



August 12, 2015

Heather R. Martin
Beery Elsner & Hammond LLP
1750 SW Harbor Way, Suite 380
Portland, OR 97201

Re: *Determination Whether Project is Subject to Prevailing Wage Rate Laws*
Project: Privately Constructed Mixed Use Development at 350 E. Main Street, Hillsboro,
Revised
Requested by: Beery Elsner & Hammond LLP for City of Hillsboro

Dear Ms. Martin:

On February 23, 2012, you submitted a request on behalf of Metro and the City of Hillsboro asking if the Prevailing Wage Rate laws would apply to the proposed project known as Privately Constructed Mixed Use Development at 350 E. Main Street, Hillsboro. On March 7, 2012, the Bureau of Labor and Industries issued a determination that the Prevailing Wage Rate laws would not apply to the project.

On July 23, 2015, you submitted a request on behalf of the City of Hillsboro asking for an updated determination for this project, based on a recent change in the fact situation for this project. Sufficient information to make a determination was received on August 10, 2015, and therefore, the commissioner issues the following determination:

FINDING OF FACT

1. The City of Hillsboro (the "City") and Metro purchased property located at 350 E. Main Street in Hillsboro, Oregon in 1998, and subsequently sold the property to Tokola Properties ("Tokola") in 2012 to facilitate a transit-oriented development. On February 22, 2012, the City, Metro and Tokola entered into an Agreement for the Disposition and Development of Real Property ("Agreement") that called for Tokola to build a new four-story mixed-use building at this location, which would include commercial space on the ground floor and three floors of apartments. The Agreement also called for an existing building, referred to as the Bank Building, to be renovated and used for retail or restaurant use.

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2. When the March 7, 2012 determination was issued, the amount of funds of a public agency to be used for the project was \$631,551.
3. On July 12, 2012, Tokola conveyed the property at 350 E. Main Street in Hillsboro to 4th Main LLC (“4th Main”), and assigned the Agreement to 4th Main. The City and Metro issued a Certificate of Completion to 4th Main on October 17, 2014 indicating that 4th Main had satisfactorily completed the construction required under the Agreement, which included bringing the Bank Building up to warm shell standards sufficient to permit the Bank Building to be leased. Under Section 3.13.2 of the Agreement, the Certificate of Completion provided for termination of construction obligations for 4th Main.
4. Under Section 3.1.3 of the Agreement, 4th Main was obligated to lease the Bank Building to a tenant that was either a natural food grocery store or a brew-pub. 4th Main has been unable to find a viable tenant to lease the space, but has located a prospective buyer. Bag and Baggage Productions (“Bag and Baggage”), a non-profit theater company located in Hillsboro, is interested in purchasing the Bank Building.
5. In the First Amendment to the Agreement, effective July 17, 2015, the City and Metro approved the sale of the Bank Building to Bag and Baggage, and confirmed the use for theater company performance, rehearsal, box office and ancillary administrative office space meets Metro’s Transit-Oriented Development Centers Urban Living Infrastructure criteria.
6. In the Sale Agreement and Receipt for Earnest Money dated July 10, 2015, Bag and Baggage agreed to purchase the Bank Building from 4th Main for \$775,000.
7. Through a Loan Agreement dated July 9, 2015, the City has agreed to loan Bag and Baggage \$775,000 for the purchase of the Bank Building at one percent interest over a 20-year period. If Bag and Baggage fails to repay the loan and the City is forced to take title to the Bank Building through foreclosure, the City may then sell the building. The Loan Agreement does not require Bag and Baggage to renovate the Bank Building.
8. Bag and Baggage plans to renovate the Bank Building to install theatrical equipment such as lights, lighting rigs, sound, and projections; and to install seating, box office facilities, new offices, storage, dressing rooms, concessions, and expanded restroom facilities.
9. Bag and Baggage is in the process of raising funds to pay for the renovations to the Bank Building. Funds will be raised through private donors, foundations, and government grants. The grants they plan to apply for are through the Oregon Arts Commission, the Oregon Cultural Trust, the National Endowment for the Arts, and the federal ArtsPlace program. The grant goal is \$250,000, but it is unknown at this time how much, if any, will be awarded from each entity.

