

DEPARTMENT OF INDUSTRIAL RELATIONS

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April 18, 2019

Stephen Tedesco  
Littler Mendelson, PC  
333 Bush Street, 34th Floor  
San Francisco, CA 94104

Re: Public Works Case No. 2017-025  
Lincoln Landing Project  
City of Hayward

Dear Mr. Tedesco:

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 Labor Code section 1773.5<sup>1</sup> and California Code of Regulations, title 8, section 16001, subdivision (a). Based on my review of the facts of this case and an analysis of the applicable law, it is my determination that the Lincoln Landing Project (Project) is not a public work and is therefore not subject to prevailing wage requirements.

### **Facts**

The Project is a mixed-use development consisting of 476 multi-family market rate apartments, 80,500 square feet of commercial space, rehabilitation of an existing four level parking garage, and related site improvements, on an approximately 11.5-acre site in the City of Hayward. The developer is DP Ventures, LLC (Developer).

As a condition of the City's approval of the Project, the Developer is required to comply with article 16, section 10 of the Hayward Municipal Code. (Hayward Municipal Code, § 10-16.00 et seq., hereinafter "Park Land Dedication Ordinance" or "the Ordinance.") The Ordinance provides:

As a condition of approval of a tentative subdivision map, parcel map, use permit, planned development, site plan review, or building permit, for residential purposes . . . requirements shall be determined for the subdivider, developer, or owner of the land to dedicate land, pay a fee in lieu thereof, or do a combination of both, at the option of the City subject to the limitations set forth in Sec. 10-16.31(a), for park and recreational purposes in accordance with the provisions of this article.

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<sup>1</sup> All subsequent references are to the Labor Code unless otherwise specified.

(*Id.*, § 10-16.10.) The City uses a formula tied to the probable occupancy level of each density or type of housing unit to determine the amount of land to be dedicated. In the case of multi-family housing, the area of park land required per dwelling unit is 604 square feet. (*Id.*, § 10-16.21.) Similarly, “in-lieu-of” fees are set by a fee schedule. Multi-family dwellings require a minimum in-lieu-of fee of \$9,653 per dwelling unit. (*Id.*, § 10-16.30.) The Ordinance also affords Developer a mandatory credit for the value of park and recreation improvements conferred on the dedicated land. (*Id.*, § 10-16.47.) Developer will receive dollar-for-dollar credits for the cost of improvements to the land, subject to limitations described further below.<sup>2</sup>

To satisfy the Park Land Dedication Ordinance, Developer is therefore required to: (1) dedicate 604 square feet of park land per unit for a total of 287,504 square feet; or (2) pay an in-lieu-of fee of \$9,653 per unit for a total of \$4,594,828; or (3) do a combination of both, provided that the total value of land dedication and fees amounts to \$4,594,828.

The City agreed to satisfaction of Developer’s obligations under the Ordinance as follows:

1. 0.53 acre land dedication;
2. Credit for improvements on the land; and
3. Payment of in-lieu-of fees to the City, if any “balance” remains after the land dedication and improvement credits.

The 0.53 acre of land (which is the equivalent of approximately 23,086 square feet) will be used to create a publicly accessible pocket park, landscaped areas, and retaining wall area on the site of the Project. This land dedication was determined to have a value of \$366,814. Developer will receive a credit for all improvements made to the land, including the play structure, terraced retaining walls, pathway resurfacing, electricity and pedestrian-scale lighting fixtures, safety railing, public art, miscellaneous furniture, as well as improvements to the Alameda County Flood Control District-owned maintenance path along San Lorenzo Creek.<sup>3</sup>

While preliminary estimates for the total cost of improvements ranged from \$3.2 million to \$4.4 million, the final amount of the credit for improvements is to be based on review and approval of an engineer’s estimate by the City’s Public Works Engineering Division and Planning Division, in consultation with the Hayward Area Park and Recreation District. The ultimate determination of the amount of the credit will be based on the City’s review and approval of the engineer’s estimate to the satisfaction of the City Engineer. The City reserved the right to cap costs associated with credit for materials, labor, or equipment according to recently completed work, jobs, or other known information if the City ultimately finds the engineer’s estimate unreasonable or otherwise inflated. Developer, or ultimately the property manager, is required to maintain the publicly accessible creek walk and pocket park upon completion.

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<sup>2</sup> It is possible, though unlikely, that the land dedication value plus the credit for improvements will exceed the total fees owed by Developer. In that case, the City would not reimburse Developer for any excess above \$4,594,828. It would be a sunk cost for Developer.

