

DEPARTMENT OF INDUSTRIAL RELATIONS

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To All Interested Parties:

Re: Public Works Case No. 2012-037
Cinema West Movie Theater and Related Facilities
City of Hesperia

The Decision on Administrative Appeal, dated July 15, 2013, in PW 2012-037, *Cinema West Movie Theater and Related Facilities – City of Hesperia*, was affirmed in a published First District Court of Appeal opinion dated June 30, 2017. See *Cinema West, LLC v. Baker* (2017) 13 Cal.App.5th 194.

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS

DECISION ON ADMINISTRATIVE APPEAL
RE: PUBLIC WORKS CASE NO. 2012-037
CINEMA WEST MOVIE THEATRE AND RELATED FACILITIES
CITY OF HESPERIA

I. INTRODUCTION

On March 8, 2013, the Director of the Department of Industrial Relations (“DIR”) issued a public works coverage determination (the “Determination”) in the above-referenced matter finding that the construction of a movie theater and related facilities in the City of Hesperia (“City”) was public work subject to prevailing wage requirements.

On April 11, 2013, Cinema West, LLC, (“Cinema West” or “Developer”) timely filed a notice of appeal of the Determination pursuant to section 16002.5(b) of title 8 of the California Code of Regulations (the “Appeal”).¹

The Appeal is based on the following grounds:

- 1) Private Construction is not subject to prevailing wage requirements merely because other construction is publically funded;
- 2) The coordination of two related construction projects does not implicate the Prevailing Wage Law; and,

¹ The Director's Determination was actually served on the interested parties on March 13, 2013, rendering the appeal timely.

3) Cinema West has not received public funds or their equivalent.

Since 2000, the City of Hesperia (City) has endeavored to build a movie theater within the city limits. In March of 2010, Hesperia Community Redevelopment Agency (Redevelopment Agency) Staff met with representatives of Cinema West regarding the City's desire to build a cinema within the City limits. Cinema West submitted a proposal to the Redevelopment Agency outlining plans for a 36,000 square foot, twelve screen, digital theater on land that was owned by the Redevelopment Agency. Cinema West proposed building the theater on 54,248 square feet of a 4.86 acre section of land owned by the Redevelopment Agency ("Project"). The proposal outlined the following actions: 1) the Redevelopment Agency would sell 54,248 square feet of land to Cinema West for fair market value; 2) Cinema West would develop a 36,000 square foot, twelve screen theater on the land; 3) The Redevelopment Agency would build a parking lot on the remainder of the 4.86 acres for use by theater patrons; 4) The Redevelopment Agency would develop a water retention system for the theater and parking lot and would install off-site improvements to curbs, gutters and sidewalks adjacent to the parking lot.

On September 10, 2010², the Redevelopment Agency and Cinema West entered into a Disposition and Development Agreement ("DDA") for the purpose of developing the Project. The DDA specified that Cinema West purchase 54,248 square feet of land from the Redevelopment Agency for its fair market value of \$1.89 per square foot or \$102,529.³ Under the DDA, Cinema West would bear all costs related to improvement

² DDA is dated September 7, 2010, but was not signed by Cinema West until November 2, 2010, and by the City until November 5, 2010.

³ An appraisal was conducted by Thompson Appraisals, Inc. on July 26, 2010.

of the purchased property and construction of the theater, with the exception of removing an existing stockpile of dirt, which was to be performed by the City.⁴ Under the DDA Cinema West was required to adhere to the Operating Covenant. In return, the Redevelopment Agency granted to Cinema West a forgivable loan in the amount of \$1,546,363.00 and agreed to repay the price of the purchase of the land. The Redevelopment Agency would be responsible for construction of a parking lot adjacent to the theater site for use by theater patrons on the remainder of the 4.86 acres not purchased by Cinema West. The Redevelopment Agency would retain possession of the parking lot after construction; however, Cinema West would be responsible for its maintenance. The Redevelopment Agency assumed responsibility for implementing a water retention system that would serve both the parking lot and theater. The parties also executed a Reciprocal Access and Parking Easement, which stated that the Redevelopment Agency would provide access to the parking lot to theater patrons.⁵ The parties agreed to use the

⁴ The DDA put Cinema West on notice that there may be a prevailing wage obligation. Section 503 of the DDA, entitled "Cost of Construction", states, in relevant part:

