STATE CALIFORNIA

DEPARTMENT OF INDUSTRIAL RELATIONS

DECISION ON ADMINISTRATIVE APPEAL

PUBLIC WORKS CASE NO. 2020-014

CITY PLACE SANTA CLARA / RELATED SANTA CLARA

CITY OF SANTA CLARA

I. INTRODUCTION

On November 28, 2022, the Director of the Department of Industrial Relations (Department) issued a public works coverage determination (Determination) finding that the City Place Santa Clara / Related Santa Clara project (Project) is a public work subject to prevailing wage requirements.

On December 28, 2022, Related Santa Clara, LLC (Related) filed an appeal of the Determination pursuant to Labor Code section 1773.5[1] and California Code of Regulations, title 8, (hereafter, Regulation) section 16002.5, and requested a hearing under subdivision (b) of section 16002.5. All interested parties were afforded an opportunity to provide legal argument and any additional supporting evidence.

The City of Santa Clara (City) filed a letter brief with exhibits in support of the Appeal. Related requested that the Department consider its Appeal as its opening brief, and incorporated the City's letter into its opening brief. The International Union of Painters and Allied Trades, District Council 16 (DC 16) filed a letter brief in opposition to the Appeal. Related filed a reply in response to DC 16's opposition. Various organizations, including Associated General Contractors of California, Inc., Bay Area Council, California Building Industry Association, and Housing Action Coalition submitted letters in support of Related's Appeal.

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

The Director has sole discretion to decide whether to hold a hearing. (Regulation section 16022.5, subd. (b).) Because the material facts are not in dispute and the issues raised on appeal are solely legal, the request for a hearing is denied.

All of the submissions have been given due consideration. The Determination is incorporated herein, and for the reasons discussed below, the Appeal is denied and the Determination is affirmed.

II. RELEVANT FACTS

Due to the detailed factual circumstances and procedural history, a recitation of the factual background is provided here for context. Any additional facts provided for the first time on appeal are also recited below.

The Project is a mixed-use development that, once complete, will total approximately 9.16 million square feet comprised of up to 5.7 million square feet of office and 1.5 million square feet of retail/restaurant/entertainment uses, 700 hotel rooms, and up to 1,680 residential units, as well as public open space and parks. The Project will sit on 240 acres of land owned by the City, most of which served as a former landfill. Two different developers submitted two separate development proposals, which were later combined to form the Project. The two developers, Montana Property Group, LLC (Montana) and Related, formed joint venture Related MPG JV, LLC to develop a portion of the Project site, with the remainder to be developed solely by Related.

A. The City accepted proposals to develop the Tasman and City Landfill Parcels without competitive bidding.

Montana submitted an unsolicited proposal to the City in December of 2010 to develop two city-owned parcels adjacent to the San Francisco 49ers stadium project site. Adhering to competitive bidding principles, City staff recommended that the City solicit proposals from other developers. The City, however, declined to open up the solicitation process to competitive bidding. On June 26, 2011, the City and Montana entering into an exclusive negotiating agreement to develop the 9.48-acre property on land described in the Determination as the Tasman Parcels.

On April 9, 2013, the City and Related entered into an Exclusive Negotiating Rights Agreement (ENA) for the development of the City Landfill Parcels -- approximately 230 acres of land that formerly served as the landfill. This proposed development envisioned subdividing the City Landfill Parcels into two sets of vertical parcels, with one parcel constituting the City's fee interest in the landfill (Landfill Parcels), and the other parcel constituting the City's fee interest in the airspace above the landfill (Airspace Parcels). The proposed development would be constructed on a platform over the former landfill. As with Montana's proposed development of the Tasman Parcels, the City did not solicit competitive proposals for the development of the City Landfill Parcels. It is unclear how the City and Related came to enter into the ENA, but the Revised Minutes of the City Planning Commission's meeting on June 8, 2016 noted that "Steve Eimer [for Related Santa Clara, LLC], the applicant, stated that they were invited by the City Council to look at this site and be a partner with the City."

