STATE OF CALIFORNIA GAVIN NEWSOM, *Governor*

DEPARTMENT OF INDUSTRIAL RELATIONS
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October 10, 2019

Andre Gardner
Executive Director
Northern California Electrical Construction Industry
4529 Quail Lakes Drive, Suite A
Stockton, California 95207

Re: Public Works Case No. 2018-034
Great Wolf Lodge
City of Manteca

Dear Mr. Gardner:

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[1] 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 construction of the Great Wolf Lodge (Project) in the City of Manteca (City) is a public work subject to prevailing wage requirements.

Facts

A. Manteca Family Entertainment Zone

In 2010, the City began working on a comprehensive development plan for the Family Entertainment Zone (FEZ). The FEZ is situated on 210.7 acres of City-owned land in the City's west side. To guide and direct development of the FEZ, the City approved and adopted the FEZ Master Plan in 2016. According to the Master Plan, the FEZ will encompass "multiple projects and parcels that will provide an extensive recreation complex featuring new and existing recreation, park, water, sports and other leisure amenities."

The Master Plan envisions the FEZ to be completed in phases. The centerpiece of Phase 1 is the development of a "500 room hotel including 30,000 square feet of conference/meeting/exhibition facility [sic] with 37,500 square feet of restaurant (food and beverage) space, community space, general retail, party rooms and related game rooms." In addition, the envisioned development would also include a "75,000 square foot indoor multi-level waterpark." To realize the development of Phase 1, the City engaged in a search for a suitable private developer. After meeting with several interested private developers and reviewing a

[1] Unless otherwise indicated, all further statutory references are to the Labor Code.

number of proposals, the City ultimately selected Great Wolf Resorts, Inc. (Developer) to develop the Great Wolf Lodge, a destination resort that will include a hotel with up to 500 rooms, an indoor water park, restaurants, meeting facilities, and a family entertainment center.

B. The Disposition and Development Agreement

Following extensive negotiations and studies regarding the Project's economic and environmental impacts, the City's staff recommended that the City enter into agreements with Developer for the development of the Project and provide certain public subsidies to make the Project economically feasible.[2] On June 12, 2018, the City and Developer entered into a Disposition and Development Agreement (DDA). Under the DDA, the City will convey a 29-acre piece of land to Developer. In exchange, Developer will build the Project on the land, in accordance with specified milestones identified in the DDA and a separate Development Agreement. The purchase price for the land is $675,000 – less than its fair market value – and paid solely from the proceeds from transient occupancy taxes[3] collected from Great Wolf Lodge hotel guests. The DDA clarifies that "Developer has no obligation to pay the Purchase Price."

The DDA also contains the following statement under a section titled "3.2 Prevailing Wages":

> The Lodge Project shall be constructed as a public work of improvements for which prevailing wages shall be paid and bonds provided under California Labor Code Section 1781(a)(2)(C). Developer and its contractors and subcontractors shall pay prevailing wages and employ apprentices in compliance with California Labor Code Section 1770, et seq., and shall be responsible for the keeping of all records required pursuant to California Labor Code Section 1776, complying with the maximum hours requirements of California Labor Code Sections 1810 through 1815, and complying with all regulations and statutory requirements pertaining thereto. Upon the periodic request of City, Developer shall certify to City that it is in compliance with the requirements of this Section 3.2.

Developer acknowledged this statement on prevailing wages when it executed the DDA.

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[2] The City identified the Project as receiving "an economic subsidy within the meaning of Government Code section 53083." An "economic development subsidy" is defined as "any expenditure of public funds or loss of revenue to a local agency in the amount of one hundred thousand dollars ($100,000) or more, for the purpose of stimulating economic development within the jurisdiction of a local agency, including, but not limited to, bonds, grants, loans, loan guarantees, enterprise zone or empowerment zone incentives, fee waivers, land price subsidies, matching funds, tax abatements, tax exemptions, and tax credits." (Gov. Code, § 53083, subd. (g)(1).) In a statutorily-mandated report, the City also acknowledged that it would be conveying land for less than its fair market value. (See Gov. Code, § 52201, subd. (a)(2)(B)(iii).)