Agency is not providing any direct or indirect financial assistance to Developer that would make any part of the Project a "public work" "paid for in whole or in part out of public funds," as described in California Labor Code Section 1720, *et seq.* ("Prevailing Wage Law"), such that it would cause Developer to be required to pay prevailing wages for any aspect of the development. Developer acknowledges and agrees that should any third party, including but not limited to the Director of the Department of Industrial Relations, require Developer or any of its contractors or subcontractors to pay the general prevailing wage rates of per diem wages and overtime and holiday wages determined by the Director of the Department of Industrial Relations under the Prevailing Wage Law for all or any of the Project, then Developer shall indemnify, defend, and hold Agency harmless from any such determinations, or actions (whether legal, equitable or administrative in nature) or other proceedings, and shall assume all obligations and liabilities for the payment of such wages and for compliance with the provisions of the Prevailing Wage Law.

⁵ Cinema West claims that City conducted a parking survey that established that there was sufficient parking provided by the existing City Hall parking lot to the east, other lots owned by the City and on-street parking, to service the Theater even without considering the new spaces provided by the parking lot to be constructed adjacent to the Theater. Cinema West, however, entered into the reciprocal agreement to provide theatre parking.

same architect to coordinate the design and construction of the theater and the parking lot. Each portion of the project was done pursuant to its own contract, and the City and the Developer paid the engineer separately for the work performed on their respective portions of the Project. The Developer hired and paid its own Surveyor, Landscape Designer, Landscaper, Architect, and Grading Contractor. Cinema West contends that none of these professionals were involved in the design or construction of City's parking lot. The Developer paid its Contractor for the construction of the Theater. The City paid its Contractor for the construction of the parking lot.

On December 20, 2011, City staff issued a report directed to the Mayor and the City Council.⁶ The Report urged the adoption of Resolution No. 2011-068, which authorized the execution of the Operating Covenant. The Resolution also granted Cinema West another \$250,000 forgivable loan. The loan was granted to partially cover a \$700,000 budgetary shortfall for the construction of the Project. It states that the City would forgive the \$250,000 loan after a 10 year period, during which time Cinema West must comply with the terms of the Operating Covenant. The revised Operating Covenant is dated December 12, 2011, and was executed in January 2012.

Developer paid City a fair market value for the lot in a buildable state. The lot would not be considered buildable without the provision of requisite water retention facilities. The City contemplated constructing a water retention facility in connection with its parking lot, which allowed City to construct a larger, more aesthetically pleasing parking structure. City retained an appraiser who valued the Theater lot, on the assumption that the City would construct that water retention facility, at \$102,000. The

⁶ The Development Agency was dissolved effective February 1, 2012, with the passage of AB1X26. The Agency is being wound down by its Successor Agency, City.

City drafted the DDA and it was signed. The City removed the pile of dirt from the property and in January 2012, the Developer closed escrow and paid the City approximately \$102,000 for the lot.

The Developer began construction of its Theater in February 23, 2012, and it was completed in December 2012. The Theater opened for business on December 14, 2012. City began constructing its parking lot in April 2012, and although it had a scheduled completion date of November 2012, it was completed just shortly before the Theater opened.

II. DISCUSSION

Labor Code section 1771⁷ generally requires the payment of prevailing wages to workers employed on public works. Section 1720, subdivision (a)(1),⁸ 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....”

Subdivision (b) provides: [f]or purposes of this section, “paid for in whole or in part out of public funds” means 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) . . . loans, interest rates . . . that are paid, reduced, charged at less than fair market value, waived, or forgiven by the state or political subdivision.

⁷ All subsequent references are to the Labor code unless otherwise specified.

⁸ Subsequent subdivision references are to section 1720.

(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.

It is undisputed that the Project involves construction that is done under contract. The Developer disputes that the Project is a public work, however, because it contends that no public funds within the meaning of subdivision (b) were used to construct the Project. Specifically, Developer contends that the two forgivable loans do not constitute a payment of public funds because the loans are contingent on Developer maintaining the Theatre and the 40 jobs required to operate it for 10 years. As such, the funds are not related to construction.⁹ Developer also discusses the scope of the Project in its appeal and argues that the Theatre and parking lot are two separate projects and that the mere coordination of the two projects does not render them a single project under the California prevailing wage law (section 1720) (CPWL). Developer alleges that the concurrent construction of public improvements done under the DDA was not to serve the theatre itself and, as such, should be treated separately from the theatre construction. Finally, Developer asserts that the “involvement of public funds in a private construction does not necessarily implicate prevailing wage laws,” citing *City of Long Beach v. Department of Industrial Relations* (2004) 34 Cal.4th 942, 954 (*Long Beach*), and *Greystone Homes. v. Cake* (2004) 135 Cal.App.4th 1, 11 (*Greystone*).