B. The Developer paid for the City's retention of consultants and attorneys for the Parties' negotiation of the Ground Leases.

The stated purpose of the ENA between the City and Related was to "establish procedures and standards for the negotiation by the City and the Developer of a disposition and development agreement (the "DDA") pursuant to which the Developer will conduct specified development activities related to the Property; a Development Agreement ("DA"); and the form of property conveyance documents. In the ENA, Related agreed to pay for the City's "reasonable costs and expenses in negotiating and preparing the DDA, the form of Ground Lease and ancillary documents and complying with planning and environmental review" subject to approval, including "reasonable fees and service of third party traffic and economic consultants and attorneys, selected by the City, relating to the Project and the preparation of the DDA, Ground Lease and ancillary documents ("Consultant Costs")." The ENA listed various negotiation tasks to be performed by the parties prior to the execution of a DDA. With respect to the "Estimated Ground Lease Payments for the Property," the ENA provided that "[t]he City and the Developer shall meet to determine the ground lease payments to be paid for the Property based on the highest and best use of the Property."

On December 19, 2013, the City and Keyser Marston Associates, Inc. (KMA), a real estate economics advisory firm, entered into an agreement for professional services. The agreement described the scope of services performed by KMA to be "disposition and financial advisory consulting services for the City in connection with the Related ENA on the development of the [City Landfill Parcels]."

C. The City entered into Term Sheets to memorialize the negotiated terms of the Ground Leases and the Rent Structure.

On February 11, 2014, the City entered into separate non-binding Term Sheets with Montana and Related for the development of the Tasman Parcels and the City Landfill Parcels, respectively. The Term Sheets and subsequent supplements documented the parties' negotiated commitments and obligations with respect to the proposed long-term lease of the parcels (Ground Leases). Section V. D. of the Related Term Sheet set forth the procedure for arriving at a proposed rent structure for the Ground Leases. The first step of the enumerated process stated that the "City is working with Keyser Marsten [sic] Associates to develop a proposed rent structure, which it would share with Developer." The City relied on the expertise of KMA to derive the rent figures and formulas.

On July 1, 2014, the City and Related entered into a Term Sheet Supplement, which stated that the parties completed the procedure for arriving at the proposed rent structure for the Ground Leases with the assistance of outside consultants and negotiated the rent structure and the related issues set forth in the Term Sheet Supplement. The rent structure for the Ground Leases was detailed in Section III of the Term Sheet Supplement. The June 27, 2014 Agenda Report from the Economic Development Officer/Assistant City Manager to the City Manager, prepared for the July 1, 2014 City Council meeting, explained that the City would take on some of Related's infrastructure investment in developing the former landfill "through a reduction in rent in the earlier years of the lease."

Related later applied to combine the two development proposals into a single project. On February 5, 2015, Montana and Related formed Related MPG JC, LLC, a joint venture to develop the "City Center" portion of the Project site, with the remainder of the Project Site to be developed by Related. On June 16, 2015, the City and Related

entered into a Term Sheet Supplement No. 2 to include the Tasman Parcels as part of the Project and to set forth a proposed rent structure for the Tasman Ground Lease. The rent structure for the Tasman Parcels was detailed in Section V of the Term Sheet Supplement No. 2. There was no change to the rent structure for the other parcels.

D. The City approved the Project with a finding that the transaction with Related would provide Fair Market Value to the City, and acknowledged that the Project would not be subject to prevailing wage requirements.

Between March 10, 2016 and June 7, 2017, the City Council and the City's Planning Commission held five study sessions for the Project. On June 28, 2016, the City Council approved the Project with the adoption of five resolutions and the passing of two ordinances concerning the Project.

