STATE CALIFORNIA

DEPARTMENT OF INDUSTRIAL RELATIONS

DECISION ON ADMINISTRATIVE APPEAL

PUBLIC WORKS CASE NOS. 2017-035 AND 2018-005

SPRINGHILL SUITES – THE DUNES AT MONTEREY BAY

FORT ORD REUSE AUTHORITY

I. INTRODUCTION

On December 9, 2020, the Director of the Department of Industrial Relations (Department) issued a public works coverage determination (Determination) finding that the construction of the SpringHill Suites – The Dunes at Monterey Bay (Project) is a public work subject to prevailing wage requirements.

On January 8, 2021, Marina Community Partners, LLC (MCP) and Shea Homes Limited Partnership (Shea) (hereafter, collectively referred to as the Appealing Parties) 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. All interested parties were afforded an opportunity to provide legal argument and any additional supporting evidence. The Appealing Parties filed an opening brief. Carpenters Local 505 and the Northern California Carpenters Regional Council (collectively, the Union) and the Division of Labor Standards Enforcement (DLSE) each filed separate oppositions to the Appeal. For each opposition brief, the Appealing Parties filed a reply brief.

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.

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

II. RELEVANT FACTS

The Project, a four-story hotel with 106 rooms, was built on 4.5 acres of land (referred to as Parcels 6 and 7), which was part of the former Fort Ord Military Base. The Fort Ord Reuse Authority (FORA) transferred for civilian use 290 acres of the former Fort Ord Military Base, including Parcels 6 and 7, to the City of Marina's then-existing Marina Redevelopment Agency. Thereafter, on September 21, 2006, the 290 acres were conveyed to MCP. On December 26, 2014, MCP conveyed Parcels 6 and 7 to Monterey Peninsula Hotels Group LP, which is owned by the Dadwal Management Group, Inc., Harbhajan S. Dadwal, and Harwider K. Dadwal (collectively, Hotel Developer).

To assist the Hotel Developer, the City of Marina (City) deferred the payment of $634,608 in impact fees until after the opening of the hotel. For several years, up until 2016, the City deferred payment of the impact fees at no cost to the Hotel Developer. After the Hotel Developer failed to open the hotel on the promised date, the City extended the deadline to open the hotel to March 31, 2017. As consideration for the extension of time, the Hotel Developer provided the City with a $100,000 promissory note (Extension Fee Note). The Hotel Developer also failed to meet the March 31, 2017 deadline. Instead, the hotel opened on June 7, 2017. Since the March 31, 2017 deadline was not met, the deferred impact fees became immediately due pursuant to the March 31, 2014 Operating Covenant and Agreement between the City and Hotel Developer. However, the Hotel Developer avoided the immediate payment of impact fees by negotiating with the City another promissory note for the full amount of the impact fees due with a below market interest rate (Impact Fee Note).

DLSE investigated possible prevailing wage violations on the Project. After its investigation confirmed prevailing wage violations on the Project, DLSE issued a civil wage and penalty assessment (Assessment) against the prime contractor Covenant Construction and a separate Assessment against subcontractor The Plumbing Company. Covenant Construction and The Plumbing Company (hereafter, collectively referred to as the Requesting Parties) filed requests to review the Assessments. During the course of these proceedings, the Requesting Parties disputed whether the Project

was a public work and subject to the prevailing wage law. The hearing officer assigned to the proceedings requested a public works coverage determination.

The Determination found the City's years-long interest-free deferment of impact fees to be a form of public subsidy and concluded that the interest rate in the Impact Fee Note was below market, thus constituting another form of public subsidy. The Determination also found that the Hotel Developer purchased Parcels 6 and 7 for $5.84 per square foot, which was below fair market value. The price per square footage of a comparable property in the same vicinity with similar existing improvements was purchased within several months for $10.49 per square foot—$4.65 more per square foot than what the Hotel Developer paid.

While the Determination did not turn solely on the 2006 conveyance between the City and MCP, the Determination did describe the 2006 conveyance to the MCP to be at fair reuse value, which was below fair market value.[2]

III. CONTENTIONS ON APPEAL

The Appealing Parties do not dispute that the Project received public subsidies and was a public work subject to prevailing wage requirements.

Rather, the Appealing Parties claim the 2006 land transfer to MCP—approximately eight years before the relevant transfer of Parcels 6 and 7 to the Hotel Developer— was *not* for less than fair market value. Because of their position, the Appealing Parties request either the deletion of the section in the Determination that analyzes the transfer of Parcels 6 and 7 or the withdrawal of the entire Determination.