[3] Transient occupancy taxes are taxes collected by a local government for "the privilege of occupying a room or rooms, or other living space, in a hotel, inn, tourist home or house, motel, or other lodging." (Rev. & Tax. Code, § 7280, subd. (a).)

C. The Development Agreement

In conjunction with the DDA, the City and Developer also entered into a separate Development Agreement. The Development Agreement specifically recognized that the City would be assisting Developer with the significant investment associated with the development of the Project. This assistance, which includes the City sharing with Developer the transient occupancy tax revenue generated by the future hotel, will be used to defray or reimburse construction costs and fees associated with the development. The Project is estimated to cost $180 million and Developer is likely to collect nearly $100 million in transient occupancy tax revenue over a 25-year period.

Under the Development Agreement's specific terms, Developer receives a share of the transient occupancy taxes collected from Great Wolf Lodge hotel in the amount of $2 million per year for 25 years. Developer's $2-million share receives the highest priority – it is paid out to Developer on an annual basis before any other disbursements from the tax revenue. After that initial disbursement to Developer, a pro rata share is made to Developer and to the City from any remaining tax revenue for the year, amortized over two years without interest, to reimburse Developer and the City for "reimbursable fees," which are essentially development fees that Developer and the City paid to non-City public agencies,[4] and then up to $500,000 in fees paid to planning and inspection consultants. Next, the $675,000 purchase price of the land is paid to the City out of the annual tax revenue, amortized over 10 years without interest. Following the reimbursement of the land's purchase price, a share is allocated to pay development fees owed to the City, amortized over 20 years without interest.[5] Finally, any remaining transient occupancy tax revenue for the year is allocated 25 percent to the City, and 75 percent to Developer in the first 10 years, and 50 percent to the City and 50 percent to Developer in the following 15 years.

As a counterbalance to this generous tax revenue sharing arrangement for Developer, the Development Agreement touted the "substantial economic and fiscal benefits" that the Project will bring to the City, "including revenue from transient occupancy taxes, property taxes, sales taxes, and other economic activity including approximately 1,400 construction jobs and 500 permanent jobs (250 full-time and 250 part-time jobs)."

The Project officially broke ground on November 8, 2018, and is estimated to be completed in 2020.

Discussion

All workers employed on public works projects must be paid at least the prevailing wage rates applicable to their work. (§ 1771.) Section 1720, subdivision (a)(1), defines "public works" to include: "construction, alteration, demolition, installation, or repair work done under contract and

[4] An economic and fiscal impact report commissioned by the City estimated that Developer owed $2 million in development fees to non-City agencies on the Project for which Developer will be reimbursed out of transient occupancy tax revenues.

[5] The economic and fiscal impact report also estimated $7.7 million in development fees owed to the City that will be deferred and paid to the City out of transient occupancy tax revenues.

paid for in whole or in part out of public funds,…." The work to be performed on the Project is indisputably construction done under contract. The issue is whether the construction is "paid for in whole or in part out of public funds."

A. The City Transferred Land to Developer for Less Than its Fair Market Value.

The Project is being built on 29 acres formerly owned by the City. The City identified the land's fair market value at $6.75 million, but sold the land to Developer for the purchase price of $675,000 to subsidize construction of the Project. For the purposes of the prevailing wage law, the City's transfer of the land – an asset of value – for 90-percent less than its fair market value constitutes a payment of public funds. (§ 1720, subd. (b)(3).) Furthermore, although the purchase price is substantially lower than the land's fair market value, the DDA explicitly provided that "Developer has no obligation to pay the Purchase Price," because the City and Developer agreed the purchase price "shall be paid solely using transient occupancy tax revenue," pursuant to the transient occupancy tax revenue sharing arrangement described in the Development Agreement. In essence, Developer received 29 acres of land from the City at no cost to fund construction of the Project. And though the free land is itself a substantial subsidy, the City also provided further financial support for the Project by "sharing" the transient occupancy tax revenue that will be generated by the Project's hotel.