On August 12, 2016, the City and Related entered into a Disposition and Development Agreement (DDA). In approving the DDA, the City made findings that the rent structure would provide the City with fair market value. The City and Related acknowledged in the DDA that the rent structure would not trigger prevailing wage requirements. The forms of the Ground Leases for Phase 1 and Phases 2 through 7 were attached to the DDA as Exhibits G-1 and G-2, respectively. The rent structure for each development phase set initial base rents with annual rent increases, along with specified "fair market value" adjustments in certain years of the lease terms. These adjustments would reset the rent amount to the greater of two enumerated options for Phase 1 and the greatest of three enumerated options for Phases 2 through 7. The specific terms of the Ground Leases were discussed in the Determination, and they are incorporated herein by reference.

Also on August 12, 2016, the City and Related entered into a Disposition Agreement (DA) pursuant to the Development Agreement Statute at Government Code sections 65864 et seq. Section 2.2 of the DA stated that future changes to City ordinances, laws, rules, regulations, plans or policies adopted after the Effective Date of the DA shall not apply to the Project.[2] Section 3.2 provided that the only Development

[2] Per Section 1.3 of the DA, the DA is effective upon its execution by all parties following the effective date of the Enacting Ordinance. City Ordinance 1956, which approved the DA, was adopted on July 12, 2016. Prior to the issuance of the underlying

Fees applicable to the Project are those Development Fees listed in Exhibit C and/or discussed in Section 3 of the DA. The specific provisions with regard to Development Fees and various impact fees were discussed in the Determination, and they are incorporated herein by reference. Notably, the DA contained provisions to freeze and cap of various fees, for the City to provide credit to Related for various taxes and fees that would be paid by Related, as well as for the City to contribute funds toward transportation needs addressed in the Multimodal Improvement Plan (MIP).

The DA also acknowledged that the City agreed to provide electric service to Related in the form of a new electrical substation. On December 3, 2019, the City, which owns and operates municipal electric utility Silicon Valley Power (SVP), and Related entered into the Esperança Substation Agreement to build a new electrical substation to provide new electric capacity and power transmission facilities to Related for the Project. The City contemplated the installation of a new Esperança Substation at the City's existing Northern Receiving Station as far back as 1999.

On July 24, 2020, DC 16 requested a determination whether the Project was a public work covered by the prevailing wage law. In December of 2022, the City and Related executed ground leases for Phase 1 of the Project.

After the Determination issued, the City and Related executed a First Amendment to the DDA that modified the appraisal instructions to determine the fair market value of the property for rent calculation purposes.

III. CONTENTIONS ON APPEAL

On appeal, Related offered the following arguments as to why it believes the Determination was wrongly decided. First, Related claims that the Ground Leases constitute fair market value based on the City's findings and expertise in negotiations, and also based on the KMA analyses that were prepared after DC 16 submitted its request for coverage determination. Second, Related claims that the deduction of

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coverage determination on November 28, 2022, the Parties had not provided Department staff with a fully executed copy of the DA. On January 31, 2023, the City provided a copy of the recorded DA showing full execution on August 12, 2016.

Premium Costs, which are the costs to develop the City Landfill Parcels, does not constitute a rent reduction, and that the Parties' post-coverage determination amendment of the DDA changing the fair market rent adjustments for Phases 2 through 7 removes the rent reduction issue. Third, Related claims that the freezing and capping of development fees does not constitute a public subsidy, any public subsidy received by Related is outweighed by the public benefits and other fees paid by Related, and that the requirement of prevailing wages for frozen fees would stifle development projects. Fourth, Related claims that any public subsidy for the Project is de minimis given the $8 billion estimated Project cost at the time of approval.[3] Finally, Related claims that the Determination is invalid because it was issued more than 120 days from the last submission under Labor Code section 1773.5.

