

DEPARTMENT OF INDUSTRIAL RELATIONS

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September 23, 2019

Jeff Ballinger, City Attorney  
City of Indian Wells  
44-950 Eldorado Drive  
Indian Wells, CA 92210

Philip Bates  
3X5-MLL, LLC  
One Venture, Suite 230  
Irvine, CA 92618

Re: Public Works Case No. 2018-003  
Hotel Development Project  
City of Indian Wells

Dear Messrs. Ballinger and Bates:

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 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 Hotel Development Project (Project) in the City of Indian Wells (City) is a public work; however, under an applicable exemption as addressed below, the prevailing wage requirements on the Project apply only to the public improvement work that was required as a condition of regulatory approval of the Project.

### **Facts**

The City and developer, 3X5-MLL, LLC, propose the construction of a mixed-use hotel and condominium project. The property upon which the Project is to be constructed was previously the subject of a 2004 disposition and development agreement (DDA) between the City and Jerson Investments, LLC. The DDA anticipated construction of a development referred to as the "Miles Crossing at Indian Wells" on thirteen parcels of land owned by both the City and the Indian Wells Redevelopment Agency (Agency), and located adjacent to the junction of Miles Avenue and Highway 111. However, construction never commenced on that project.

In 2007, a modification to the original DDA was entered into with a new developer, Miles Lodge, LLC, an affiliate of Jerson Investments, LLC. The modified agreement specified the terms

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<sup>1</sup> All further statutory references are to the Labor Code unless otherwise indicated.

of purchase as to four of the original 13 parcels of land included in the Miles Crossing at Indian Wells project. These four parcels would come to comprise the site upon which the instant Project is planned. Two of the parcels were owned by the City and two of the parcels were owned by the Agency. The properties had been appraised at an aggregate value of \$3,427,188. Pursuant to the 2007 modification, Miles Lodge, LLC, purchased the four parcels for a combined sum of \$4,391,244. The City provided records specifying that one of the two parcels owned by the City, the parcel central to the future Project site, was appraised at a value of \$2,681,982, and was conveyed in 2007 for \$3,621,484. The other City-owned parcel's sale price was accounted for in the sale of an Agency-owned parcel.<sup>2</sup> The two parcels owned by the Agency were appraised at a value of \$734,036, and were conveyed in 2007, for \$733,771, a discrepancy of \$265.

Ultimately, the DDA between Miles Lodge, LLC, and the City did not result in the construction of the originally envisioned Miles Crossing at Indian Wells project.

The DDA was again modified in 2010 as to Miles Lodge, LLC, and as to those provisions relating to the originally envisioned Miles Crossing at Indian Wells project. The 2010 modification effectively terminated the DDA as to the originally envisioned project and allowed the instant Project to proceed separately from the now-defunct project known as Miles Crossing at Indian Wells.

Miles Lodge, LLC, eventually affiliated with yet another development partner forming a new entity referred to as 3X5-MLL, LLC (Developer). Developer proposed construction of the instant Project on the four parcels of land located north-west of the junction of Miles Avenue and Highway 111. The Project entails the construction of a complex consisting of a resort hotel, condominiums, and privately owned villas. The overall budget for the Project is estimated at \$139.5 million.

During negotiations, the parties contemplated having the City rebate to Developer a portion of the transient occupancy taxes collected from hotel guests as a form of financial support for the Project. However, the Project in its present form does not include any transient occupancy tax rebates. The operation of the hotel and rental of the villas and condominiums will be subject to generally applicable taxes.

The City has required various construction improvements in order for the Project to obtain approval to proceed, including: improvements to the lining of the adjacent Whitewater Drainage Channel; improvements to the frontage of Miles Avenue and Highway 111 including public pedestrian pathways and landscaping; installation and construction of an intersection including signals and access to the Project site; and construction of a public pedestrian and golf cart pathway allowing access to the City-owned Indian Wells Golf Resort. The City has agreed to reimburse Developer for construction of the aforementioned improvements, in an amount not to exceed

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<sup>2</sup> The records provided by the City specifying the appraised value and sale price of the four parcels claim that the sale of City-owned parcel No. 633-310-009 (Parcel 2) was "accounted for" in the sale of parcel No. 633-310-013, one of the two parcels owned by the Agency. The 4.78-acre City-owned Parcel 2 was appraised at a value of only \$11,250, due to a flood easement on the parcel held by the Coachella Valley Water District. For purposes of this analysis, Parcel 2 will be treated as a gift from the City to Developer.

\$5.5 million. This agreement is memorialized in the April 19, 2018, Development Agreement (Development Agreement) between the City and Developer.

### **Discussion**

Section 1720, subdivision (a)(1), generally defines “public works” to mean: “Construction, alteration, demolition, installation, or repair work done under contract and paid for in whole or in part out of public funds . . . .” Section 1720, subdivision (b), defines “paid for in whole or in part out of public funds” to include “[t]he 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” and the “[t]ransfer by the state or political subdivision of an asset of value for less than fair market price.” (§ 1720, subd. (b)(1), (3).) In this instance, there are two separate public subsidies to the Project: (1) the sale of publicly owned property below fair market value; and (2) \$5.5 million allocated by the City for public improvement work to be performed in the execution of the Project.

