

DEPARTMENT OF INDUSTRIAL RELATIONS

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August 13, 2018

Branden Lopez
Assistant Director
Center for Contract Compliance
2551 E. Chapman Avenue, Suite 206
Orange County, California 92831

Re: Public Works Case No. 2017-002
 Virgin Hotel
 City of Palm Springs

Public Works Case No. 2017-003
Kimpton Hotel
City of Palm Springs

Public Works Case No. 2017-004
Downtown Revitalization
City of Palm Springs

Dear Mr. Lopez:

This constitutes the determination of the Director of Industrial Relations regarding coverage of the above-referenced projects under California's prevailing wage laws. This determination is made pursuant to Labor Code section 1773.5¹ 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 each of the above-referenced projects constitutes a public work subject to prevailing wage requirements.

Facts

In 2001, Palm Springs Promenade, LLC (Developer), privately acquired the Desert Fashion Plaza, a shopping mall in downtown Palm Springs, which had gone into foreclosure. On December 2, 2009, with input from citizens, consultants, and Developer, the City of Palm Springs (City) approved the Museum Market Specific Plan (MMSP) to revitalize downtown Palm Springs. The MMSP proposed breaking the lot on which the Desert Fashion Plaza stood (DFP lot) into five (5) city blocks, and constructing roads, parking garages, street-facing shops, and housing, as well as developing luxury hotels. The stated goals of the MMSP were to attract visitors, tourists, and convention-goers into the downtown area by creating a walkable area linking the convention center and museum districts, which flank the DFP lot. The MMSP was also adopted by the Palm Springs Redevelopment Agency.

¹ All further statutory references are to the Labor Code unless otherwise indicated.

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On September 22, 2010, prior to any construction or demolition of the Desert Fashion Plaza mall, the City ordered an assessment of the DFP lot, which was issued on or before December 15, 2010, and which set the value of the entire 13-acre DFP lot at \$15.7 million. Developer alleges it obtained a competing appraisal setting the value of the DFP lot at \$30 million, but did not submit this appraisal to the Department. The City made an offer to purchase the DFP lot for \$18 million in December 2010, which was rejected by Developer, and reported by the City Mayor in a public statement.

On March 31, 2011, the City and Developer entered into a Reimbursement Agreement, which stated that the City and Developer would split Developer's "procurement costs" for preconstruction architectural, planning, and engineering for the DFP lot 50/50. The City paid at least \$230,000 for Developer's procurement costs under this Reimbursement Agreement. In addition, by March 31, 2011, the City approved a Revitalization Plan, which amended the MMSP to call for complete demolition of the existing mall and new construction on the entirety of the DFP lot, the majority of which would be privately held by Developer.

On July 7, 2011, Kaiser Martin, consultants, at the request of the City and Developer, issued a feasibility study showing that, based on the Revitalization Plan, the DFP lot redevelopment would turn a profit of 4.5% without public participation, but the market expectation for return on investment in projects of this size is at least 9.5%, and that over \$40 million in public funding would be necessary to ensure a minimum 9.5% return. On July 20, 2011, the City Council discussed public funding of Developer's construction on the DFP lot. A staff report considered at that meeting stated that redevelopment of the DFP lot would eliminate blight and allow the City to compete for sales tax revenue with other towns in the Coachella Valley, while the majority of the redeveloped lot would remain privately held.

At some point in 2011, Developer alleges it obtained an independent appraisal of the value of the land for the public improvements contemplated by the Revitalization Plan, constituting several streets, public garages, and two vacant lots within the DFP lot. This appraisal allegedly set the land value at \$32 million; however, Developer did not provide this appraisal to the Department.

On September 29, 2011, the City and Developer entered into a Project Finance Agreement (PFA) to complete all construction contemplated by the Revitalization Plan. Under the terms of the PFA, the City agreed to pay Developer a City Payment of \$43 million for redevelopment of the DFP lot. Of those funds, according to the PFA, \$11 million of the City Payment was for construction of public improvements, including the streets and public garages. The PFA characterized an additional \$32 million of City funds as being for the purpose of acquiring title to the public improvements, presumably after they had been constructed, including the streets, public garages and two vacant lots designated as Blocks H-1 and H-2.