The Appealing Parties make several key arguments in support of their contention that the transfer was for fair market value. First, the Appealing Parties argue that MCP's purchase price for the land could "increase significantly in the event the Profit Participation Payment was triggered." (Opening Brief, p. 4.) The Appealing Parties contend that the provisions of section 5.3 of the Disposition and Development

[2] The Determination also discusses the fact that the Hotel Developer acquired Parcels 6 and 7 from MCP for below fair market value because MCP acquired the property from the City for below fair market value.

Agreement "could increase the price paid by MCP in amounts equal to 50% of the excess cash flow over a threshold internal rate of return." (*Ibid*.)

Next, the Appealing Parties also argue that the purchase price reflected the highest and best use under the City's redevelopment plan and anticipated specific plan. The Appealing Parties provide a copy of the May 2005 Reuse Valuation prepared by Keyser Marston Associates, Inc. (KMA) and argue in its valuation, KMA assessed the property's fair market value. (Opening Brief, pp. 5-6.)

Further, the Appealing Parties also dispute the Determination's interpretation of PW 2004-035, *Santa Ana Transit Village/City of Santa Ana*, at p. 5 (Dec. 5, 2005) (*Santa Ana Transit*). They argue "*Santa Ana Transit* never states that a fair reuse value is necessarily less than fair market value, or fair market price. Nor does it state that a fair reuse value could never be the equivalent of a fair market value, or a fair market price." (Opening Brief, p. 7.)

DLSE and the Union contend the regulations that govern appeals of coverage determinations do not permit an appeal to correct an error contained in a coverage determination, rather the regulations allow for appealing a determination that a project is covered or not covered as a public work. (DLSE Brief, p. 1.) Again, the Appealing Parties do not dispute the Project is covered. DLSE also argues the Appealing Parties fail to state whether the Profit Participation Payment clause was even triggered. (DLSE Brief, p. 2.) Further, DLSE emphasizes the Determination found that the Hotel Developer acquired the property at below fair market value based on a sales comparison with a comparable property in the vicinity. (*Ibid*.)

The Union further argues that the failure to consider the contingent Profit Participation Agreement was not erroneous and does not change the outcome of the analysis. The Union contends MCP did not purchase the 290 acres at fair market value, because in light of *Santa Ana Transit*, a Reuse Valuation cannot be characterized as an appraisal. In *Santa Ana Transit*, the Determination held that only the "market" can ascertain fair market price, thus "any workaround calculation relying on assumptions could not be an estimate of fair market price." (Union's Reply Brief, p. 4.)

In response to the Union's and DLSE's arguments that the appeal is procedurally defective, the Appealing Parties note that nothing in the regulations mandate that an

appeal contest the ultimate finding of coverage in a determination. (Reply to Union's Brief, p. 2.)

IV. DISCUSSION

A. The Appealing Parties Do Not Appeal the Finding of Coverage.

The Appealing Parties are not contesting the Determination's finding that the Project is a public work. Rather, the appeal is based on alleged "specific errors" in the Determination.

The "errors" cited by the Appealing Parties are the Determination's statement that MCP acquired the former Fort Ord property for less than "fair market value" and the Determination's alleged misinterpretations of "fair reuse value" and "fair market price." (Opening Brief, pp. 6-8.) Notwithstanding, according to the Appealing Parties, the Determination reached the correct conclusion that the Project was a public work. (*Id*. at p. 1.)

Appeal of a public works coverage determination is authorized by Labor Code section 1773.5, subdivision (c). Regulation 16002.5, subdivision (a), provides additional guidance on appeals of coverage determinations. Regulation 16002.5, subdivision (a) reads, in part:

> Those interested parties enumerated in Section 16000 of these regulations *may appeal* to the Director of Industrial Relations or the Director's duly authorized representative as set forth in Section 16301 of these regulations *a determination of coverage* under the public works laws (Labor Code Section 1720 et seq.) regarding either a specific project or type of work under Section 16001(a) of these regulations. . . .

(Regulation, § 16002.5, subd. (a), italics added.)

The plain language of the regulation authorizes the appeal of a finding of coverage. Labor Code section 1773.5 and Regulation 16002.5 are silent on appealing to correct an error where coverage is not in dispute. As the Appealing Parties expressly agree with the Determination's ultimate finding of coverage, Regulation 16002.5 simply does not provide a basis for the Appealing Parties' appeal, which does not dispute "a determination of coverage."