<sup>3</sup> Developer is not entitled to credit for required public frontage improvements or public easements (Hayward Municipal Code, §§ 10-16.25, 10-16.46.) Developer is also not entitled to any credits for any required drainage, soil, or non-visible improvements pursuant to Provision C3 of the Alameda County Clean Water Program.

The City will ultimately receive the equivalent of \$4,594,828 (the total value of calculated in-lieu-of fees) that Developer owes in the form of dedicated land and park and recreation improvements to that land. In the event the total value of the land dedication and improvements is less than \$4,594,828, Developer will be required to pay any difference remaining, and has expressly stated its intent to do so. This balance would be due prior to issuance of any certificate of occupancy or final inspection permit.

### Discussion

Section 1720, subdivision (a)(1), defines “public works” as “[c]onstruction, alteration, demolition, installation, or repair work done under contract and paid for in whole or in part out of public funds.” In this context, “public funds” include fees, costs, or other obligations normally 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. (§ 1720, subd. (b)(4).) There is no question that the Project entails construction. Developer, however, disputes that the work is done under contract. In addition, Developer and City both contend that the Project is not being paid for in whole or in part with public funds.

#### The Work is Done Under Contract

With respect to the “under contract” language in section 1720, subdivision (a)(1) only requires that the work be done under contract, not that the contract be awarded by a public entity. (See PW Case No. 2013-015, Decision on Administrative Appeal, *Central Valley Next Generation Broadband Infrastructure Project – Central Valley Infrastructure Network* (Jan. 14, 2015).)

The California Supreme Court analyzed the meaning of work done under contract in *Bishop v. City of San Jose* (1969) 1 Cal.3d 56, 63-64. *Bishop* concluded that, by using the “under contract” language, the Legislature intended to exclude the situation where the public agency was using its own forces to carry out the construction. The Legislature later codified the *Bishop* decision by amending section 1771 to expressly exclude “work carried out by a public agency with its own forces.” (Stats. 1974, ch. 1202, § 1; see also *Azusa Land Partners, LLC v. Department of Industrial Relations* (2010) 191 Cal.App.4th 1, 20 [statutory requirement means that work must be done “under contract (i.e., not by the public entity’s own employees)”]; *O.G. Sansone Co. v. Dept. of Transportation* (1976) 55 Cal.App.3d 434, 459, fn. 5.) The work at issue here is being done under contract as the City is not using its own forces to perform the construction.

#### The Quimby Act

Given that the work is being done under contract, the key question is whether the Project will be paid for in whole or in part with public funds. And more specifically, the question is whether the Project involves a payment of public funds as defined in section 1720, subdivision (b)(4): “Fees, costs, ... 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.” (Lab. Code, § 1720, subd. (b)(4).)

The Ordinance requiring park land or in-lieu-of fees for this Project was enacted pursuant to the Quimby Act, which authorizes the legislative bodies of counties and cities to enact ordinances requiring the dedication of land or payment of fees in lieu thereof, or a combination of both, for park or recreational purposes as a condition for the approval of a tentative map or parcel

map. (Gov. Code, § 66477, subd. (a).)<sup>4</sup> The Quimby Act conditions this grant of authority on a corollary requirement “mandating a credit for park and recreational improvements to dedicated land.” (*Branciforte Heights, LLC v. City of Santa Cruz* (2006) 138 Cal.App.4th 914, 939.) In other words, a local agency that opts to enact a Quimby Act ordinance must allow as a credit against the payment of fees or dedication of land, the value of park and recreational improvements to the dedicated land, including any equipment located on the site. (*Id.* at p. 935; Gov. Code, § 66477, subd (a)(9); see also 73 Ops.Cal.Atty.Gen. 152 (1990) [a city “may not lawfully require the dedication of land improved for park and recreational purposes without credit being given to the subdivider for the value of the recreational improvements.”].)

Developer’s obligations for this Project under the Ordinance are valued at \$4,594,828 (calculated at the in-lieu-of fees rate), and it is required to satisfy this obligation in full prior to issuance of a certificate of occupancy or final inspection permit for the Project. The City, consistent with its authority under the Ordinance, required Developer to fulfill its obligations through a combination of land dedication and park construction. Because Developer is obligated for the entire sum of \$4,594,828, regardless of the form in which it satisfies that figure, there is no payment of public funds. No part of the \$4,594,828 obligation is being reduced or waived, and there are no funds passing from the City to Developer by operation of the improvement credits.<sup>5</sup> The Quimby Act sets forth the conditions upon which the City may require land dedication and collect in-lieu-of fees. Mandatory “credits” for improvements to the dedicated land under the statutory scheme is a counterbalance to the City’s right to require land dedication or in-lieu-of fees.