Other provisions of the PFA, however, provided that the \$32 million City Payment (ostensibly for the later purchase of public improvements) would be deposited into a Private Improvements Escrow (PIE) account at the inception of the project. The PFA conferred sole control of this PIE account on the Developer, and expressly allowed the funds to be used for any and all private construction contemplated by the PFA, which included the shops and residential buildings. The terms of the PFA were thus somewhat internally inconsistent in that the \$32 million City Payment that was ostensibly to be for the purpose of later acquiring completed public improvements was actually paid over at the beginning of the project for the Developer's use in constructing the private improvements.

The PFA also included a Performance Trust Deed, whereby Developer conveyed title to the entire DFP lot to the City as security for the City Payment and a guarantee of Developer's performance of its duties under the PFA, which include construction of all public and private improvements. When all public and private construction contemplated by the PFA was completed, title to the private land would return to Developer.

The PFA only permitted the use of the \$43 million City Payment funds on construction designated as part of what was termed "Phase I" of the development of the DFP lot, as described in the PFA. Under the terms of the PFA, Phase I would include all work on the project from the Revitalization Plan, except for vertical development on Blocks D, E, and G.

In November 2011, the City passed Measure J in a local election. Measure J was a 1% sales tax increase to fund public projects. Campaigning for Measure J, the City Manager told the Desert Sun, a local paper, that "our studies have shown that a majority of that tax [the sales tax] is paid by visitors and tourists, although everyone pays the sales tax . . . the majority of it comes from our tourism industry." On April 26, 2012, the City and Developer amended the PFA to allow the City to sell bonds to fund its \$43 million payment to Developer. In June 2012, the City sold Measure J Bonds, tapping future Measure J sales tax revenue to fund public projects. The bonds raised \$47 million in public funds.

In June 2012, the City deposited the \$43 million City Payment pursuant to the PFA. Documents produced by the Developer characterized this payment as \$11 million for construction of public improvements, and \$32 million for the purchase of the garages, the land for the streets, and the unimproved blocks H-1 and H-2 "as-is." At the time of this payment, no construction had been completed.

On October 17, 2012, the City and Developer amended the PFA a second time, explicitly incorporating the development of the Kimpton Hotel as a private improvement under Phase I of the PFA on Block C-1. The Second Amended PFA states that a preliminary review of the proposed Kimpton Hotel showed that it qualified for the City's Transient Occupancy Tax (TOT) Rebate program. On December 19, 2012, the City and Developer entered into a Third Amended PFA, which permitted hotels to be constructed on Block B-1. On September 17, 2014, the City and Developer entered into a Fourth Amended PFA, which reserved development on Block B-1 for Phase 2 construction for which the City Payment and PIE account could not be used.

On November 17, 2014, the City and Developer entered into a TOT Agreement for the Kimpton Hotel on Block C-1. Pursuant to the TOT Agreement, the Kimpton Hotel will collect and remit the TOT to the City, and Developer will receive monthly direct payments from the City equivalent to 75% of the TOT collected on the property for up to 30 years or a maximum of \$50 million. The TOT Agreement states that it is intended to increase tourism and convention center business from out of town. Pursuant to the terms of the PFA, as described above, the Developer used \$13 million from the City funds deposited into the PIE account to finance the construction of the Kimpton Hotel.

On December 15, 2014, the City and Developer entered into a TOT Agreement for a Marriott Hotel on Block F. The terms and conditions of this agreement are identical to the Kimpton Hotel TOT Agreement. Also, in December 2014, the City agreed to pay an additional \$3.1 million for

enhancements to the public improvements under the PFA, and \$5.3 million for the purchase of Block E for a public event center.

On January 1, 2015, the City passed Municipal Ordinance 7.06.030, which requires all City public works to comply with state prevailing wage law.

On April 5, 2015, the City Council considered whether to cede title under the Performance Trust Deed to several blocks of land within the DFP lot. Developer had requested the return of title to these blocks as a means to obtaining additional financing and allowing its creditors to have a first priority lien on the property. The City Council based its decision to cede title on a finding that Developer had substantially performed its duties to the City under the PFA by beginning construction of the Kimpton Hotel, and seeking permits to begin construction of the Marriott Hotel.

