



September 5, 2013

Jeanette Launer
JM Launer Law Practice
5216 SW Burton Drive
Portland, OR 97221

Re: *Determination Whether Project is Subject to Prevailing Wage Rate Law*
Project: Privately Constructed Mixed-Use Development at Orenco Station,
Hillsboro, Oregon
Requested by: JM Launer on behalf of Holland Development, LLC

Dear Ms. Launer:

On July 30, 2013, you submitted a request on behalf of Holland Development, LLC asking if the Prevailing Wage Rate law would apply to the Privately Constructed Mixed Use Development at Orenco Station project. Sufficient information to make a determination was received on September 3, 2013, and therefore, the Commissioner issues the following determination:

FINDINGS OF FACT:

1. The City of Hillsboro adopted Comprehensive Plan and Zoning Ordinance revisions in August of 1996 to encourage development in the vicinity of light rail stations throughout the City. The City of Hillsboro also established the Orenco Station Community Planning Area.
2. In August 2011, Holland Development, LLC ("Holland") approached the City of Hillsboro (the "City") with an idea of building a mixed-use development with excellent transit and amenities on properties located near the Orenco Light Rail Station in Hillsboro. In late 2011, Holland approached Tri-County Metropolitan Transportation District of Oregon ("TriMet") with the idea of building on property owned by TriMet as part of the proposed project.
3. The project involves the development of four parcels of land – the West Podium Parcel, the Central Podium Parcel, the East Podium Parcel and the Plaza Parcel.

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4. The total square footage of the project exceeds 875,000 square feet. This includes the West Podium Parcel, the Central Podium Parcel, the East Podium Parcel and the Plaza Parcel. The total square footage of all parcels includes all parking, common spaces, commercial spaces and apartment spaces.

Development Agreement

5. The City and Holland have entered into the Orenco Station Development Agreement (“Development Agreement”), effective March 6, 2013. Holland and the City contemplated multiple development scenarios and settled on the development scenario described in the Development Agreement. Pursuant to the Development Agreement, Holland will build the Privately Constructed Mixed-Use Development at Orenco Station project (the “project”). A Hillsboro City Planning Department “Notice of Decision” letter dated July 3, 2013 states that it was the “joint goal” of the City and Holland “to create vibrant, multi-story, mixed-use buildings and an activity filled urban plaza.” Holland is a private company. Two other public agencies, Washington County and Clean Water Services, are also involved in the project.
6. The City has required Holland to develop a minimum number of housing units on the East, Central and West Podium Parcels. Likewise, Holland is required to provide no less than 22,000 square feet of ground-level retail commercial space in the East, Central and West Podiums. Holland is prohibited from leasing ground-floor retail space fronting the Plaza area to any professional office and professional office use is limited to not more than 15% of ground-level retail space.
7. The City has required Holland’s initial tenant marketing plan to include a minimum amount of ground floor retail/commercial space. Specific restrictions on retail and commercial uses should be reflected in Holland’s initial tenant marketing plan. The City may review and comment on the initial tenant marketing plans and proposed tenant mix for each of the parcels. Finally, the City will require a specific level of tenant improvement investment in the retail/commercial spaces to assure high quality development.
8. Holland and its affiliates will be responsible for all construction, building contracts, subcontracts and the management thereof. No public agency will be a party to or supervise performance of Holland’s contracts with the construction contractors. Except as described in the Development Agreement relating to design review, and as required for compliance review with any City permits and permit-related inspections, no public agency will manage or direct the construction or engage in any project supervision.

9. The project will be constructed according to the plans and specifications attached to the Development Agreement. The City has agreed that the schematic drawings are consistent with the City's development goals for the Orenco Station area. Additionally, the project must comply with City Code as to land use entitlement and permitting, parking, utilities, storm water management and transportation improvements.
10. The Development Agreement provides that the City and Holland have agreed to a schedule for the project.
11. The Development Agreement provides that the City may recover from Holland monetary damages caused by an uncured Holland default of the Agreement. Likewise, the Development Agreement provides that Holland may recover from the City monetary damages caused by an uncured City breach of the Agreement. Holland and the City agreed that equitable remedies may include specific performance or injunctive relief in some circumstances. The Development Agreement also states that Holland may elect to terminate the agreement, without liability or cost to the City, if BOLI determines that the prevailing wage laws apply to the project.