#### The Land Dedication “Credit” and “In-Lieu” Fees

As noted, the Ordinance requires a developer to either dedicate park land, or to pay in-lieu-of fees, or to do some combination of both. This is based on the Quimby Act, which authorizes cities to “require the dedication of land or payment of fees in lieu thereof, or a combination of both, for park or recreational purposes.” (Gov. Code, § 66477, subd. (a).) For this Project, the City calculated the total obligation of the Developer by starting with a total value for the in-lieu-of fees, based on a fee of \$9,653 per unit, for a total of \$4,594,828. This would be the total amount owed if no land was dedicated. From this number, the City then deducted the value of the .53 acres of land dedicated for the pocket park and landscaped areas, leaving a balance of \$4,228,014. And against this number, the Developer was entitled, as discussed above, for a credit for any improvements to the dedicated land.

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<sup>4</sup> The Quimby Act was enacted against a landscape of a rapidly increasing population and the corollary recognition that “parks are essential for a full community life.” (*Associated Home Builders etc., Inc. v. City of Walnut Creek* (1971) 4 Cal.3d 633, 639 [upholding constitutionality of the Quimby Act, formerly Bus. & Prof. Code, § 11546.].) Despite the passage of several decades since its passage, the statute’s important purpose and relevance continue to be recognized in the case law. (See *Home Builders Assn. of Tulare/Kings Counties, Inc. v. City of Lemoore* (2010) 185 Cal.App.4th 554, 567.)

<sup>5</sup> While the required land dedication and park improvements could be characterized as “other obligations” under section 1720, subdivision (b)(4), the same result follows. The City is neither waiving nor reducing Developer’s obligations since they are being satisfied by the 0.53 acre land dedication and planned park improvements.

By calculating the obligations in this manner, the City was not in any way waiving or reducing fees that would otherwise be required for the Project; nor was it applying a public funds "credit" against obligations otherwise owed. (See Lab. Code, § 1720, subs. (b)(4), (6).) Rather, the City was simply valuing and applying the various components of the Ordinance as written, i.e., recognizing that the Developer could meet its obligations through a combination of in-lieu-of fees, dedicated land, and improvements to the dedicated land. The "credit" the Developer was given against the total in-lieu-of fees (that would otherwise have been due if no land was dedicated), for the dollar value of the dedicated .53 acres, was not a reduction of obligations otherwise owed; it was a proper valuation and accounting of the Developer's obligations under the Ordinance and its plan for meeting those obligations.

#### The Credit for Park and Recreation Improvements

Nor does the credit for park and recreational improvements to the dedicated land constitute a payment of public funds. Developer is entitled under the Ordinance, and as required by the Quimby Act, to a dollar-for-dollar credit for park and recreation improvements it provides to the dedicated land, subject to capping by the City for costs associated with materials, labor, or equipment. By allowing Developer to take a credit for these improvements, the City is not reducing Developer's overall obligations, nor allowing Developer to take a credit any larger than the cost of the improvements or any greater than as mandated by statute. The maximum credit Developer could receive is the actual cost of the improvements. Indeed, the Developer could potentially receive a credit less than the actual cost of improvements if the City finds the engineer's estimate to be excessive or unreasonable.

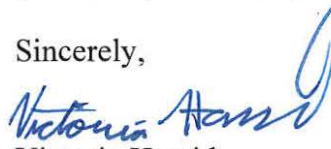
Under the Quimby Act, the City has no discretion to disallow the credit, as the value of the improvements "shall be a credit." (Gov. Code, § 66477, subd. (a)(9), italics added.) The City's only discretion is in determining the value of the improvements. As such, the credit for improvements does not constitute a waiver or reduction by the City of fees otherwise due; it is simply what is required under the statute. (See *Lynch v. California Coastal Com.* (2017) 3 Cal.5th 470, 475.)

#### Conclusion

For the foregoing reasons, the Lincoln Landing Project is not a public work and is therefore not subject to prevailing wage requirements.

I hope this determination satisfactorily answers your inquiry.

Sincerely,

  
Victoria Hassid  
Chief Deputy Director<sup>6</sup>

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<sup>6</sup> See Government Code sections 7 and 11200.4.