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Re: Public Works Case No. 2007-004
Carson Marketplace
Carson Redevelopment Agency/City of Carson

Dear Messrs. Weiner and Welner and Ms. Honeywell:

This constitutes the determination of the Director of Industrial Relations regarding coverage of the above-referenced project under California's prevailing wage laws and is made pursuant to California Code of Regulations, title 8, section 16001(a). Based on my review of the facts of this case and an analysis of the applicable law, it is my determination that the construction of Carson Marketplace (the "Project") is not a public work subject to prevailing wage requirements except as provided herein.

Facts

The Project is a mixed-use commercial and residential development on two parcels of land in the City of Carson ("City"). One of the parcels, approximately 157 acres in size ("Site"), was a municipal landfill between 1959 and 1965. It was designated a hazardous site in 1985 by the California Department of Health Services (now the Department of Toxic Substances Control ("DTSC")). In March 1988, DTSC issued a remedial action order for the Site.

A Final Remediation Action Plan ("RAP") dated October 1995 was approved by DTSC as part of a Consent Decree entered in 1996 against the then-owner of the Site, L.A. MetroMall ("LAM"). The Consent Decree imposed upon LAM the obligation to remediate the Site in accordance with the RAP and requires that any purchaser of the Site assume this obligation.

The RAP requires the following remedial actions: (1) installation of a landfill clay cap to contain the waste and impacted soil; (2) extraction and treatment of landfill gas; and (3) extraction and treatment of the contaminated groundwater. The RAP also provides for the long-term operation and maintenance ("O&M") of these remedial measures. In addition, the RAP contains additional measures related to the proposed development, which "work in conjunction with the ... remedial

actions, to protect human health and the environment.” The proposed development at the time contemplated commercial/light industrial use. The additional remedial measures include a geomembrane liner under the building area and a landfill gas extraction and treatment system for the building areas.

Hopkins Real Estate Group (“Hopkins”), a California corporation, opened escrow in March 2004 for the purchase of the Site from LAM. Hopkins assigned the purchase contract to Carson Marketplace, LLC (“Developer”), a Delaware limited liability company, as of December 27, 2005. Developer finally acquired the Site in September 2006.

In December 2004, Developer’s contractor, Tetra Tech, submitted to DTSC proposed “remedial design refinements.” The principal refinement was to substitute a geomembrane cap in place of the clay cap. In addition, improvements were proposed to the landfill gas extraction and treatment system.

On January 18, 2006, Developer submitted an application to City for a Development Agreement (“DA”) for the Project.

On February 21, 2006, the City Council adopted Ordinance No. 06-1341 which, among other things, adopted the Specific Plan and “Conditions of Approval” as part of the set of land use regulations for the Project. One of the Conditions is that the Specific Plan conforms to Mitigation Measures that must be satisfied prior to the issuance of building permits for the Project.

The Mitigation Measures are found in the Final Environmental Impact Report (“FEIR”). Mitigation Measures C-1 to C-16 require construction of certain off-site street, intersection and traffic improvements (the “infrastructure improvements”). The FEIR also provides that the remedial work required by the RAP be completed as a condition of proceeding with the construction of the Project. In particular, it provides that implementation of the Project requires that DTSC approve refinements to the RAP and oversee RAP construction. Mitigation Measures D-1 to D-4 require Developer to provide documentation to City showing that the remedial work required by the RAP has been done to the satisfaction of DTSC. The Specific Plan provides that, “The development shall ... implement all applicable mitigation measures as set forth in the Project’s Mitigation Monitoring and Reporting Program,” which includes Mitigation Measures D-1 to D-4.

On March 21, 2006, Developer and City entered into a DA pursuant to which Developer was granted development rights in consideration for Developer’s “good faith efforts to complete the development of the Project.” The DA provides that the Project will be constructed with financial assistance from Carson Redevelopment Agency (“Agency”) under the terms of an Owner Participation Agreement (“OPA”).

The DA requires Developer to construct the infrastructure improvements and imposes time constraints within which Developer must commence and complete the remedial work required by the RAP and the residential and commercial (“vertical”) development. The remedial work is

deemed completed "upon Developer's receipt of all necessary approvals and clearances from DTSC permitting construction of the Project's vertical improvements to commence."