The Marriott Hotel was never constructed. On May 4, 2016, the City and Developer entered into an agreement to transfer the rights under the Marriott Hotel TOT Agreement for Block F to a Virgin Hotel contemplated on Block B-1. The terms and conditions of the Virgin Hotel TOT Agreement are identical to the Marriott and Kimpton Hotel TOT Agreements. As Block B-1 had been reserved for Phase II construction by the Fourth Amended PFA, the City Payment and PIE account could not be used for construction of the Virgin Hotel.

In total, by May 15, 2017, Developer reported having spent \$144 million, including all private and public funds, on construction at the DFP lot.

Requests for Coverage Determinations

On January 16, 2017, the Center for Contract Compliance (CCC) submitted three separate requests for coverage determinations regarding: (1) the Virgin Hotel; (2) the Kimpton Hotel; and (3) the remainder of the Downtown Revitalization, including all improvements in Phase I of the PFA. On March 28, 2017, DIR sent the City, Developer and CCC requests for documents as well as a request for a position statement regarding whether the projects should be considered as one project or three separate projects. On June 2, 2017, Developer submitted three (3) position statements and responsive documents regarding each project. On June 16, 2017, the CCC submitted a single position statement and responsive documents addressing all three (3) projects. The City did not submit a position statement or any documents.

Positions of the Parties

The City has taken no position for or against coverage. In addition, the City has not responded to the request for determination or any Department requests for a position statement or supporting documents.

Developer asserts that the City acted as an arms-length investor in the projects, which were separately executed and maintain their character as three (3) separate, distinct projects. According to Developer, all City payments were purchases of assets for fair market value and not payments for construction, and any subsidies that were used for construction were *de minimis* in the context of the project. Further, Developer asserts that the City purchased the public improvements for \$32 million, which is claimed to be the appropriate valuation, and Block E for \$5.3 million. Moreover, since the City solely used local funds for these purchases, Developer argues that the charter city exemption

relieves the City and Developer of any obligation to pay prevailing wage for the projects. Developer also argues that the TOT Agreements do not result in coverage under the prevailing wage law because the TOT funds rebated under these agreements are local taxes used for a purely municipal purpose and subject to the charter city exemption which was in effect for the City of Palm Springs until January 1, 2015, at which point all TOT agreements had been executed.

The Center for Contract Compliance (CCC) asserts that the City has paid Developer \$89 million for construction on the DFP lot. According to CCC, in addition to the \$43-million City Payment under the PFA, the TOT reimbursements for the Kimpton and Virgin hotels are worth \$37 million. CCC also contends that the \$5.3 million purchase of Block E and \$4 million for changes to the public improvements constitute contributions of public funds. These payments exceed the \$15.7-million value of the DFP lot, according to CCC, and were used for construction. CCC also argues that the development should be considered one project as the entire project grew from the PFA and all aspects are interrelated and intended to encourage tourism. According to CCC, the charter city exemption does not apply because the work was not solely for a municipal purpose and City funding was used to build private buildings with the goal of attracting visitors from outside the municipality.

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 mean, *inter alia*: construction, alteration, demolition, installation, or repair work done under contract and paid for in whole or in part out of public funds. The work performed here is clearly construction done under contract. The parties disagree, however, as to: 1) which construction should be considered as part of a single project; 2) whether the project was paid for out of public funds; and 3) and whether the charter city exemption applies.

A. All Phase I Construction is Properly Considered a Single Project.

Where there are multiple potential projects proceeding on the same site, the scope of the construction project in question must be determined before considering the question of public works coverage. To determine the appropriate scope of a project, the “totality of the circumstances” must be examined to determine the “complete integrated object” of construction. (*Oxbow Carbon & Mineral, LLC v. Department of Industrial Relations* (2011) 194 Cal.App.4th 538, 549-550.) In so doing, the function, purpose, and goals, as well as the timing, of each aspect of construction should be considered. (*Cinema West, LLC v. Baker* (2017) 13 Cal.App.5th 194, 212-214.)

