March 29, 2019

Jeffrey G. Condit, P.C.
Miller Nash Graham & Dunn LLP
3400 U.S. Bancorp Tower
111 S.W. Fifth Avenue
Portland, OR 97204

Re: Determination Whether Project is Subject to Prevailing Wage Rate Laws - AMENDED
Project: Wood Village Commons
Requested by: City of Wood Village

Dear Mr. Condit:

On February 2, 2018, the Bureau of Labor and Industries received your request asking if the Prevailing Wage Rate laws would apply to the proposed Wood Village Commons, also known as the Wood Village Apartments. On July 20, 2018, BOLI issued a determination that divided this project’s public works from those parts of the project that are not public works. The commissioner determined that the improvements to the City of Wood Village’s public water, sewer, and storm water infrastructure are public works subject to the Prevailing Wage Rate laws.

On February 21, 2019, BOLI received your request for an amended determination along with updated information, including the amount of funds of a public agency used on the Project. Sufficient information to make an amended determination was received on March 14, 2019, and therefore, the commissioner issues the following amended determination:

FINDING OF FACT

1. The City of Wood Village (the “City”) and the City of Wood Village Urban Renewal Agency (the “Agency”) are public agencies as defined by ORS 279C.800(5). The City owns approximately 6.3 acres of land (the “Property”) residing within the Wood Village Urban Renewal Area and adjacent to City Hall located at the northeast corner of Northeast Halsey Street and Northeast 238th Drive.
2. In January 2016, the City publicly offered 5.74 acres (249,906 square feet) of the City owned Property to developers for mixed-use development at a sale price of $4,500,000.00, approximately $18.00 per square foot. NAI Norris, Beggs & Simpson valued the land using a comparable sale approach that included the sale of five retail/commercially zoned properties within the previous four years and similar in size, use, and condition to the Property. The City’s offering failed to lead to a sale agreement.

3. On September 25, 2017, Colliers International of Portland (the “Broker”) provided the City with a “Broker’s Opinion of Value” determining the Property’s value at $3,750,000.00. The opinion applied a comparable sale approach that included six vacant property sales destined for multi-family, affordable housing, and retail development within the last four years and similar in size, use, and condition to the Property. The Broker valued the Property’s 274,906 SF at $13.64 per square foot, 90.9 percent of the comparable high value of $15.00 per square foot.

4. On November 16, 2017, the City and Agency entered into a Disposition and Development Agreement (the “Agreement”) with Williams/Dame & Associates, Inc. (the “Developer”), a domestic business corporation. Upon closing, the Agreement will transfer ownership of the Property to the Developer at the purchase price of $3,750,000.00.

5. After closing on the Agreement, the Developer intends to demolish the existing City Hall and construct a mixed residential and commercial use development known as the Wood Village Commons (the “Project”). The City finds that the proposed Project is consistent with the City’s Wood Village Urban Renewal Plan.

6. The City and Agency included incentive provisions for the Developer within the Agreement requiring the City to make improvements to public water, sewer, and storm water infrastructure. Specifically, the Agreement requires the relocation of these items to the perimeter of the Property from their current location that crosses the plane of the Property. On July 23, 2018, the City first advertised the contract specifications for the planned improvements to public water, sewer, and storm water infrastructure. The City awarded a contract to 3 Kings Environmental, Inc. and construction began on September 24, 2018 and ended on December 21, 2018. The total cost to the City and Agency for the improvements, engineering, final change order, and bid advertisement was $341,988. The City will retain ownership of the water utilities after the closing of the Agreement.
7. On February 23, 2010, the City approved its Wood Village Urban Renewal Plan, which identified the Property for redevelopment and the need for improvements to City owned utilities within the Urban Renewal Area. In September 2015, City Manager Bill Peterson reported to Wood Village’s City Council in a proposal seeking approval to enter into an agreement with a real estate broker that the Property is “encumbered by a variety of constraints, including the presence of [...] water lines, sewer and storm drain lines [...].” On April 4, 2018, City Manager Bill Peterson reported to BOLI that the Agency will proceed with contracting for the public water, sewer, and storm water infrastructure improvements to the Property regardless of whether or not the Agreement with the Developer closes.

9. On May 24, 2018, the City purchased approximately 0.44 acres (approximately 25,000 square feet) of the Property’s land known as the Best Western Parcel from Swami Shreeji, LLC, a domestic business corporation, for $300,000. The Project’s plans include construction on the Best Western Parcel. The Agreement stipulated that the City acquire a purchase and sale agreement or option to purchase the Best Western Parcel. Upon closing of the Agreement, the City will convey the Best Western Parcel to the Developer.