#### **A. Transfer of Publicly Owned Property at Below Fair Market Value.**

The sale of the four parcels comprising the Project, when viewed in the aggregate, appears to be a transfer from the City and the Agency to Developer at a price above fair market value. Nonetheless, the conveyance of three of the four parcels from the City and the Agency to Developer, which actually was two separate transactions, must be characterized as a below market transfer of assets constituting a public subsidy to an otherwise private development project. The sale by the Agency of the two Agency-owned parcels at a price \$265 below their appraised value constitutes a single transaction, and the transfer of the City-owned Parcel 2, valued at \$11,250, from the City to Developer at no cost, constitutes a separate transaction. Thus, the sale of the three parcels at a price below their fair market value amounts, in the aggregate, to an \$11,515 public subsidy under section 1720, subdivision (b)(3).

However, a public subsidy to an otherwise private development project that is “de minimis” in the context of the overall project will not result in the project’s coverage under the prevailing wage laws. (§ 1720, subd. (c)(3).) In this instance, the estimated budget for the Project is \$139.5 million. While de minimis is not specifically defined by the statute, past determinations have held public subsidies to be de minimis when the “amount of public funds is proportionately small enough in relation to the overall cost of the Project, such that the availability of the subsidy does not significantly affect the economic viability of this Project.” (PW 2011-033, *Blue Diamond Agricultural Processing Facility – City of Turlock* (May 9, 2012).) The subsidy at issue in *Blue Diamond* was 1.75 percent of the overall project cost and was found to be de minimis. The subsidy in this instance is .00825 percent of the estimated overall cost of the Project, and is therefore de minimis.

#### **B. Allocation of Public Funds for Public Improvement Work.**

The more significant public subsidy to the Project is the allocation of up to \$5.5 million by the City for reimbursement for the cost of public improvements. Reimbursement by the City for the specified public improvements may have the effect of subjecting the entire Project to the requirements related to the payment of prevailing wages if no exemption is applicable.

The Project entails construction done under contract. And the Project is paid for in part out of public funds within the meaning of section 1720, subdivision (b)(1), in the form of reimbursement by the City in an amount not to exceed \$5.5 million for specified improvements. Accordingly, the Project meets the elements of a public work under section 1720, subdivision (a)(1), and the entire Project is subject to the requirements of California's prevailing wage laws, unless an exemption applies. (*Azusa Land Partners v. Department of Industrial Relations* (2011) 191 Cal.App.4th 1, 29 (*Azusa*).

Given the circumstances presented in this case, the primary issue is whether the partial exemption for private development projects paid for in part with public funds applies. Section 1720, subdivision (c)(2), provides:

(c) Notwithstanding subdivision (b):

...

(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.

This exemption applies if four requirements are met: (1) the public improvement work is a condition of regulatory approval of the project; (2) the project is an otherwise private development; (3) the public entity contributes no 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 maintains no proprietary interest in the overall project. (*Azusa, supra*, 191 Cal.App.4th at p. 29.)

Here, the public improvement work includes improvements to the lining of the adjacent Whitewater Drainage Channel; improvements to the frontage of Miles Avenue and Highway 111 including public pedestrian pathways and landscaping; installation and construction of an intersection including signals and ingress and egress to the Project;<sup>3</sup> and construction of a public pedestrian and golf cart pathway accessing the City-owned Indian Wells Golf Resort. Each of the components of the aforementioned public improvement work is required as a condition of the City's regulatory approval of the Project, as memorialized in the Development Agreement. The Project is an otherwise private commercial development. Pursuant to the Development Agreement, the funds contributed to the Project by the City are not to exceed the collective cost of the required public improvement work, up to a maximum of \$5.5 million. The City maintains no proprietary interest in the Project. Accordingly, the elements of the exemption under section 1720, subdivision (c)(2), are satisfied. Only the public improvement work specified in the Development Agreement, the cost of which will be reimbursed by the City, is subject to prevailing wage

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<sup>3</sup> Elements of the public improvement work specified in the Development Agreement might also constitute public works under section 670.1 of the Streets and Highways Code, which contains a special provision declaring certain improvements to the state highway system to be public works. Given that this determination finds the improvements in this case to be covered under section 1720, subdivision (c)(2), a separate analysis under the Streets and Highways Code is unnecessary.

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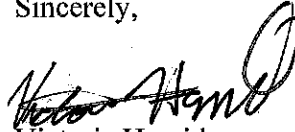
requirements. The remainder of the Project is not subject to the requirements of section 1720, et seq.

**Conclusion**

For the foregoing reasons, the Hotel Development Project in the City of Indian Wells is a public work, but the partial exemption found in section 1720, subdivision (c)(2), applies to the Project, and accordingly, only the construction of the public improvements required by the City as a condition of regulatory approval is subject to prevailing wage requirements.

I hope this determination satisfactorily answers your inquiry.

Sincerely,

  
Victoria Hassid  
Chief Deputy Director<sup>4</sup>

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<sup>4</sup> See Government Code sections 7 and 11200.4.