Given the interrelated goals, expectations, and funding regarding all Phase I construction, it should be considered a single project. The Kimpton Hotel was explicitly incorporated into Phase I construction in the Second Amended PFA. Inclusion of the Kimpton Hotel as a Phase I project ensured that the same funding, including the City Payment and PIE account, could be used to construct the Kimpton Hotel along with all other Phase I construction. Indeed, Developer admits that PIE account funds were used to construct the Kimpton Hotel. Moreover, a luxury hotel had been a part of the downtown redevelopment plan since the MMSP in December of 2009. The PFA was intended to effect the downtown redevelopment plan, including the development of luxury hotels. The City funded Phase I of the PFA in order to attract of out-of-town visitors, tourists, and convention-goers to a new commercial center, and construction of the Kimpton Hotel served to meet that goal by providing visitors attractive and desirable accommodations. Finally, the City deemed

the Kimpton Hotel necessary for substantial performance of Phase I when negotiating the release of its claims under the Performance Trust Deed. As a result, it is apparent that the City and Developer considered the Kimpton Hotel a necessary and integral part of the Phase I construction, and accordingly, all Phase I construction constitutes a single project for purposes of the prevailing wage law.

B. The Virgin Hotel is a Separate Project from the Phase I Construction.

The Virgin Hotel, however, is distinct from Phase I construction. The Virgin Hotel was never incorporated into the PFA, and a Virgin Hotel was never part of the initial or amended site plans. As a Phase II project, the City Payment and PIE account cannot be used to fund construction of the Virgin Hotel, and the City did not require construction of the Virgin Hotel as substantial performance under the Performance Trust Deed. The obligations under the Performance Trust Deed reflect what the City expected in return for its direct payment of public funds, and the exclusion of the Virgin Hotel from this list is significant for the public works coverage analysis. Additionally, the fact that the Kimpton Hotel was constructed early in the project and the Virgin Hotel was first considered as a private project five (5) years after the PFA shows that it was not necessary to effect the Phase I construction. Although the designations of Phase I and Phase II are not determinative, the functional differences, specifically with regard to available funding and the City's expectation in return for the payment of public funds, reflect that the Phase II construction of the Virgin Hotel should be considered a separate project

C. The Construction for Both Projects (Phase I and the Virgin Hotel) Was Paid for with Public Funds.

A project is paid for with public funds if a public entity pays money directly to a developer for construction. (*§ 1720*, subd. (b)(1).) Waiver of fees, taxes, or other obligations to pay money or the equivalent of money, which would normally be collected by the public entity, also constitutes public funding. (*Id.*, subds. (b)(1), (b)(4).) There is an exemption if public funds are paid solely for public improvements on an otherwise private development project and those public improvements are required as a condition of regulatory approval, or if the public funds are *de minimis* in the context of the private development project. (*Id.*, subds. (c)(2)-(3).)

1. The City Payment and Additional Direct Funding for Phase I.

For the Phase I construction, the City paid Developer at least \$46,330,000, consisting of a \$43-million City Payment (with \$11 million earmarked for public improvements and \$32 million ostensibly for the ultimate "purchase" of the public improvements but paid to the Developer at the outset and expressly made available for construction of private improvements), \$3.1 million for additional public improvements, and \$230,000 for preconstruction costs. Developer submitted a spreadsheet showing that the total project cost through May 2017 was \$144 million. At 32% of the overall project cost, the City's direct payments to Developer cannot be considered *de minimis* in the context of the overall project.

Developer sought to characterize the City's payments as the purchase of assets for fair market value. A transfer of land at fair market value does not constitute public funding. (See *§ 1720*, subd. (b)(3).) Developer alleges the \$43million City Payment was a purchase of public assets. However, the amount of the City Payment was based on the Kaiser Martin study showing that over \$40 million in

public funding was necessary to make the entire project financially feasible. The City Council approved the payment in order to remove blight and attract tourists to the downtown area, which would require construction of more than just the streets, garages, and vacant lots designated as public improvements in the PFA. Moreover, the City obviously believed it was getting private buildings in exchange for its \$43 million payment because it considered construction of the Kimpton Hotel and other private improvements necessary for substantial performance under the Performance Trust Deed which secured the City Payment.

Out of the \$43 million City Payment, \$11 million was specifically earmarked to fund construction of the public improvements. This constitutes direct payment of public funds for construction under the prevailing wage law, and not a purchase of assets.