Plaza Parcel

12. The Plaza Parcel is currently owned by TriMet. It is comprised of approximately 1.62 acres (approximately 70,500 square feet) that will consist of public open space and City public roadway. The Plaza Parcel is adjacent to the West Podium, Central Podium and East Podium Parcels, as well as adjacent to the Orenco Light Rail Station. The Plaza Parcel will be developed as public open space ("Plaza Park") and City public roadway ("Plaza Road").
13. As a condition to Holland beginning development of any of the Parcels, TriMet will commit to transferring the Plaza Parcel to the City. The conveyance of the Plaza Parcel will be between TriMet and the City only and will occur before construction begins on the project. There will be no cash purchase price for this parcel of land.
14. The Development Agreement provides that Holland and the City will participate with TriMet in developing the design for the Plaza Park. Upon agreement on the Plaza design by the three parties, Holland will prepare Schematic Drawings for the Plaza Park which will present a Plaza Park design that Holland estimates can be built within budget.
15. The Development Agreement provides that the City will be responsible, without contribution from Holland, for the repair, maintenance and capital replacement of all elements of the Plaza.

16. Holland will complete the Plaza Park construction; however, after substantial completion, the City may, but is not required to, add tenant improvements. Any Plaza Park enhancements built would be funded solely by the City, under a separate contract. At this time, the City has no definite plans, timeline or budget for any tenant improvements.
17. The City will manage the Plaza Park activities, events and programming after the project is completed. For the first 10 years of Plaza operation, Holland will pay the City \$75,000 per year to help offset the City's costs of programming management.

West Podium Parcel

18. The West Podium Parcel is comprised of approximately 2.3 acres. The Development Agreement provides that this parcel will be developed with a six-story podium-style building. The building will include approximately 220 multi-family housing units, a minimum of 5,000 square feet of retail space, and structured parking, including 125 commuter parking spaces that will be made available to TriMet commuters.
19. The West Podium Parcel is privately owned in part by a Holland Joint Venture. The remaining portion of the West Podium Parcel is owned by TriMet. Holland anticipates paying fair market value in the amount of \$650,000 to purchase the portion of the West Podium Parcel property currently owned by TriMet. The purchase will occur before Holland commences construction on the project. This property will be encumbered with the obligation to build the 125 commuter parking spaces.

Central Podium Parcel

20. The Central Podium Parcel is privately owned by a Holland Joint Venture. It is comprised of 0.75 acres. The Development Agreement provides that this parcel will be developed with a six-story podium-style building. The building will include approximately 114 multi-family housing units, a minimum of 7,000 square feet of retail or neighborhood commercial space, and structured parking.
21. Metro will provide a \$700,000 grant to Holland as an inducement for the Holland affiliate to develop the Central Podium as a transit-oriented development. Holland will encumber the Central Podium with a Declaration of Transit-Oriented Development/Urban Centers Easement restricting the development and future use of the Central Podium to Transit Oriented Development/Urban Centers supportive uses. The easement will be in effect for at least 30 years.

East Podium Parcel

22. The East Podium Parcel is privately owned by a Holland Joint Venture. It is comprised of 1.79 acres. The Development Agreement provides that this parcel will be developed with a six-story podium-style building. The building will include approximately 245 multi-family housing units, an 850 square-foot public bicycle parking area, three separate ADA public restrooms, an equipment storage room, an event storage room, a minimum of 10,000 square feet of retail or neighborhood commercial space, and structured parking.
23. The City will lease the East Podium Parcel's bike parking area, three public restrooms and two storage spaces. The City will lease a total of approximately 1,462 square feet. The term of this lease will be fifty years and rent will be \$10, annually.
24. After substantial completion of the East Podium Parcel construction by Holland, the City may, but is not required to, add features and equipment to the bike storage area ("tenant improvements"). Any tenant improvements would be funded solely by the City, under a separate contract. At this time, the City has no definite plans, timeline or budget for any tenant improvements.