10. On August 29, 2018, the City acquired from Grover Investment Group, LLC (“Grantor”), a privately owned company, property over which an emergency public access easement is required to service the Property. The City paid the purchase price of $200,560 for this property (the “Easement”), an amount that reflects the funds necessary for the Grantor to contract for a new fence and lighting along the Grantor’s Property line. The City paid $262 in fees associated with the acquisition of the Easement.

11. The Developer’s Project consists of the new construction of between 166 and 200 residential units, 8,400 square feet of ground floor retail or commercial space, and 249 parking spaces. In regard to the residential units, the Developer is under no obligation or requirement by the City or any other public agency to serve occupants of any particular level of income.

12. Although the Developer contracted Kerr Construction to begin fill of the northern portion of the Property in February 2018, the Developer has not contracted for the construction of its proposed Project’s buildings. The City estimates that the Developer will begin construction after closing, which is scheduled for June 2019.

13. Under the “Design Guidelines; City Regulatory Processes” section of the Agreement as amended, the City and Agency agree that the site plan, renderings, and material palate are subject to change and that the City is “specifically not obligating itself, the City, or any other agency with respect to any discretionary action relating to development of the Project or operation of the improvements to be constructed on the Property.” The “Design Guidelines” of the Agreement require 1) between 166 and 200 residential units, 2) at least 8 percent of residential units to be three-bedroom units, 3) a community gathering area adjacent to the 8,400 square-foot retail area, and 4) no building taller than four stories. The Developer must receive approval from the City’s regulatory processes for any and all required land use and entitlements.
14. If the Developer defaults prior to closing of the Agreement, the City may terminate the Agreement and retain Earnest Money and accrued interest from the Developer.

15. On January 31, 2019, the City and the Developer amended its Agreement to confer upon the Developer the responsibility of paying $50,000 of the $187,500 in brokerage fees in exchange for a reduced increase in the Earnest Money.

16. The Project will use funds of a public agency, including but not limited to the following City expenses:

<table>
<thead>
<tr>
<th>Description</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>Closing costs for property purchased from Swami Shreeji, LLC</td>
<td>$1,847</td>
</tr>
<tr>
<td>Survey</td>
<td>$2,894</td>
</tr>
<tr>
<td>Transportation evaluation</td>
<td>$3,000</td>
</tr>
<tr>
<td>Attorney fees</td>
<td>$20,000</td>
</tr>
<tr>
<td>Closing costs for property sale to Williams/Dame &amp; Associates, Inc.</td>
<td>$10,800</td>
</tr>
<tr>
<td>Purchase price of Easement property</td>
<td>$200,822</td>
</tr>
<tr>
<td>Brokerage fees</td>
<td>$137,500</td>
</tr>
<tr>
<td>Improvements to public water, sewer, and storm water infrastructure</td>
<td>$341,988</td>
</tr>
<tr>
<td><strong>TOTAL</strong></td>
<td><strong>$718,851</strong></td>
</tr>
</tbody>
</table>

17. The City has the option to lease the City Hall building from the Developer upon closing of the Agreement until said lease expires 30 days prior to start of construction on the Project. No public agency will use or occupy any portion of the Project during construction or after completion.

CONCLUSIONS OF LAW

1. While the Agreement categorizes the Agency’s improvements to public water, sewer, and storm water infrastructure as an incentive of public funds to the Developer to be contracted for by the Agency regardless of the outcome of the Agreement, it is clear that one purpose of this work is to facilitate the Developer’s Project. Consequently, BOLI considers both the Agency’s improvements to the City’s public water infrastructure and the Developer’s plans to be components of a single Project.

2. The Project includes the construction of improvements contracted for by a public agency to serve the public interest. Therefore, the Project meets the definition of “public works” under ORS 279C.800(6)(a)(A).
3. Under ORS 279C.800(6)(a)(B), “public works” includes a project that uses $750,000 or more of funds of a public agency for the construction, reconstruction, major renovation, or painting on a road, highway, building, structure, or improvements of any type. According to the information provided to BOLI, the Project will use $718,851 in funds of a public agency. Therefore, the Project does not meet the definition of “public works” under ORS 279C.800(6)(a)(B).

4. The total Project cost will exceed $50,000, and the Project will use funds of a public agency. Therefore, the exemptions from the Prevailing Wage Rate Law under ORS 279C.810(2)(a) and (b) do not apply to the Project.