The City supplemented and expanded Related's arguments against the Determination. The City offers several factual clarifications. First, the City reiterated that it provided documents prepared by KMA showing that the City received fair market value, and that it now provides a supplemental report by KMA dated January 30, 2023 in response to the Determination. Second, the City clarified that it adopted findings that the rent was not reduced and represented fair market value, contrary to the statement by City staff in the June 27, 2014 Agenda Report that the City would take on some of Related's responsibility for infrastructure investments on the Project through a reduction in rent. Third, the City clarified that the renumbering of the parcels between the Term Sheet supplements and the DDA did not result in any change to the initial rent amounts. Fourth, the City clarified that it previously provided an unsigned copy of the DA and that it now has provided a fully executed copy of the DA. Fifth, the City reiterated that the treatment of the various development and impact fees in the DA do not constitute public subsidies, because these obligations only exist by virtue of the DA and were extracted from Related as public benefits. Sixth, the City clarified that after the Determination was issued, the City amended the DDA with regard to the appraisal instructions for the fair market value adjustments for Phases 2 through 7 such that the treatment of Premium

[3] Related currently values the Project at $10 billion.

Costs would not constitute a rent reduction. Finally, the City reiterated its position that the freezing of development fees does not constitute a public subsidy.

DC 16 opposed Related's appeal of the Determination. DC 16 contends that Related and the City rely on the same evidence and arguments considered and previously rejected in the Determination, with the exception of the post-Determination amendment of the DDA. DC 16 contends that the post-Determination change to the rent structure does not alter the analysis of the rent reduction issue, and that the nature of whether a project is a public works must be determined at the inception of the project. Finally, DC 16 requests that the Director address whether the City's construction of the Esperança Substation constitutes an alternate basis for coverage.

Related offered the following response to DC 16's opposition to its appeal. First, Related relies on the KMA report dated July 21, 2022 as evidence of the Project's fair market value, and contends that the Director has no authority to dispute the City's finding of fair market value. Second, Related contends that the renegotiated fair market value adjustments for Phases 2 through 7 are not rent reductions because they result in an increase in rent, and contends that the Parties can renegotiate the DDA at any time. Third, Related contends that the provisions in the DA regarding development and impact fees result in a net increase of public funds. Fourth, Related contends that the de minimis exception is met based on the value of the Project. Finally, Related contends that the Director should not consider DC 16's request to decide whether construction of the electrical substation constitutes another basis for finding that the Project is subject to prevailing wage requirements, as DC 16 waived this argument by failing to appeal the Determination.

The Associated General Contractors of California, Inc., Bay Area Council, California Building Industry Association, and Housing Action Coalition all submitted letters in support of Related. The letters from the four organizations largely parroted each other, and the overall contention they make is that the Determination could stifle housing production in California and "disincentivize public-private partnerships," particularly innovative ones such as this one to "redevelop an aging golf course/former landfill into the largest mixed-use development in California. Public-private partnerships like this are not uncommon, and often provide the resources necessary for cities to

initiate infill Development." More specifically, they also argue that (1) the Determination "circumvents" a city's ability to negotiate development agreements; (2) the Department does not acknowledge the information provided by the City's consultants; (3) that the Department fails to acknowledge the rent structure is consistent with industry standards; and (4) that the freezing of fees is common and does not constitute a public subsidy.

IV. DISCUSSION

The overall purpose of California's prevailing wage law is to "protect and benefit employees on public works projects." (*Lusardi Construction Co. v. Aubry* (1992) 1 Cal.4th 976, 985 (*Lusardi*).) The goal of prevailing wage laws in general is to "give local contractors and labor a fair opportunity to work on public building projects that might otherwise be awarded to contractors who hired cheaper out-of-market labor." (*Kaanaana v. Barrett Business Services, Inc.* (2021) 11 Cal.5th 158, 166 (*Kaanaana*).) The law is liberally construed to fulfill these purposes. (*Ibid*.) "[B]oth the awarding body and the contractor may have strong financial incentives not to comply with the prevailing wage law." (*Lusardi, supra,* 1 Cal.4th at p. 987.) Therefore, attempts by an awarding body and the contractor to contract around prevailing wage requirements must be rejected. (See, e.g., *id.* at pp. 987-988; *Azusa Land Partners v. Department of Industrial Relations* (2010) 191 Cal.App.4th 1, 32; *Oxbow Carbon & Minerals, LLC v. Department of Industrial Relations* (2011) 194 Cal.App.4th 538, 550.)