⁹ This assertion is contradicted by the Hesperia City Council’s Resolution 2011-068, dated December 20, 2011. The resolution recites that the project cost had increased by \$700,000.00 and that City was adding a second forgivable loan in the amount of \$250,000.00 to help off-set the increased costs of construction.

With respect to the Developer's argument that none of the work at issue is publicly funded, there are three separate sources of public funds or their equivalent utilized on the Project. (See revised section 1720(b)¹⁰ defining public funds for purposes of the prevailing wage law and *State Bldg. and Constr. Trades Council v. Duncan* (2008) 162 Cal.App.4th 289, 319-320 (*Trades Council*)). First, the one-time payment of the land purchase price in the amount of \$102,529 upon the filing of a notice of completion for the theatre to Cinema West constitutes the payment of public funds under subdivision (b)(1). There does not appear to be any conditions for this payment other than the filing of a notice of completion. Accordingly, the one-time payment of \$102,529 constitutes the payment of money by the state or political subdivision directly to or on behalf of the public works contractor, subcontractor, or developer.

Second, there are two forgivable loans made by City to Cinema West in the amounts of \$1,546,363 and \$250,000 for a total of \$1,796,363.¹¹ The forgivable loans are made pursuant to the DDA and under the terms of two operating covenants that require Cinema West to operate the theatre for 10 years and employ 40 people. According to the Operating Covenants, the loans are to be completely forgiven at the end of the 10 year period. This is a section 1720(b)(5) subsidy in that it is money loaned by

¹⁰ Section 1720 (b) was amended by Senate Bill 975 (Sen. Bill No. 975, (Chapter 938, Statutes of 2001) and again by Senate Bill 972 (Chapter 1048, Statutes of 2002).

¹¹ It appears from the Promissory Note, dated September 7, 2010, that the forgivable loan will be amortized over a ten year period on a straight line basis and, should there be a default, only the unamortized portion of the loan, plus 10% interest, shall be due to City under the Note's "Acceleration" Clause. According to the Promissory Note, if the conditions and covenants are complied with for the ten year period, the "Borrower shall have no obligation to reimburse Lender any of the Note Amount." The loan is not only forgivable, it is interest free for all sums amortized, and, therefore constitutes public funds of the waived interest under subdivision (b)(4). While Cinema West stresses the funds "never changed hands," debt and interest are being forgiven on an annualized basis.

the state or political subdivision that is to be repaid on a contingent basis and is, therefore, also the payment of public funds.

Third, there is the construction of the adjacent parking lot, a water retention system for the theater and parking lot, and the installation off-site improvements to curbs, gutters and sidewalks on that portion of the Project. The requirement that City build the parking lot and other improvements is found in the DDA and the Reciprocal Access and Parking Easement attached thereto as Exhibit 11. There does not appear to be any repayment obligation attached to these improvements. Accordingly, these improvements constitute a payment of public funds under subdivision (b)(2) because they amount to "performance of construction work by the state or political subdivision in execution of the project." In sum, the above-referenced payments satisfy subdivision (a)(1)'s requirement that the project be paid for in whole or in part out of public funds.

Regarding the scope of the Project, under the facts presented, it is clear that the theatre construction, parking lot improvements and related infrastructure improvements constitute a single project for purposes of the CPWL. The specific terms of the DDA and the mutual agreements of the parties to construct all of the improvements in tandem to serve the theatre complex support the conclusion that the scope of the "Project" includes all the elements specified in the DDA.¹² The use of different contractors by Developer and City does not negate the parties' intent to create a complete and integrated theatre complex as outlined under the single DDA and single architectural plan. (See *Oxbow Carbon & Minerals, LLC v. Department of Industrial Relations* (2011) 194 Cal.App.4th 538, 548-550.)

¹² Developer's argument that the work and funding can be segregated into multiple discrete projects seems disingenuous given that both the payment of public funds and the construction of the parking lot are required under the DDA and its subsequent amendments.

Even under a narrower view of the "Project," excluding the parking lot and water retention system, the one-time payment reimbursing the land purchase price and the two forgivable loans are sufficient to conclude that the theatre, standing alone, is a public work because it is being paid for, in part, with public funds in the form of a contractually enforceable subsidy. (See *Hensel Phelps Construction Company v. San Diego Port District* (2011) 197 Cal.App.4th 1020 (*Hensel Phelps*)).