Developer and Agency entered into an OPA on July 25, 2006. A stated purpose of the OPA is to provide for the remediation of the Site pursuant to the RAP and amendments thereto. In the OPA, Agency agrees to provide financial assistance for the remediation of the environmental contamination (not including the O&M) and for construction of the infrastructure improvements. The parties estimate the cost of the remediation work and infrastructure improvements to be \$135 million. Of this, Agency has agreed to pay up to \$110 million - \$90 million of the estimated \$115 million cost of the remediation work in cash and tax allocation bonds; and \$20 million in Community Facility District ("CFD") bonds for the infrastructure improvements.¹ Developer will fund the balance. The parties agree that Developer is to pay prevailing wages for the remediation work and for construction of the infrastructure improvements.

The Project otherwise is to be paid for entirely from private funds.

Analysis

Labor Code section 1720(a)(1)² in relevant part 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"³ Section 1720(b)(1) provides that "paid for in whole or in part out of public funds" means "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."

The Project entails construction done under contract. There are three sources of Agency financial assistance to Developer: cash from tax increment funds not directly related to the Site, tax allocation bond proceeds, and CFD bond proceeds. The parties do not dispute that each constitutes the payment of money by Agency to Developer within the meaning of section 1720(b)(1).

The question presented is whether, notwithstanding Agency's payments for the remediation and the construction of the infrastructure improvements, the Project is nonetheless exempt from prevailing wage requirements under section 1720(c). Section 1720(c)(2) provides:

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

¹In addition, the OPA acknowledges a pre-existing Cooperation Agreement between Agency and the State of California, Department of Transportation (Cal-Trans) in which Cal-Trans is to undertake and Agency is to pay for construction of interchange improvements to Avalon Boulevard. This work will proceed even if the Project is not built and, therefore, is not considered an element of the Project for purposes of this determination.

²All statutory references are to the Labor Code unless otherwise specified.

³Section 1771 generally requires that prevailing wages be paid to workers employed on public works.

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.

As shown, the remedial work required by the RAP and the construction of the infrastructure improvements are required by City as conditions of its regulatory approval of the Project. Agency payments will not exceed the actual costs of that work. The Project is "an otherwise private development project" in that it is a private development in all other respects. Neither City nor Agency will maintain a proprietary interest in the overall Project. There is no question that the infrastructure improvements are "public work[s] of improvement" within the meaning of section 1720(c)(2). The issue is whether the remediation also falls into this category.

Section 1720(c)(2) does not define "public work of improvement." The environmental remedial work serves the public in that it protects against exposure from hazardous waste and contaminated groundwater. Moreover, the Legislature has recognized the public nature of this type of work by authorizing local governments to establish community facility districts under the Mello-Roos Act⁴ to finance such work. Gov. Code § 53313(f).⁵ As such, the remedial work is a public work of improvement for purposes of the section 1720(c)(2) exemption.

Accordingly, the Project falls within the exemption provided by section 1720(c)(2), and prevailing wages are required only for the remedial work required by the RAP and construction of the infrastructure improvements.

Finally, during the Department's investigation, the question arose whether prevailing wages are required for the O&M required by the RAP. Developer intends to subdivide the Site into two lots: a Vertical Lot and a Remediation Lot, the latter of which will contain the remedial systems. The Remediation Lot is to be transferred to a Mutual Benefit Corporation ("MBC"), a California private non-profit corporation. The MBC will be responsible for the O&M, which is to be paid for out of CFD bond funds.

Section 1771 provides that prevailing wage obligations apply to "contracts let for maintenance work," which the Department's regulations define as work performed on "publicly owned or operated" facilities. Cal. Code Regs., tit. 8, § 16000. As presently envisioned, the remedial systems will be privately owned and operated. Accordingly, the O&M does not appear to fall within the definition of covered maintenance.⁶

⁴Gov. Code § 53311 et seq.

⁵The Mello-Roos Act was established to provide a method of financing certain "public facilities and services." Gov. Code § 53311.5. Government Code section 53313(f) provides in relevant part that community facility districts may be established to finance "[s]ervices with respect to removal or remedial action for the cleanup of any hazardous substance released or threatened to be released into the environment."

⁶Developer initially proposed to transfer the Remediation Lot to a Public Benefit Corporation. The Department takes no position and does not decide by this determination whether that arrangement would trigger prevailing wage requirements. This determination applies to the facts as presented. Should the facts relating to the O&M or any other aspect of this Project change, the conclusions reached herein may be inapplicable.

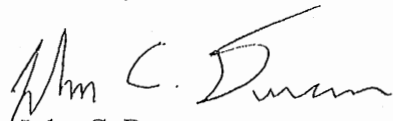
Letter to Peter H. Weiner, Esq., Jon Welner, Esq. and Dawn C. Honeywell, Esq.

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I hope this determination satisfactorily answers your inquiry.

Sincerely,

A handwritten signature in cursive script, appearing to read "John C. Duncan".

John C. Duncan
Director