The prevailing wage law's protections only apply to a project that constitutes "public work," which is defined in several different provisions of the law. (See, e.g., §§ 1720, subds. (a), (e), 1720.2-1720.9.) Labor Code section 1720, subdivision (a) itself sets forth eight separate definitions of the term. The parties appear to agree that the Project here should be analyzed under the most commonly known definition of "public works," which is set forth in section 1720, subdivision (a)(1) (hereafter section 1720(a)(1).) "There are three basic elements to a 'public work' under section 1720(a)(1): (1) 'construction, alteration, demolition, installation, or repair work'; (2) that is done under contract; and (3) is paid for in whole or in part out of public funds." (*Busker v. Wabtec Corporation* (2021) 11 Cal.5th 1147, 1157 (*Busker*).) Here, it is undisputed that the Project involves construction done under contract. Thus, as is often the case, the

only element in dispute here is the third one, and the phrase "paid for in whole or in part out of public funds" is defined in section 1720, subdivision (b), as "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.
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> (2) Performance of construction work by the state or political subdivision in execution of the project.
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> (3) Transfer by the state or political subdivision of an asset of value for less than fair market price.
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> (4) Fees, costs, rents, insurance or bond premiums, loans, interest rates, 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.
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> (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.

The Determination found that the Project's construction is paid for out of public funds and the Project therefore constitutes a public work because the rent was both reduced and charged at less than fair market value, and the freezing and capping of fees and the provision of credits for certain fees constituted a public subsidy. The Determination further concluded that the de minimis exception under section 1720, subdivision (c)(3) (hereafter section 1720(c)(3)) does not apply.

A. The Determination correctly found that rent was both reduced and charged at less than fair market value.

A payment of public funds for purposes of the prevailing wage law occurs when a public entity either reduces rent *or* charges rent at less than fair market value. (§ 1720, subd. (b)(4); *Hensel Phelps Construction Co. v. San Diego Unified Port Dist.* (2011) 197 Cal.App.4th 1020, 1039.) While there is "no requirement that both conditions be present," the Determination found both conditions to exist: the rent adjustments in Years

45 and 70 for the Airspace Parcels constituted a rent reduction, and there was no evidence that the rent was charged at fair market value.

The Determination found that the rent adjustments constituted a public subsidy because the rent adjustment formula deducted Premium Costs even though the formula was based on the unimproved condition of the land. In essence, the rent adjustment resulted in the subtraction of Related's infrastructure investment from the value of the unimproved parcel. After the Determination was issued on November 28, 2022, Related and the City renegotiated the terms of the rent adjustments on December 19, 2022 to remove the deduction of Premium Costs from the rent adjustment formula discussed in the Determination. Such post-Determination maneuvering by awarding bodies and developers to evade prevailing wage requirements is disallowed as it would result in an ever-moving target for workers, labor compliance groups, and "the Department's limited enforcement personnel." (*Cinema West, LLC v. Baker* (2017) 13 Cal. App. 5th 194, 216, 220.) "Parties must be able to predict the public-works consequences of their actions under reasonably precise criteria and clear precedent." (*McIntosh v. Aubry* (1993) 14 Cal.App.4th 1576, 1593 (*McIntosh*), superseded by statute on another ground as stated in *State Building & Construction Trades Council of California v. Duncan* (2008) 162 Cal.App.4th 289, 307 (*State Building Trades*).) Allowing parties to change the terms of the deal after construction had already begun, a Determination had been issued, and expectations had been set "would create confusion and uncertainty." (*Sheet Metal Workers' Internat. Assn., Local 104 v. Duncan* (2014) 229 Cal.App.4th 192, 213, disapproved on other ground by *Mendoza v. Fonseca McElroy Grinding Co., Inc.* (2021) 11 Cal.5th 1118.)