Developer's argument that the public funds do not subject the Project to prevailing wage requirements because the funds are not paying for construction has been rejected by the Court of Appeal. In *Hensel Phelps* the Court found that public subsidies for a project did not have to be in the form of a payment for actual construction and include a broad variety of subsidies specified in subdivision(b). As explained by the Court:

We also find no support in the statutory language for Petitioners' contention that a project does not constitute " 'construction ... done under contract' " unless the public agency pays the actual costs of construction rather than providing a different type of subsidy to the project. Indeed, the language of section 1720, subdivision (b) suggests that the opposite is the case. In defining the type of public subsidies that will render a project " 'paid for in whole or part out of public funds,' " the statute specifies numerous types of subsidies that, as a practical matter, cannot be used to pay the actual construction costs, but that can serve to reduce a developer's project costs. Among such subsidies are a public entity's (i) performance of construction work (§ 1720, subd. (b)(2)); (ii) transfer of an asset for less than fair market price (§ 1720, subd. (b)(3)); (iii) payment, reduction, forgiveness or waiver of fees, costs, rents, bond premiums or interest rates (§ 1720, subd. (b)(4)); and (iv) allowance of credits against payment obligations. (§ 1720, subd. (b)(6).) The Legislature's inclusion of these items would serve no purpose if the phrase "[c]onstruction ... done under contract" is understood to mean that the public agency must contract to pay the *actual costs* of construction. We will not adopt a statutory interpretation that renders meaningless a large part of the statutory language. (Id. at p. 1034.)

Developer's reliance on *Long Beach* and *Greystone* is also misplaced. As the Court observed in *Hensel Phelps*, that, "requiring the payment of public funds to be applied to the actual costs of construction would nullify many of the types of payments of public funds identified in section 1720, subdivision (b). We thus reject *Greystone's* approach in light of the current text of section 1720." (*Hensel Phelps* at p.1032.) Also, as presciently observed in *McIntosh v. Aubry* (1993) 14 Cal.App.4th 1576, 18 Cal.Rptr.2d 680 (*McIntosh*), "Legislators could easily express an intent to bring waived costs (or rent) within the concept of payment with 'public funds' but have not done so." (*Id.* at p. 1590.) The Legislature did this, and much more, with the passage of SB 975 and SB 972.¹³ Accordingly, the funding of the movie theatre construction itself is not necessary to create a public work. Here, it is sufficient that Developer received payments of public funds for the Project.

Cinema West now says that it cannot meet the covenants contained within the DDA and that it has advised City that it will not be taking advantage of the forgivable loans. Absolutely no evidence is provided to support either statement. Cinema West admits, however, that it "would hope to that the appropriate compensation for that obligation could be renegotiated with the City" while it argues that a renegotiated agreement is not a foregone conclusion and, therefore should not be considered by the Director in determining whether the Project is a public work. Delaying the timing of the payment or renouncing it in order to renegotiate what may turn out to be a larger subsidy

¹³ *Long Beach, Greystone and McIntosh* were all decided under a former version of Section 1720 that was supplanted by SB 975 and SB 972. As observed in *Hensel Phelps*, their holdings are based on the old statute, not the new one. Also, as observed in *Trades Council, McIntosh* in particular "generated repeated attempts in the Legislature to modify or overturn it. These efforts culminated in the passage of Senate Bill 975 in 2001. (Stats.2001, ch. 938, § 2.)" (*Id.* at 307.)

on even more generous terms for Cinema West cannot be used as a means to evade prevailing wage obligations.

III. REQUEST FOR HEARING IS DENIED.

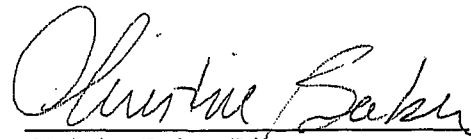
With regard to Cinema West's request for a hearing, section 16002.5(b) of title 8 of the California Code of Regulations provides that the decision whether to hold a hearing is within the Director's sole discretion. Here, the facts set forth in the Determination material to the coverage question are not in dispute. The issues raised in the appeal are solely legal and, therefore, no hearing is necessary. As such, the request for a hearing is denied.

IV. CONCLUSION

In summary, for the reasons set forth in the Determination and in this Decision on Administrative Appeal, the Appeal is denied and the Determination affirmed. This Decision constitutes the final administrative action in this matter.

Dated:

7/15/2013



Christine Baker, Director