In addition, as discussed above, the remaining \$32 million of the City's \$43 million payment was ostensibly intended to purchase title to the public improvements, which had allegedly been valued at \$32 million by an independent appraisal. Developer has never produced this supposed \$32 million valuation appraisal to the Department. Moreover, the PFA is clear that this \$32 million in City funding financed private construction through the PIE account, and Developer admits that these funds were used for construction of private improvements, including the Kimpton Hotel.

In addition, it is implausible that the public improvements and Blocks H-1 and H-2 had a fair market value of anything close to \$32 million in June 2012. The public improvements consisted of streets, public garages, and Blocks H-1 and H-2. Blocks H-1 and H-2 were vacant lots at the time. Pursuant to the PFA, Block H-1 had to be graded level before it was turned over to the City, but no other changes had to be made, and Block H-2 had no changes whatsoever. Block E, which is adjacent to Blocks H-1 and H-2, and approximately the same size as the two put together, was sold by Developer to the City in December 2014 as an unimproved lot for \$5.3 million.²

Even assuming Blocks H-1 and H-2 could have had a comparable value of \$5.3 million over two years prior to the sale of Block E, the remaining public improvements, the streets and garages, could not possibly have had a fair market value of \$26.7 million. No construction had yet been performed on these improvements, and the City was already paying \$11 million for their construction. Moreover, in December of 2010, under Developer's alleged appraisal, the entire 13-acre DFP Lot prior to construction was worth only \$30 million. Under the City's appraisal, the entire DFP lot was worth even less, \$15.7 to \$18 million. No argument has been made, or could be made, that the remaining public improvements, which constituted less than half of this space, could have had a fair market value of \$26.7 million eighteen (18) months later when there had still been no construction performed. As a result, the \$32-million portion of the City Payment that was characterized as being for the purpose of purchasing the public assets, in fact, was intended to, and did, finance construction on the project, and thus constitutes the payment of public funds. (See § 1720, subd. (b)(1).) To allow the payment for construction of improvements to be characterized as merely a purchase of improvements under these facts "would encourage awarding bodies and contractors to legally circumvent the [prevailing wage] law." (*Lusardi Construction Co. v. Aubry* (1992) 1 Cal.4th 976, 987.)

The \$230,000 payment for 50% of Developer's preconstruction costs likewise constitutes the payment of public funds for construction; for the purposes of the prevailing wage law, construction includes preconstruction work. (See § 1720, subd. (a)(1).) Similarly, the City's later payments of

² This sale of undeveloped land at fair market value is not considered public funding.

\$3.1 million for enhancements to the public improvements also constituted direct payment of public funds for public construction. (*Ibid.*)

2. The Transient Occupancy Tax Agreements for both Phase I and the Virgin Hotel.

The TOT Agreements also constitute the payment of public funds, as to both the Phase I project and the Virgin Hotel. The waiver of fees and taxes or the transfer of a thing of value constitutes public funding, even absent direct payment. (See § 1720, subds. (b)(1), (b)(4).) Waivers of future payments to a public entity owed during hotel operation as a means of financing hotel construction have previously been found to constitute public funding. (See *Hensel Phelps Const. Co. v. San Diego Unified Port Dist.* (2011) 197 Cal.App.4th 1020, 1037 [waiver of hotel rents to subsidize construction constituted public funding].)

The TOT Agreements in the present case do not waive the TOT collection by the City or TOT payments by the hotels. Rather, the agreements require Developer to ensure the Kimpton and Virgin Hotels are operated on the DFP lot for a period of thirty (30) years and to pay the regular TOT payments to the City. In exchange, the City will pay back to the Developer an “Owner’s share” payment from City funds equivalent to 75 percent of the City’s TOT income from the properties up to a maximum of \$50 million. This is a promised direct payment of public funds to Developer, not a tax waiver, and clearly a thing of value, estimated to be worth up to \$50 million per property or \$100 million total. Moreover, each TOT Agreement recites that the City Council is agreeing to the arrangement as a method of financing the construction of the contemplated hotel. As a result, the TOT Agreements constitute the payment of public funds for construction because they promise direct payments of up to \$100 million in public funds for the purpose of financing construction.

D. The Charter City Exemption is Inapplicable.

A California charter city may enact a law exempting locally-funded public works projects that are purely “municipal affairs” from state prevailing wage law. (*State Bldg. and Const. Trades Council of Cal., AFL-CIO v. City of Vista* (2012) 54 Cal.4th 547, 552-553 (*City of Vista*)).