The Determination also found no evidence that the rent structure constituted fair market value. Related asserts that the Director should defer to the City's findings of fair market value, based on the City's reliance of its economic expert KMA in negotiating with Related. In support of that argument, the City clarified that it adopted findings that the rent was not reduced and represented fair market value. But the City's clarification is incompatible with the statement by City Staff in the June 27, 2014 Agenda Report that the City would take on part of Related's responsibility for infrastructure investments through a reduction in rent. Furthermore, blindly deferring to the City's finding that the

terms of the Ground Leases set forth in the DDA would provide the City with fair market value would mean the Director is impermissibly relinquishing to the City her responsibility to determine coverage of the prevailing wage law. Contrary to Related's assertion otherwise, the Director has the statutory authority to determine whether a construction project is a public work subject to prevailing wage requirements. (*Lusardi*, *supra,* 1 Cal.4th at pp. 988-989; § 1773.5.) Nowhere in the statutory scheme is the crucial function of determining fair market value delegated to cities or any other entity. As the California Supreme Court in *Lusardi* aptly pointed out, a public entity "may have strong financial incentives not to comply with the prevailing wage law." (*Lusardi, supra*, 1 Cal.4th at p. 987.) A rule that the Department must defer to a city's findings of fair market value would grant a city unchecked discretion to assess the value of its self-interested transactions.

Both Related and the City place much emphasis on the City's use of KMA in the negotiation process. Regardless of what work KMA performed in negotiating the lease terms, from when the City retained its services on December 19, 2013 to when the City and Related entered into the Term Sheet Supplement on July 1, 2014 which detailed the negotiated rent structure, neither the City nor Related have provided any appraisal performed by a qualified, independent third-party appraiser during the negotiation process to show fair market value. Instead, Related and the City rely on various analyses by KMA and Economic & Planning Systems, Inc. (EPS), another real estate consulting firm, prepared after DC 16's request for a coverage determination to justify the negotiated rent structure. These after-the-fact analyses do not and cannot take the place of a bona fide appraisal performed in determining the fair market value of the property. (Public Works Case No. 2004-035, *Santa Ana Transit Village – City of Santa Ana* (Dec. 5, 2005/June 25, 2007); see also Public Works Case No. 2004-034, *Lake Piru Recreation Area Concessionaire Improvements – United Water Conservation District* (Mar. 15, 2005).) It is difficult to characterize the negotiations between City and Related as arms-length when the City invited Related to develop the property, and Related paid for the City's retention of consultants and attorneys in the negotiations. An after-the-fact appraisal is almost presumptively self-serving, as it was procured specifically to counter the reasoning and the findings in the Determination.

Nonetheless, even if these consultants and reports were considered, they still do not qualify as support that the rent was either reduced or provided at less than fair market value. (§ 1720, subd. (b)(4).) Commissioned by Related, EPS provided its post-Determination review in a four-page report criticizing the Determination's treatment of the terms of the DDA. First, EPS argues that the DDA includes a "suite of interrelated financial provisions and milestones to arrive at a rent structure that represents 'fair market value.'" According to EPS, the Determination "ignores these interrelationships and inappropriately 'cherry picks' certain provisions in the DDA, among many, as evidence of a public subsidy." But in reviewing the December 27, 2022 EPS report, EPS fails to actually disclose what exactly these interrelationships are. EPS then attempts to refute the Determination's findings that there was no evidence to show that 6.5% represents fair market value by referring to evidence in the record that has been submitted by other parties. And yet, EPS does not once detail what the data or the report say to find that 6.5% is fair market value. A simple statement that other similar projects were charging the same rate at the time of the negotiated DDA with real data to back it up could have sufficed. Instead, EPS presents vague generalities and essentially urges the Department to trust EPS, because they are experts.

