December 7, 2007

Roger Jeanson, Esq.
Department of Industrial Relations
Office of the Director - Legal Unit
455 Golden Gate Avenue, Suite 9516
San Francisco, CA  94102

Re:  Public Works Case No. 2006 – 021;
Hilton San Diego Convention Center Hotel

Dear Mr. Jeanson:

We submit this letter on behalf of the Associated General Contractors of California\(^1\) in support of the positions of Hensel Phelps Construction Co. and Phelps Portman Development that the privately-funded, privately-contracted construction of the privately-owned Hilton San Diego Convention Center Hotel is not a “public works” within the meaning of the California Prevailing Wage Law.

AGC is interested in this case, because it is concerned that the coverage determinations of the DIR since the passage of SB 975 are often inconsistent with one another, are based upon inadequate information and an incomplete understanding of the facts of the transactions involved and are often inconsistent with the terms of SB 975. The recent determination on appeal of the coverage determination in the Fry’s matter (Public Works Case No. 2005-06 Oxnard Marketplace Shopping Center-Fry’s) enhances AGC’s concerns that the DIR is taking an inappropriately expansive view of SB 975.

AGC is also interested in this case in terms of the DIR’s practice of exercising its discretion to expend considerable scarce agency legal resources to offer coverage determination opinions for developments where work has been bid and various works of construction have already commenced, and where they have often been completed by the time an opinion issues. It may be useful to parties to private developments intersecting with public agency land use controls and redevelopment objectives or to unions and others interested in the upcoming works

\(^{1}\) AGC of California is a construction trade association consisting of more than 1,100 member firms. Its contractor members perform the majority of public works in California. AGC of California is one of 98 chapters that comprise the Associated General Contractors of America and is the second largest chapter in the United States. AGC of America has over 32,000 members nationwide. The collective membership performs substantial public works construction across the United States and maintains comprehensive knowledge of the laws that apply to public works. AGC representatives participated in extensive negotiations with the representatives of the State Building Trades Council and the Carpenters Union over amendments to SB 975, initiated by organized labor, the provisions of which are at issue in this coverage determination.
of construction within those developments to obtain input from the DIR regarding its opinion as to the applicability of prevailing wages to all or some of the works of construction beforehand, but it is seldom efficacious afterward. The DIR’s opinion is not binding, and the agency is neither funded nor equipped adequately in terms of staff, procedures and the required protections of due process and trier-of-fact impartiality to supplant the courts as a forum for interpreting the application of a statute.

In this case, AGC submits that the facts before the DIR and the structure of the statute the DIR is interpreting dictate that the only coverage determination that can properly be made is that the private construction of the hotel is not a “public works” for which prevailing wages are required.

**The Facts**

The DIR is here presented with a *bona fide* appraisal of a hotel lease prepared, certified and submitted by an appraisal firm known for its expertise in valuing hotels for sophisticated investors nationwide. The individual appraiser signing on behalf of the firm has impressive credentials in detail and in breadth.

The appraisal considers the elements of public improvements adjacent to the leasehold parcel, the parking structure, and the terms of hotel access to and cost for use of that parking structure. It treats the structure as a positive feature and factors the value of that feature into the fair market value of the leasehold interest.

The appraisal considers the burdens, the benefits and the conditions of use of the public spaces the lessee must improve and maintain throughout the life of the leasehold and factors that into the assessment of the fair market value of the leasehold interest.

The appraisal examines the terms of the lease, the rental costs of the various revenue-generating components of the hotel and determines the overall cost of the leasehold interest on a unit basis. This valuation is tested against area “comps” with differences adjusted.

Having proceeded through the discipline called for by appraisal procedures, a conclusion is reached that the lease for the leasehold is at or above fair market value for such a lease.

The validity of the appraiser’s conclusion is supported by the agency’s October 2, 2007 letter describing the process by which the Port negotiated the lease with the developer and by other information in the record discussed by counsel for the developer and by the appraiser in the appraiser’s response to criticism of the appraisal.

No evidence appears in the record of a higher fair market value for the leasehold. No appraisal sets forth a higher fair market value assessment. Only a “desk-top appraisal review” is offered to suggest that some of the formal appraisal’s methodology can be questioned.
leading to an *implication* that further factual inquiry *might* result in a different determination of fair market value.

The insufficiency and invalidity of such armchair challenges we leave to the parties. What is important for the request for coverage determination is that there is no competent evidence of the fair market value being anything higher than that assessed by the Jones Lang LaSalle appraisal.

Instead, there is substantial evidence that the agency transferred the leasehold interest to the developer for a fair market price or better. A competent, independent appraisal is before the DIR establishing that the lease is not for less than a “fair market price.” A statement of the public agency describing the process and reasoning for its having proceeded to bind itself to the transaction and setting forth the events underpinning its conclusion that the terms of that transaction were for not less than a fair market price is before the DIR. These facts are effectively unchallenged by the petitioners.