Project Cost/Funding

25. The Development Agreement's Funding and Financing Plan includes the City financing a portion of Holland's System Development Charge ("SDC") payments. SDCs are one-time fees assessed on new development to cover a portion of the costs of providing certain types of public capital facilities to address impact created by new development. Oregon law provides for establishment of SDC fees for transportation, water, wastewater (sewer), stormwater, and parks and recreation facilities.
26. The total project cost is \$121,535,691. Funding for the project will come from the following sources:
 - a. Funds of a public agency: \$700,000
 - i. Metro grant - \$700,000
 - b. Other funds: \$120,835,691
 - i. Private construction loan - \$72,850,000*
 - ii. Private equity investment - \$43,550,000*
 1. Includes \$650,000 from TriMet for land

- iii. City of Hillsboro, Washington County and Clean Water Services –
SDC Credits & Financing: \$4,435,691*

*Estimated funding, actual amounts may vary

CONCLUSIONS OF LAW:

1. The definition of “public works” under ORS 279C.800(6)(a)(A) applies to projects the construction of which is carried on or contracted for by any public agency to serve the public interest. The Development Agreement between the City of Hillsboro and Holland does not rise to the level of a contract for construction. Likewise, it is Holland Development that will have the most control over the project. Holland Development, a public company, will carry on and contract for the project; therefore, this definition of “public works” will not apply.
2. The definition of “public works” under ORS 279C.800(6)(a)(B) applies to projects that are privately owned, use funds of a private entity and \$750,000 or more in funds of a public agency. This definition of “public works” will not apply to the project because although three out of four parcels involved in the project will be privately owned and the project will use funds of a private entity, the project will not use \$750,000 or more in funds of a public agency.

However, should the project use \$750,000 or more in funds of a public agency, this conclusion would change.

3. The definition of “public works” under ORS 279C.800(6)(a)(C) applies to projects that are privately owned in which a public agency will use or occupy 25% or more of the square footage of the completed project. Here, the total project square footage exceeds 875,000 square feet. The City will lease the East Podium Parcel’s bike parking area, three public restrooms, equipment storage room, and Plaza event storage space from Holland. This space totals approximately 1,462 square feet. The City will own the Plaza Parcel which is 70,500 square feet. However, the combined square footage of project space that the City will use or occupy does not total 25% or more of the square footage of the completed project, so this definition of “public works” will not apply to the project.
4. The development of the East Podium, Central Podium, West Podium and Plaza parcels would be considered one project for the purposes of compliance with the prevailing wage rate laws because ORS 279C.827 prohibits the division of a public works project into more than one contract for the purpose of avoiding compliance with ORS 279C.800 to 279C.870.

5. The City may, but is not required to, construct improvements on the Plaza Park or its leased East Podium Parcel bike storage space. Because there are no definite plans, timeline or budget for “tenant improvements” at this time, there is insufficient information available to opine on whether the tenant improvements would be considered part of the Privately Constructed Mixed-Use Development at Orenco Station project or not.
6. The total project cost is \$121,535,691; therefore, the exemption under ORS 279C.810(2)(a) for projects for which the contract price does not exceed \$50,000 will not apply.
7. The project will use a total of \$700,000 in funds of a public agency; therefore, the exemption under ORS 279C.810(2)(b) for projects in which no funds of a public agency are directly or indirectly used will not apply.

DETERMINATION:

Based on the foregoing, the Prevailing Wage Rate laws, ORS 279C.800 to ORS 279C.870, and OAR Chapter 839, Division 025, will not apply to the proposed construction, reconstruction, major renovation and/or painting of the Privately Constructed Mixed-Use Development at Orenco Station project.