Next, EPS takes issue with the Determination's treatment of the rent resets. EPS argues that though the rent payments are capped, they are also subject to a floor. The fact that there is a floor that the rent payments cannot fall beneath has little bearing on a fair market value analysis. Unquestionably, rent payments must have a floor. If there was no floor, the rent payments to the City qualify as a public subsidy because a rent reset without a floor is a rent reduction that is more likely than not being charged for less than fair market value. (§ 1720, subd. (b)(4).) The existence of the floor is part of the threshold inquiry, while placing a ceiling on the rent resets is strong indication that the rent is being artificially restricted. The public subsidy inherent in capping rent resets under these facts is evident to EPS, as the report concedes that the "provisions also provide the financial incentive necessary to attract private sector investment in a long-term, speculative real estate project requiring significant up-front infrastructure and public improvements." Providing financial incentives to developers is exactly the scenario the Legislature envisioned as requiring prevailing wages when it added the

definition of “paid for in whole or in part out of public funds” to section 1720, subdivision (b).[4] (See Senate Third Reading, Analysis of Sen. Bill 975 (2001–2002 Reg. Sess.) as amended Aug. 30, 2001, p. 4 [Supporters of the bill argue that the bill fixes “the discrepancy under existing law between a monetary transfer of funds to a developer that would trigger prevailing wage requirements and tax forgiveness or a fee waiver for an equivalent amount of funds that would not trigger prevailing wage requirements.”])

On the point of the fair market value of the rent, EPS argues that the Determination’s analysis of the DDA was flawed, but bases that argument on the terms of the First Amendment to the DDA – an amendment that took place after the Determination had issued, and which the Determination had no occasion to consider. As discussed above, shifting gears after the Determination has issued and after construction begins cannot be allowed. “It would incentivize gamesmanship on the part of local government bodies and developers whereby projects would be publicly subsidized but constructed without PWL compliance. If an investigation later revealed the violation, the developer could still avoid paying prevailing wages and statutory penalties by repaying or disclaiming the public subsidy.” (*Cinema West, supra,* 13 Cal.App.5th at p. 216.)

B. The freezing and capping of fees, and the provision of fee credits, constitute a public subsidy.

The Determination found that the freezing and capping of development fees in the DA, as well as the provision of credit to Related for fees paid to the City, constitute

[4] SB 975, which added the definition of “paid for in whole or in part out of public funds,” was driven by the Court of Appeal’s decision in *McIntosh*. In *McIntosh*, the court found that the development project was not a public work under the former version of section 1720 because the various subsidies provided by Riverside County, such as a commitment to place minors in the finished facility, a rent-free sublease for 20 years, payment of up to $75,000 in bond premiums, and a waiver of inspection costs, did not pay for construction. (*McIntosh, supra,* 14 Cal.App.4th at pp. 1580-1581.) The project at issue “grew out of County efforts to find a qualified, privately run residential shelter care facility to shelter and treat disturbed or abused minors under its charge.” (*McIntosh, supra,* 14 Cal.App.4th at p. 1580.) Like the Project here, *McIntosh* dealt with a development project that would be unattractive without public involvement. As discussed above, SB 975 repudiated *McIntosh*’s holding of what it means to be a public subsidy. (*State Building Trades, supra,* 162 Cal.App.4th 289, 307.)

public subsidies. First, the Determination found that the DA froze the dwelling unit tax required by the City municipal code for 7 years after the March 24, 2020 approval of the first Development Area Plan (DAP), and that the DA credits the full amount of the dwelling unit tax paid towards any costs owed to the City. Second, the Determination found that the DA froze the local traffic impact fee required by the City municipal code for the later of 7 years after the March 24, 2020 approval of the first DAP, or the date by which building permits have been issued for at least 3 million square feet of office space on the Project site, and that the DA caps the local traffic impact fee at $2.25 per square feet for office space and $900 per hotel room for the entire term of the DA.