The Appealing Parties rely on Regulation 17261, subdivision (a), which concerns reconsiderations of prevailing wage enforcement decisions under Labor Code section 1742, and states that "[u]pon the application of any Party or upon his or her own motion, the Director may reconsider or modify a decision issued under Rule 60 [Regulation 17260] above *for the purpose of correcting any error* therein." (Regulation, § 17261, subd. (a), italics added.) The Appealing Parties argue "[a]n appeal under Section 16002.5 acts like a motion for reconsideration does in the hearing process. . . . [s]imilarly, following issuance of a decision by the Director after a Civil Wage and Penalty Assessment hearing (see 8 CCR § 17260(b)), the reconsideration process in 8 CCR § 17261 allows a party to submit issues to the Director for reconsideration. The processes are essentially the same." (Reply to DLSE Brief, p. 2.) The Appealing Parties assert that under Regulation 17261, subdivision (a), they have properly raised various grounds for their appeal of the Determination.

The processing of reconsiderations under Regulation 17261 is irrelevant to the instant appeal. The reconsideration process for prevailing wage enforcement decisions is an entirely different process than appeals of coverage determinations. Under Regulation 17261, there is a broader basis to reconsider a decision following a Labor Code section 1742 hearing—i.e. "correct[ing] any error." On the other hand, for appeals of coverage determinations, Regulation 16002.5 plainly states a party may appeal "a determination of coverage" —there is no reference to "correcting errors." Accordingly, the grounds for appeal under Regulation 16002.5 and the grounds for reconsideration under Regulation 17261 are different. Moreover, timeframes differ as well—appeals of a coverage determination must be filed within 30 days of the date of the determination. Whereas, for decisions issued pursuant to Labor Code section 1742, parties must file any request for reconsideration within 15 days of the issuance of the decision.

Significantly, the processes are not "essentially the same" as stated by the Appealing Parties because the Director's authority to issue public works coverage determinations pursuant to Labor Code section 1773.5 differs from the Director's authority to issue prevailing wage enforcement decisions pursuant to Labor Code section 1742. Public works coverage determinations are quasi-legislative acts, while

prevailing wage enforcement decisions are quasi-judicial. (See Lab. Code, § 1773.5, subd. (d); Lab. Code, § 1742, subd. (c).)

In light of the plain language of Regulation 16002.5, only "a determination of coverage" may be appealed. MCP and Shea's appeal does not contest the ultimate finding of coverage. In fact, the Appealing Parties concede the Project is a public work. Accordingly, the Appealing Parties do not present a cognizable basis for appeal under Regulation 16002.5.[3]

B. No Assessments Have Been Issued Against the Appealing Parties.

The Appealing Parties assert that failure to consider their arguments would result in "blatant denial of due process." (Reply to DLSE brief, p. 2.) The California Supreme Court decided 30 years ago that the Director's coverage determinations are not "an 'adjudication' resulting in a deprivation requiring procedural due process." (*Lusardi Construction Co. v. Aubry* (1992) 1 Cal.4th 981, 990 (*Lusardi*).) A coverage determination that "a project is a public work may lead to further action that triggers due process rights," but at the time the determination is made, "no process is due." (*Id.* at p. 993.) This conclusion holds true particularly in this situation, where no Assessments have been issued against either of the Appealing Parties MCP or Shea.[4] As described in *Lusardi,* the Appealing Parties may be entitled to due process rights in a *separate* proceeding where DLSE seeks to recover wages and penalties. (*Lusardi, supra,* 1 Cal.4th at p. 993.) However, the issuance of a coverage determination could not have deprived the Appealing Parties of due process, as the Assessments were not against

[3] It is worth noting that both requests for review of the Assessments have since been withdrawn and the matters are closed. (See Cal. Code Regs., tit. 8, § 17225.) The underlying controversy that gave rise to the coverage determination has now been resolved. The Requesting Parties, who are the affected contractors in this matter and initially disputed coverage under the prevailing wage law, have no further interest in the coverage determination and whether or not the project is a public work. Therefore, since the Appealing Parties concede the Project is a public work and the Requesting Parties are no longer disputing coverage, it is unclear what the appeal will accomplish.

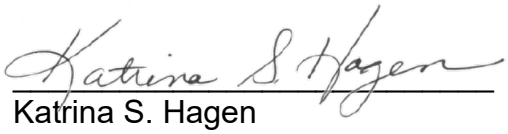
[4] As previously noted neither the Assessments nor the coverage determination's finding of coverage turn solely on the land conveyance from the City of Marina to MCP. Instead, the Assessment and coverage determination considered as a whole whether the Project received public subsidies.

the Appealing Parties, and the Appealing Parties fail to specifically identify what interests of theirs are being affected.

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: September 6, 2022



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