDDA.

> (3) If the state or a political subdivision reimburses a private developer for costs that would normally be borne by the public, or provides directly or indirectly a public subsidy to a private development project *that is de minimis in the context of the project*, an otherwise private development project shall not thereby become subject to the requirements of this chapter.

Nut Tree Holdings argues that this exemption applies because the public subsidy provided to the Westrust Nut Tree Project is de minimis in the context of the project. For all the reasons discussed at length above, that contention is plainly wrong. Prior public works decisions have established that a subsidy is de minimis within the meaning of this exemption if it is in the range of 1.75 percent or less of the total project cost. (See, e.g., Public Works Case No. 2011-33, *Blue Diamond Agricultural Processing Facility, City of Turlock* (May 9, 2012).) In this case, the Determination found the total project cost to be $91,244,395. In its most recent submission, Nut Tree Holdings claims that "an accurate accounting of all Project Costs that NTH has incurred is actually over $101,800,000 when including all carrying costs since July 1, 2009." (Nut Tree Holdings "Legal Overview," March 10, 2015, at p. 1.) Setting aside for the moment the fact that no actual accounting for this asserted number has been provided to the Department, and accepting this number solely for the sake of argument, it is clear that the total public subsidy of approximately $12.6 million (see footnote 16, *supra*) is more than 12 percent of the total project cost. Even if the total subsidy amount is calculated using the Webster appraisal – again solely for the sake of argument – the subsidy is at least in the range of 10 percent, *far* in excess of any amount that could be considered "de minimis." The only way Nut Tree Holdings gets to its proffered total public subsidy number (of approximately $1.1 million), which it claims is de minimis, is through a series of factual and legal fallacies, as discussed above, by which it variously discounts, ignores and minimizes the very substantial public funds that were invested in this project.

F. THE DETERMINATION AND THIS DECISION APPLY TO THE OVERALL PROJECT.

In his original request for a determination, (by letter addressed to Director John C. Duncan, dated July 5, 2011), Mr. Capretta asked for eight separate prevailing wage determinations as to separately-designated parcels within the overall Westrust Nut Tree Project. The questions themselves were hypothetical, and/or unclear and ambiguous, in that they asked "if [Nut Tree Holdings] develops this property (*or sells this property to a third party at fair*

market value) . . . ," (emphasis added), would the parcel be subject to the prevailing wage law. The questions thus assumed both that the prevailing wage law could apply parcel by parcel, and that it would not matter whether Nut Tree Holdings itself developed a property, or sold it to a third party.

As was pointed out in the Determination, a development project that is a complete integrated whole cannot be parsed in this manner into individual parcels. (See, e.g., *Oxbow Carbon & Minerals, supra,* 194 Cal.App.4th at pp. 549-550; *Azusa, supra,* 191 Cal.App.4th at p. 37.) As stated by the court in *Azusa*, "[o]nce the determination is made that the Project is a "public work" under section 1720, subdivision (a)(1), the entire Project is subject to the PWL [prevailing wage law]." (*Azusa, supra,* 191 Cal.App.4th at 29.) Thus, it is contrary to established case law to address any specific parcel contained with the "overall project." The *entire* Westrust Nut Tree Project, as described in the ARDDA and as thoroughly discussed herein, constitutes a public work, including all parcels therein. As such, *any and all* "construction, alteration, demolition, installation, or repair work," and any other work as listed in Section 1720(a), constitutes "public works" for which prevailing wages must be paid. (Section 1720(a); 1771.)

In its September 26, 2014 Letter in support of its administrative appeal, Nut Tree Holdings does not ask again for the eight separate determinations. It does, however, ask that the Director address the following question: "If NTH sells a property to a third party at a fair market value price in an arm's length transaction and that third party does not accept any abatements or benefits from NTH or the City of Vacaville, is the subject property a separate project for prevailing wage purposes?" This is, again, an incomplete hypothetical question. For all the reasons set forth above, the Westrust Nut Tree Project, as described and memorialized in the ARDDA, and including all parcels within the "overall project" is a public work. Thus, all work done in the execution of the overall project requires the payment of prevailing wages.

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IV. CONCLUSION.

For all the foregoing reasons, and for the reasons stated in the Director's original Determination, the Westrust Nut Tree Project was and is a public work subject to the California prevailing wage requirements set forth in Labor Code sections 1720, *et seq.*

Dated: 6/25/2015

CHRISTINE BAKER
Director, Department of Industrial Relations