Related, its supporters, and the City contend that the freezing and capping of development fees does not constitute a public subsidy because the Development Agreement statute, at Government Code sections 65864 et seq., allows for development fees to be fixed as of the time of a development agreement. However, neither Related nor its supporters has provided any legal authority to show that development fees frozen by a development agreement is excluded from the prevailing wage law's definition of public funds. In fact, the Development Agreement Manual cited by Related in its appeal specifically noted that "financial incentives may trigger prevailing wage requirements." (Institute for Self Local Government, Development Agreement Manual (2002), p. 18.) To the extent that Related contends that the Determination would treat fees frozen under the Housing Crisis Act and the Subdivision Map Act to constitute public subsidies triggering the prevailing wage requirements, the Determination did not decide that issue because no such facts were presented for consideration.

Related and the City also contend that any public subsidy it may receive is outweighed by the concessions it made to the City. However, the prevailing wage law does not turn on a cost/benefit analysis as to whether the awarding body or the developer exacted more concessions in the transaction. (Public Works Case No. 2011-021, *Westrust Nut Tree Project – City of Vacaville and Vacaville Redevelopment Agency* (Aug. 8, 2014/Jun. 25, 2015).) Section 1720, subdivisions (a) and (b), require that the project be "paid for in whole or in part out of public funds." There is no legal support for Related's position that prevailing wage requirements would not be triggered

if the awarding body exacted more concessions from the developer as compared to concessions exacted by the developer against the awarding body.

C. The public subsidies are not de minimis.

The Determination did not find the so-called de minimis exception in section 1720(c)(3) to apply to this Project because there was no evidence of the fair market rental value to even approximate the total amount of public subsidies involved. Assuming that the pre-2021 version of section 1720(c)(3), applies to the Project, that provision states:

> If the state or a political subdivision reimburses a private developer for costs that would normally be borne by the public, or provides directly or indirectly a public subsidy to a private development project that is de minimis in the context of the project, an otherwise private development shall not thereby become subject to this chapter.

Related claims that any public subsidy received for the Project is de minimis given the $8 billion estimated Project cost at the time of approval.[5] According to Related, a subsidy of less than 1.5% of the total cost of the project is considered de minimis, which equals $120 million for this Project based on the $8 billion estimated total cost at approval. As noted in the Determination, only one prior coverage determination found $1.66 million in public subsidies to be de minimis, and all other coverage determinations involved only thousands of dollars. (Public Works Case No. 2011-033, *Blue Diamond Agricultural Processing Facility – City of Turlock* (May 9, 2012).) The "familiar rule" is that statutory exemptions must be narrowly construed. (*Sacramento County Employees' Retirement System v. Superior Court* (2011) 195 Cal.App.4th 440, 463.) Up to $120 million in public subsidies can hardly be considered de minimis, under any definition of the term.

Related also contends that the Director cannot reject the de minimis exception because the Director failed to determine the total amount of the public subsidies given by the City to Related. This is a failure of the parties' own making. The party seeking shelter in an exception has the burden to demonstrate the exception applies. (*Meacham*

[5] Related currently values the Project at $10 billion.

v. Knolls Atomic Power Laboratory (2008) 554 U.S. 84, 91.) Related fails to provide the necessary showing to claim the de minimis exception.

D. The time period to issue a Determination is directory, not mandatory.

Related claims that the Determination is invalid because it was issued more than 120 days from the last submission under section 1773.5.[6]

The time period prescribed in section 1773.5 is directory, and not mandatory, because there is no consequence for failure to act within the time prescribed. (*California Correctional Peace Officers Association v. State Personnel Board* (1995) 10 Cal.4th 1133, 1145.) Therefore, a determination issued outside of the 120-day requirement of section 1773.5 is not invalid.

E. The remaining arguments need not be addressed.

Because the Determination is affirmed for the reasons stated herein, it is not necessary to address the Parties' arguments with respect to the construction of the electrical substation or any other basis for coverage.

V. CONCLUSION

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

Dated: January 15, 2026

Jennifer Osborn
Director of Industrial Relations

[6] The last submission by the parties was on July 22, 2022. The Determination was issued 128 days later on November 28, 2022.