This determination is based on the agency’s file as of the date of this determination. The commissioner may make a different determination if any of the project information is incorrect, or if the project or project documents are modified or supplemented after the date of this determination.

REQUEST FOR RECONSIDERATION:

After the commissioner issues a determination, the requestor or any public agency served with a copy of the determination may request that the commissioner reconsider the determination. A request for reconsideration must be submitted in writing to the Prevailing Wage Rate Unit, must include the reason or reasons for the request and any documents in support of the request, and must be received within 15 calendar days of the date the determination was mailed. A request for reconsideration does not toll the time period for requesting a contested case hearing on the determination.

RIGHT TO A HEARING:

The requestor and any person adversely affected or aggrieved by this determination are entitled to a hearing as provided by the Administrative Procedures Act (ORS 183.413 to 183.470) and ORS 279C.817. If you want a hearing, the Bureau of Labor and Industries,

Wage and Hour Division, must receive your written request for hearing within 21 days from the date this notice was mailed. Hearing requests should be addressed and delivered to:

Administrator
Wage and Hour Division
Bureau of Labor and Industries
800 NE Oregon St., Suite 1045
Portland, OR 97232

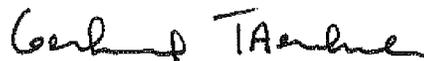
If a written request for hearing is not received within this 21-day period, your right to a hearing shall be considered waived.

If you request a hearing, you will be notified of the date, time and place of the hearing. You have the right to be represented by legal counsel at a hearing. However, if you are a government agency, corporation, partnership, or unincorporated association, you must be represented by either legal counsel or an authorized representative. If you request a hearing, you will receive information on Contested Case Rights and Procedures before the hearing. After the hearing, an order confirming, modifying or reversing this determination will be issued. This determination shall remain in effect until the final order is issued.

If you request a hearing, but fail to appear at any scheduled hearing, you will have waived your right to hearing, and the commissioner may issue a final order by default. If the commissioner issues a final order by default, the agency file on this matter shall serve as the record for purposes of proving a prima facie case. You are not entitled to judicial review of this determination order unless you have made a timely request for a hearing.

Date: September 5, 2013

BRAD AVAKIAN, Commissioner
Bureau of Labor and Industries



GERHARD TAEUBEL,
Administrator
Wage and Hour Division
Bureau of Labor and Industries

Certificate of Service

On September 5, 2013, I mailed the Prevailing Wage Rate Determination for the Privately Constructed Mixed-Use Development at Orenco Station project to the requestor and affected agencies, as follows:

Jeanette Launer
JM Launer Law Practice
5216 SW Burton Drive
Portland, OR 97221

Certified Mail – Return Receipt Requested
Article #: 7012 3050 0001 7255 3717

Pamela J. Beery, Hillsboro City Attorney
Beery Elsner & Hammond, LLP
1750 SW Harbor Way, Suite 380
Portland, OR 97201

Certified Mail – Return Receipt Requested
Article #: 7012 3050 0001 7255 3724

Monique Lee Hawthorne, LEED AP
Deputy General Counsel /TriMet
Capital Projects Division
1800 SW First Avenue
Portland, OR 97201

Certified Mail – Return Receipt Requested
Article #: 7012 3050 0001 7255 3731

Joel Morton, Senior Attorney
Office of the Metro Attorney
600 NE Grand Avenue
Portland, Oregon 97232-2736

Certified Mail – Return Receipt Requested
Article #: 7012 3050 0001 7255 3748

Alan Rappleyea, County Counsel
Washington County
155 N First Avenue, Suite: 300
Hillsboro, OR 97124-3072

Certified Mail – Return Receipt Requested
Article #: 7012 3050 0001 7255 3755

Clean Water Services Administration
2550 S.W. Hillsboro Highway
Hillsboro, Oregon 97123

Certified Mail – Return Receipt Requested
Article #: 7012 3050 0001 7255 3762


Cristin Casey
Compliance Specialist
Wage and Hour Division
Bureau of Labor and Industries