The current Palm Springs Municipal Code, section 7.06.030, as amended January 1, 2015, requires the payment of prevailing wages on all locally-funded public works. Developer alleges that, prior to the January 1, 2015 amendment, the City, a California charter city, had enacted a municipal law exempting local projects from the payment of prevailing wages. No party has produced a copy of this prior law or any evidence regarding when it went into effect, but CCC has not objected, and admits the law did exist. For the purpose of this determination, it is assumed that the City enacted an exemption from state prevailing wage law for local projects prior to January 1, 2015, and that, effective January 1, 2015, the City waived its entitlement to the charter city exemption for all projects going forward.³

³ Because Senate Bill 7 passed by the Legislature in 2013 (Stats. 2013, ch. 794, codified at Lab. Code, § 1782.) deprived charter cities of state funding for construction projects bid after January 1, 2015 if the city had a public works exemption on the books, many charter cities repealed their public works exemptions effective January 1, 2015.

The definition of “municipal affair” is not fixed, but “changes with the changing conditions upon which it is to operate,” and requires some consideration of the factual context of the case. (*City of Vista, supra*, 54 Cal.4th at p. 557, quoting *Pac. Tel. & Tel. Co. v. City and County of S.F.* (1959) 51 Cal.2d 766, 771.) Relevant factors to be considered in determining whether a project is a “municipal affair” include the purpose of the project, the control of the public funds involved, control of the completed structure, and the extent to which the project serves the city’s inhabitants. (See *City of Vista, supra*, 54 Cal.4th at p. 559 [discussing the purpose and control of funds in *City of Pasadena v. Charleville (Charleville)* (1932) 215 Cal. 384, 389.]) Use of the normal public procurement process of a charter city to construct a city-owned and city-operated facility for the benefit of city inhabitants will generally constitute a “municipal affair,” for which a charter city may claim an exemption from state prevailing wage law. (See *City of Vista, supra*, 54 Cal.4th at p. 559 [city directly contracted for construction of several city-owned and operated fire houses]; see also *Charleville, supra*, 215 Cal. at p. 393 [city directly contracted for city-owned fence around city-owned and operated reservoir serving city inhabitants].) In finding this exemption in *City of Vista*, the court was concerned with a charter city’s right to control the construction cost of charter-city-owned assets. (*City of Vista, supra*, 54 Cal.4th at p. 562 [“the question presented is whether the state can require a charter city to exercise its purchasing power in the construction market in a way that supports regional wages and subsidizes vocational training, while increasing the charter city’s costs.”].) Applying the reasoning from *City of Vista* to the present case, it is apparent that these projects do not fall within the charter city exemption.

1. The Phase I Construction is Not a Purely Municipal Affair.

City of Vista found that “the construction of a *city-operated* facility for the benefit of *a city’s inhabitants*” and where *the city* maintains “control over the expenditure of a city’s own funds” was plainly a purely municipal affair and thus within the charter city exemption to state prevailing wage laws. (*City of Vista, supra*, 54 Cal.4th at p. 559, emphasis added.) In the present case, and in contrast, none of the factors found in *City of Vista* are present. First, the Phase I construction is not “city-operated;” the City will not even retain title to the majority of the Phase I construction. Except for the event center and parking lots, which constitute a minority of the overall improvements, the Phase I construction is all private commercial or residential space despite its significant public funding. Since Phase I construction is predominantly private, it cannot be equated to the wholly city-owned or operated facilities considered by the court in *City of Vista*. (*Id.* at pp. 559-560.)

In addition, Phase I construction does not provide the kind of direct, local public benefit that the construction considered in *City of Vista* did. The local fire stations and reservoir at issue in *City of Vista* were public assets and facilities serving an obvious public function for the benefit of local residents in the relevant charter cities. (*Id.*) Here, the shopping district created by the Phase I construction has no such obvious public purpose. Based on the PFA and MMSP, the intent of the construction is to remove blight in the downtown area by essentially guaranteeing a private Developer a healthy profit margin. Community redevelopment and the removal of blight are issues of statewide, and not local concern. (See, e.g., *Redevelopment Agency v. City of Berkeley* (1978) 80 Cal.App.3d 158, 169.) Ensuring a 9.5% return on investment for a developer is also not purely “for the benefit of the city’s inhabitants.” (*City of Vista, supra*, 54 Cal.4th at p. 559, italics omitted.) As a result, the Phase I construction was primarily undertaken for private benefit and profit, with a subsidiary goal of removing blight, which is an issue of statewide concern. These goals are not in keeping with the purely local benefit needed to find an exempt “municipal affair.” (*City of Vista, supra*, 54 Cal.4th at p. 559.)