B. The City's Sharing of Transient Occupancy Tax Revenue with Developer Constitutes a Payment of Public Funds.

"Like many other communities in this state and elsewhere, [the City] has adopted an ordinance imposing a tax on visitors for the privilege of occupancy in hotels located within the city," known as a transient occupancy tax. (*In re Transient Occupancy Tax Cases* (2016) 2 Cal.5th 131, 133.) The City currently imposes a tax of 12 percent of the rent charged by a hotel and the "tax constitutes a debt owed by the transient to the city." (Manteca Mun. Code, § 3.16.030.) The tax is "a general tax, with TOT revenue allocated to the general fund to be expended for any proper municipal purpose." (Manteca Mun. Code, § 3.16.010(A).) The tax revenue enters public coffers and constitutes public funds that belong to the City. (See *Azusa Land Partners v. Department of Industrial Relations* (2010) 191 Cal.App.4th 1, 23–24 [bond funds held in community facilities district's public coffers constituted public funds, where the district authorized expenditures and controlled disbursements of the money]; see also PW 93-054 *Tustin Fire Station – Tustin Ranch* (June 28, 1994) [money collected for, or held in coffers of, public agency constitutes "public funds" under section 1720].)

The DDA, the Development Agreement, and other City documents show that the City's sharing of this tax revenue is meant to subsidize construction of the Project and "serve[s] to reduce a developer's project costs." (*Hensel Phelps Construction Co. v. San Diego Unified Port Dist.* (2011) 197 Cal.App.4th 1020, 1034 (*Hensel Phelps*).) The tax revenue sharing arrangement demonstrates that a substantial portion of the revenue will be used to pay development fees and various costs directly related to the construction of the Project. In fact, the $675,000 discounted land purchase price which Developer normally would have had to pay will be deferred and then paid entirely out of the City's transient occupancy tax revenue.

To highlight the potential local economic benefit, the City prepared a spreadsheet projecting nearly $175 million in transient occupancy tax revenue generated by the Project within

a 30-year period. Based on those estimates, Developer is expected to receive nearly $100 million[6] in tax revenue, while the City will ultimately collect only about $75 million. As obligated under the Development Agreement, Developer must remit the tax revenue on a quarterly basis to the City. Within 10 business days of receiving the tax revenue, the City must *pay* Developer its share of tax revenue. This payment is clearly a "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." (§ 1720, subd. (b)(1).)

While the payments of this tax revenue may not have yet commenced, the Development Agreement obligates the City to make the promised payments to Developer once the transient occupancy tax is collected. Under the prevailing wage law, the payment of public funds does not have to be made before or during construction in order for a project to be a public work. For instance, in *Hensel Phelps*, the port district agreed to reduce a hotel developer's rent that was due after construction was completed, but the future rent reduction was actually intended to subsidize construction of the hotel on port land. The *Hensel Phelps* court found that the rent reduction – even though it would occur years in the future – constituted a payment of public funds for the hotel construction. (See *Hensel Phelps, supra,* 197 Cal.App.4th at pp. 1034, 1037.) In similar fashion here, the City's future payment of money out of its public coffers constitutes a public subsidy to the Project.

Despite the fact that a developer may not actually receive the public subsidy until after construction is complete, a determination that a project is a public work can be based on documents and other facts in the record that support an inference that the developer "will receive the promised amounts" of public funds. (*Cinema West, LLC v. Baker* (2017) 13 Cal.App.5th 194, 216.) While nothing suggests that the City will fail to pay Developer the promised share of transient occupancy tax revenue, a project can be deemed a public work even in instances where the developer "never receives any of the promised payments," so long as project documents call for the payments to be made. (*Ibid.*) In this case, Developer is relying on the tax revenue subsidy to ensure the economic feasibility of the Project, and all indications are that the City will honor its contractual obligations.

The construction work on the Project is done under contract and paid for in part out of public funds, in the form of the City's payment to Developer of tax revenue and the transfer to Developer of City-owned land for less than fair market value. Accordingly, the Project is a public work.

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[6] Developer receives tax revenue for only 25 years. The City's spreadsheet assumes that tax revenue collection for the Project begins in projected year 3. Thus, while the City potentially receives tax revenue indefinitely, Developer stops receiving its share of tax revenue in year 27.

Conclusion

For the foregoing reasons, the construction of the Great Wolf Lodge in the City of Manteca is a public work and therefore subject to prevailing wage requirements.

I hope this determination satisfactorily answers your inquiry.

Sincerely,

Victoria Hassid
Chief Deputy Director[7]

[7] See Government Code sections 7 and 11200.4.