The Structure of the Statute

The California Prevailing Wage Law sets forth a clear framework by which works of construction should be analyzed to determine whether or not they are “public works” within the meaning of the statute. Section 1720 has its own step-by-step process.

First, as always, but as is often ignored by those with an expansive agenda, the California Prevailing Wage Law is written to apply only to “public works”, and, more importantly, only to those “public works” that fall within the definitions of Sections 1720, 1720.2 and 1720.3, 1721 and 1722. These definitions are, by and large, limiting definitions, narrowing the number of public works to which they apply, not expanding the definition of works covered beyond “public works” to pick up private works somehow deemed to be related to the public works.2

The Legislature has never revoked this general understanding of what works were covered and what were not. Even with the addition of the provisions of SB 975, the statutory definition of “public works” limits the works covered from all “public works” to those within the restrictions of the definitions of the Prevailing Wage Law.3

2 While looking at the details of what the Legislature adopted in SB 975, the DIR should respect and not overlook this fundamental, undeniable structure of the statute. In the 1930’s and until recently, nobody needed a definition of “public works.” Everybody knew what “public works” were. They were works of construction for the public, owned by or maintained for the broad use by or benefit of the public. They were the set of construction projects that were juxtaposed with the other known set of works of construction, “private works.” The Prevailing Wage Law needed to have a definition of “public works” for its purposes, because its provisions did not apply to all public works, only to those that fit its limiting definitions.

3 Proponents of an expansive interpretation of the Prevailing Wage Law are fond of quoting decisional law that recites the intent of the Legislature that the Prevailing Wage Law be interpreted broadly to protect the interests of workers. The language quoted, however, appears in decisional law only in the context of protecting workers on “public works.” No one can seriously contend that the Legislature intended the Prevailing Wage Law to be “interpreted broadly in the interests of workers” to override the State Minimum Wage Law and other private
The question here is whether the developer’s construction of the hotel on the leasehold is being “paid for…out of public funds.” Petitioners argue that the public construction of the public parking garage constitutes “payment” in part for construction of the hotel, by virtue of Section 1720(b)(2), because the parking structure construction constitutes the performance by the public of construction “in execution of the project.” This is an unsustainable interpretation. Where the hotel construction is unsubsidized, because the benefits of the separate construction of the parking structure are completely offset by the cost of the leasehold rent requirements, the public is not paying for the hotel construction work in any respect.

Most nearby public improvements constructed near in time to a private development can be argued to be “in execution of the project.” But the question is whether the public construction expenditures are “paying” for “the construction” of the hotel. Where the hotel developer is paying full value for the property it occupies, including the value to the developer’s private site of all nearby public amenities, it cannot be said that the public agency’s construction activities were in “execution of the [private] project.” Instead, the public construction is a free-standing public works project executed for the benefit of the public as a whole, not for the benefit of a developer that is paying a higher and full fair market price for the value of its private site as enhanced by the nearby public amenities.

The foregoing interpretation is substantiated by a comparison to Section 1720(c)(2). Had the Port required the hotel developer to construct the public parking facility and then reimbursed the developer for the cost to the developer of the parking facility, the developer would only have been required to pay prevailing wages on the parking facility. The construction work on the hotel would have been unaffected, because the construction work on the hotel was not being “paid for” by the public funds that reimbursed the cost of the parking facility.

The same analysis applies to the other public improvements installed by the Port and to the hotel developer’s operations of its site that includes certain improvements and space dedicated to the public or that imposes obligations on it to operate and maintain the Port’s public improvements on nearby sites. As long as the hotel developer is paying a fair market price for its leasehold as benefited by the public enhancements, no public funds are being paid for the private construction. This is true even where credit is given to the hotel developer for the financial burdens of these improvements in the form of the reduced value of its leasehold through restrictions on use, on the permissible footprint of its private construction work and for the private funds that must be expended to assume the costs of operating and maintaining the public improvements, costs normally borne by the public. Section 1720(c)(3) confirms this result. Where the Port reimburses the hotel operator for the costs of providing and maintaining the public improvements, the private hotel development is not converted into a “public works.”

sector labor laws in favor of imposing “prevailing wage” requirements upon employers engaged in “private works” of construction. To the extent the Legislature acted to characterize some private works of construction as “public works”, it acted specifically and expressed no intent that such extensions be interpreted broadly.

4 Although the initial intent of the proponents of SB 975 may have been to import into statute the Vineyard Creek rationale of the Davis Administration’s DIR for tying public and private works together into one “public works project” [Vineyard Creek Hotel and Conference
Conclusion

The record before the DIR in this matter provides competent evidence that the leasehold obtained by the developer was acquired at a fair market price or better. No competent evidence offers a competing, higher assessment of the fair market price. This should end the DIR’s inquiry. Given that a fair market price is being paid for the leasehold as benefited and as burdened by the public improvements nearby and by the requirements for maintenance of public improvements, Section 1720 provides no basis for concluding that the privately-funded, privately-constructed, privately-owned hotel improvements constitute “construction…paid for…in part out of public funds.”

Sincerely,

John S. Miller, Jr.

JSM/pbw