CONCLUSIONS OF LAW

1. The project as originally described was determined not to be subject to the Prevailing Wage Rate laws. The project did not meet the definition of “public works” under ORS 279C.800(6)(a)(A) because the project would not be carried on or contracted for by a public agency. The project did not meet the definition of “public works” under ORS 279C.800(6)(a)(B) because, although the project would be privately owned, it would not use \$750,000 or more in funds of a public agency.
2. The project as revised is not being carried on or contracted for by a public agency, and as such does not meet the definition of “public works” under ORS 279C.800(6)(a)(A).
3. Under ORS 279C.800(5), a public agency is defined as the State of Oregon or a political subdivision of the State of Oregon, or a county, city, district, authority, public corporation or public entity organized and existing under law or charter or an instrumentality of the county, city, district, authority, public corporation or public entity. The Oregon Arts Commission and the Oregon Cultural Trust meet the definition of “public agency.”
4. Under ORS 279C.810(1)(a)(A), “funds of a public agency” do not include funds provided in the form of a government grant to a nonprofit organization, unless the government grant is issued for the purpose of construction, reconstruction, major renovation or painting. If the Oregon Arts Commission and/or the Oregon Cultural Trust award grants to Bag and Baggage for renovation of the Bank Building, such funds will be funds of a public agency, and will be given for the purpose of major renovation. The amount of the grants that may be awarded by these entities is unknown at this time. To date, the project has used \$631,551 in funds of a public agency; therefore, if \$118,449 or more is given in grant amounts (or other funds of a public agency) for this project, this project as revised will meet the definition of “public works” under ORS 279C.800(6)(a)(B), as it will be a project that uses funds of a private entity and \$750,000 or more of funds of a public agency for constructing, reconstructing, painting or performing a major renovation on a privately owned building.
5. OAR 839-025-0310(4) provides that when a private project for major renovation that is already underway becomes a public works by virtue of the provisions of ORS 279C.800(6)(a)(B), the Prevailing Wage Rate laws apply prospectively to the project once any public agency commits to the provision of funds for the project. In this instance, Prevailing Wage Rate laws would apply to the project at the point the Oregon Arts Commission and/or the Oregon Cultural Trust award grant funds in the amount of \$118,449 or more. However, if a public agency delays a commitment to the provision of funds for the purpose of avoiding compliance with the Prevailing Wage Rate laws, the commissioner may determine that the Prevailing Wage Rate laws apply to the entire project.

DETERMINATION

Based on the foregoing, the Prevailing Wage Rate laws, ORS 279C.800 to ORS 279C.870, and OAR Chapter 839, Division 025, will apply to the project known as Privately Construction Mixed Use Development at 350 E. Main Street, Hillsboro, as revised, if the project uses an additional amount of \$118,449 or more in funds of a public agency.

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 A 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, Oregon 97232

If a written request for hearing is not received within this 21-day period, your right to a hearing shall be considered waived, this determination order will be final, and the agency file on this matter shall serve as the record for purposes of proving a prima facie case.

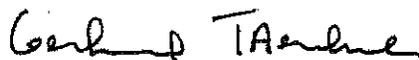
If you request a hearing, you will be notified of the date, time and place of the hearing. You have the right to be represented by legal counsel at a hearing. However, if you are a government agency, corporation, partnership, or unincorporated association, you must be represented by either legal counsel 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 order 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.

Date: August 12, 2015

Brad Avakian, Commissioner
Bureau of Labor and Industries



Gerhard Taeubel, Administrator
Wage and Hour Division
Bureau of Labor and Industries

Certificate of Service

On August 12, 2015, I mailed the Prevailing Wage Rate Determination for the project known as Privately Construction Mixed Use Development at 350 E. Main Street, Hillsboro, as revised, to the requestor and interest parties as follows:

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