5. When appropriate, pursuant to ORS 279C.827(3), the commissioner shall divide a project that includes parts owned by a public agency and parts owned by a private entity. In doing so, BOLI will separate those parts of the project that are public works from the parts of the project that are not public works and, therefore, not subject to Prevailing Wage Rate laws. Such an action shall first consider the following factors provided in ORS 279C.827(1)(c):

   A. The physical separation of the project structures;
   The public water, sewer, and storm water infrastructure improvements involved relocating these items to the Property's perimeter from their previous location, which crossed the Property's plane. Whereas there is no separation between these infrastructure improvements and the Developer's proposed construction, this factor weighs toward not dividing the Project.

   B. The timing of the work on the project phases or structures;
   The Agency contracted the public water, sewer, and storm water improvements to 3 Kings Environmental, Inc., which completed the improvements between September and December 2018. The City anticipates that the Developer will begin work no sooner than June 2019, but the schedule is contingent on the result of BOLI's response to the City's request for an amended coverage determination. These construction schedules indicate that the Developer's work will follow the Agency's work in close succession. Although the Agreement requires the Agency to complete its infrastructure work prior to closing, this fact weighs only slightly toward the conclusion that BOLI is able to divide these parts from the Developer's part of the Project.

   C. The continuity of project contractors and subcontractors working on project parts or phases;
   While the City and Agency are responsible for contracting for the sewer and storm water improvements of the Project, awarding the contract to 3 Kings Environmental, Inc., the Developer is expected to contract for all other Project work. As of the date of this amended determination, the Developer has not contracted for its construction work on the Project. Therefore, insufficient evidence exists regarding contractor continuity for BOLI to consider this factor in determining whether or not the Project should be divided.
D. The manner in which the public agency and the contractors administer and implement the project;
In the City's Wood Village Urban Renewal Plan, published seven years prior to its Agreement with the Developer, the City identified the improvement of City owned utilities within the Urban Renewal Area as a goal. Regardless of whether or not the Agreement with the Developer closes, the Agency completed the public water, sewer, and storm water infrastructure improvements to the Property. These facts weigh toward dividing the Agency's public water, sewer, and storm water infrastructure work from the Developer's part of the Project.

E. Whether a single public works project includes several types of improvements or structures;
The parts of the Project contracted for by the Agency are distinguishably different in nature from the Developer's parts. While the Developer's work includes the demolition of existing structures and the construction of a mixed residential and commercial space, the Agency's work is isolated to utility improvements. The difference between the types of construction the Agency and the Developer plan to undertake weighs toward dividing the utility improvements from the Developer's part of the Project.

F. Whether the combined improvements or structures have an overall purpose or function.
While the City and Agency's relocation of the water infrastructure was completed in order to accommodate the Project, and consequently this activity serves the Project's overall purpose, it is also true that the City's 2010 Urban Renewal Plan identified the relocation of these items as a public necessity to meet service demands. Furthermore, the City and Agency undertook the infrastructure improvements regardless of the outcome of the proposed Agreement. Whereas the Project's combined improvements serve the purpose of constructing a mixed-use development on the site of the former City Hall, the Agency's improvements were also intended to upgrade the City's sewer and storm water infrastructure for the public good. Consequently, this factor weighs slightly toward dividing the Project.

The preceding analysis demonstrates that, upon consideration of the facts relevant to this issue, it is appropriate to divide the part of the Project owned by a public agency from the part of the Project owned by a private entity.

DETERMINATION

Based on the foregoing, the Prevailing Wage Rate laws, ORS 279C.800 to ORS 279C.870, and OAR Chapter 839, Division 025, the commissioner divides from the Wood Village Commons project the part owned and contracted by a public agency. Therefore, the aforementioned Prevailing Wage Rate laws will apply to the Agency's improvements to the City's public water, sewer, and storm water infrastructure.
Conversely, the Prevailing Wage Rate laws, ORS 279C.800 to ORS 279C.870, and OAR Chapter 839, Division 025 will not apply to the parts of the Project known as the Wood Village Commons that are owned by the Developer, a private entity.

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: March 29, 2019

Val Hoyle, Commissioner
Bureau of Labor and Industries

Lois Johnson, Interim Administrator
Wage and Hour Division
Bureau of Labor and Industries
Certificate of Service

On March 29, 2019, I mailed the amended Prevailing Wage Rate Determination for the Wood Village Commons project to the requestor and interested party, as follows:

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Wage and Hour Division
Bureau of Labor and Industries