Further, unlike the projects considered in *City of Vista*, which were direct contracts for construction where the city negotiated and controlled expenses, the Phase I Construction turned over significant control of public funds to the Developer. (*Id.* at pp. 559-560.) In this case, the City did not directly contract for the construction through its public procurement process, and so the costs of construction were not controlled or reviewed through the usual channels. Instead, pursuant to the PFA, the City simply turned over the City Payment to Developer, which had (and still has) sole control of the PIE funds to use as Developer saw (or sees) fit. As a result, the concerns of the *City of Vista* court regarding a charter city's control over its own costs, are largely irrelevant in this project, as the PFA and related documents give the City little, if any, control over costs. (*Ibid.*)⁴ In such a circumstance, the construction of privately-owned structures with public funds is not a purely municipal affair.

In sum, the City's decision to subsidize the profit margin of private landowner in the City's downtown is not equivalent in purpose, scale, or function, to the purely municipal acts of building a local fire station or fencing for a reservoir, as in *City of Vista*, and accordingly, the charter city exemption does not apply.

2. The Virgin Hotel is Also Not a Purely Municipal Affair.

The charter city exemption also does not apply to the Virgin Hotel. On January 1, 2015, the City adopted a municipal ordinance requiring that all local projects comply with state prevailing wage law, effectively waiving its charter city exemption for all future projects. The Virgin Hotel obtained public funding on May 4, 2016, when the City and Developer signed an agreement purporting to transfer the TOT Agreement rights of the planned-but-never-built Marriott Hotel on Block F to the Virgin Hotel on Block B-1. Although the initial Marriott Hotel TOT Agreement was executed prior to January 1, 2015, it did not become an agreement applicable to the Virgin Hotel until the 2016 agreement between the City and Developer transferring the TOT rights and obligations. The Virgin Hotel thus became publicly-funded after January 1, 2015, and no evidence was presented that the project was bid or construction began prior to January 1, 2015. As a result, the Virgin Hotel is a post-2015, publicly-funded project for which the charter city exemption is not available.

Even if construction on the Virgin Hotel had commenced prior to January 1, 2015, it would not be considered a purely municipal affair in that it is neither "city-owned" nor "city-operated," and is not primarily for the benefit of city inhabitants. Nor did the City exercise control over the process or cost of construction. (*City of Vista, supra*, 54 Cal.4th at pp. 559-560.) The TOT Agreement simply requires the City to surrender public funds to Developer to offset private construction costs, and it gives the City none of benefits required of a municipal affair by *City of Vista*. Although the hotel provides a benefit to tourists from outside the City, to the hotel's owner and operator, and presumably to other businesses in the City who receive income from tourists, the hotel does not provide the type of benefit to City residents that is conferred by public facilities and infrastructure such as the fire and water utilities discussed by the court in *City of Vista*. (*Ibid.*) Accordingly, the

⁴ A prior coverage determination has similarly held that where developer obtains public funds to construct private structures, but the public entity is not a party to the construction contract, the project is not a true municipal affair. (See PW 2002-021, *City Place Project – City of Long Beach* at p. 3 n. 4 (Nov. 5, 2002) (*City Place Project*.)

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Virgin Hotel construction is not a purely municipal affair, and the charter city exemption would not apply even if the project commenced prior to January 1, 2015.

Conclusion

For the foregoing reasons, the Phase I construction, consisting of both the Kimpton Hotel and Downtown Revitalization, and the Virgin Hotel construction, are all public works subject to prevailing wage requirements.

I hope this determination satisfactorily answers your inquiry.

Sincerely,

A handwritten signature in blue ink that reads "André Schoorl". The signature is fluid and cursive, with "André" on top and "Schoorl" below it.

André Schoorl
Acting Director
Department of Industrial Relations