Office of
The City Attorney
City of San Diego

MEMORANDUM
MS 59

(619) 533-5800

DATE: December 2, 2015

TO: Honorable Mayor and Councilmembers

FROM: City Attorney

SUBJECT: Proposed Labor Neutrality Provision and Application of the Living Wage Ordinance Related to the Seventh and Market Project

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INTRODUCTION

On November 9, 2015, the San Diego City Council (Council) considered the approval of an Exclusive Negotiation Agreement (ENA) between the City of San Diego (City) and Cisterra Development (Cisterra) with respect to Cisterra's proposed development of a mixed-use project (Project) on a site located at Seventh Avenue and Market Street in downtown San Diego (Site). The City owns the Site in its capacity as the housing successor to the former Redevelopment Agency of the City of San Diego (Former RDA). The Project, if approved and constructed, would feature both affordable housing units and several market-rate elements, including Ritz-Carlton condominiums, a Ritz-Carlton hotel, and a Whole Foods Market store serving as the "anchor" retail tenant.

The ENA envisions that the City and Cisterra would negotiate a Disposition and Development Agreement (DDA) for the Site during an exclusive negotiation period lasting at least 180 days. The DDA, if approved by the Council, would require the City to sell its ownership interest in the Site to Cisterra in exchange for Cisterra's commitment to develop and operate the Project on the Site. The purchase price for the Site would be memorialized in the DDA and is expected to equal the appraised fair market value, minus a relatively small deduction in property value to account for the on-site affordable housing requirement. The City would deposit the net sale proceeds into a dedicated affordable housing fund, in accordance with applicable California law.

During the November 9 meeting, the Council voted to continue the ENA item to December 8 after several substantive motions did not receive five affirmative votes. The first failed motion, initiated by Councilmember Todd Gloria, sought to approve the ENA, with the stipulation that

the City and Cisterra must negotiate for inclusion of a so-called "card check neutrality provision" (Neutrality Provision) in the final DDA. *See* Attachment A for a copy of the Neutrality Provision distributed for the first time during the November 9 meeting. The Neutrality Provision would require any business employer at the Site to recognize a labor union as the exclusive bargaining representative for bargaining unit employees at the business if the labor union collects and produces authorization cards signed by a majority of those employees.

With respect to the first failed motion, the Office of the City Attorney commented verbally that the Council could ask staff to include the Neutrality Provision in the negotiating parameters for the DDA, but that this Office would need to research and evaluate whether the City could legally impose the Neutrality Provision as a condition to approval of the DDA. This memorandum addresses a legal issue related to the City's potential imposition of the Neutrality Provision and answers a question raised by Council President Sherri Lightner after the November 9 meeting.

QUESTIONS PRESENTED

1. Under the federal preemption doctrine, is the City prevented from imposing the Neutrality Provision as a condition to approval of the DDA?

2. Will the City's living wage requirements apply to the hotel and retail operators at the Site if the City provides a partial subsidy toward the affordable housing component?

SHORT ANSWERS

1. Yes. Federal law, specifically the National Labor Relations Act (NLRA), mandates the use of a secret ballot election to determine whether a majority of employees wish to organize into a union. By contrast, the Neutrality Provision would allow a labor union to collect signed authorization cards directly from a majority of employees to confirm their intent to organize into a union. Due to this direct conflict between the NLRA's requirements and the Neutrality Provision, the City is prohibited under the doctrine of federal preemption from imposing the Neutrality Provision through the DDA with Cisterra in an effort to regulate the conduct of the eventual hotel and retail employers at the Site. However, the City can try to negotiate for Cisterra (and, by extension, the hotel and retail operators at the Site) to consent voluntarily to the Neutrality Provision.

2. No. The DDA will not qualify as a financial assistance agreement as defined in the City's Living Wage Ordinance and thus will not trigger application of living wage requirements to the hotel and retail aspects of the Project. Although the City and Cisterra have not yet negotiated the purchase price for the Site, this memorandum assumes that the reduction in price attributable to the on-site affordable housing requirement will meet the monetary threshold of $500,000 for direct financial assistance within the City's definition of a financial assistance agreement. Yet, the reduced purchase price will constitute the City's partial subsidy solely toward the affordable housing component of the Project and will not be provided for the express purpose of facilitating economic development, job creation, or job retention as required under the definition of a financial assistance agreement.

BACKGROUND

A. Description of the Site and the Project

In January 2012, the Council designated the City to serve as the Former RDA's housing successor for purposes of performing the Former RDA's housing functions pursuant to California Health and Safety Code (HSC) section 34176(a)(1).[1] In its capacity as housing successor, the City administers various housing assets, such as real property assets originally acquired by the Former RDA to facilitate the development of affordable housing. Among other things, the housing assets include the Site and six other mixed-use assets, each of which is eligible to be developed with a significant affordable housing component and a mix of other uses to be determined in the future.

The Project will be a 751,474 square foot mixed-use development that includes 58 for sale market-rate Ritz-Carlton condominiums, 115 market-rate rental apartments, 32 affordable rental apartments, a five-star Ritz-Carlton hotel with 160 rooms, 155,538 square feet of office space, 46,187 square feet of retail space, and 238 public parking spaces. The Project will adhere generally to the strategy for use and disposition of housing assets set forth in the Affordable Housing Master Plan (Master Plan), approved by the Council on May 30, 2013. The Master Plan states that certain higher-value real estate housing assets in downtown San Diego, such as the Site, will be sold at close to market rate with a requirement that at least 15 percent of the total on-site residential units will be subject to long-term affordability restrictions. The inclusionary housing level will be 16 percent for the Project, not counting the hotel rooms as residential. The net proceeds received by the City from the sale of the Site will be deposited into the Low and Moderate Income Housing Asset Fund (LMIHAF), as required by HSC section 34176(d). The City administers the LMIHAF and, in accordance with HSC section 34176.1(a), must use all LMIHAF monies for restricted purposes, primarily for the development of affordable housing.

As with the typical affordable housing transaction, the Project is slated to undergo a two-step formal approval process (exclusive of any land use or permitting requirements). First, the Council will be asked to approve the ENA, which envisions that the City and Cisterra will exclusively negotiate the DDA in good faith for 180 days, subject to the City's one-time administrative time extension of up to 90 additional days. Second, assuming the ENA is approved and negotiations are successful, the Council will be asked to approve the DDA, which will memorialize the purchase and sale terms (including the purchase price) for the Site, will require Cisterra to cause development of the Project consistent with specified objectives and criteria, and will impose the long-term affordability covenants on the affordable housing units.

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[1] The City, acting in its capacity as the housing successor to the Former RDA, is not a separate and distinct legal entity from the City, a municipal corporation. The real property assets and funds possessed by the City as housing successor, however, are not general assets and funds of the City; instead, they are subject to separate restrictions on use, reporting, and auditing under HSC sections 34176 and 34176.1. The City, as housing successor, essentially holds its real property assets and funds in trust for specified affordable housing purposes.

B. Distinction Between NLRA Requirements and a Contractual Neutrality Provision

The NLRA is designed to prevent labor disputes and strikes. 29 U.S.C. § 151. The NLRA guarantees certain rights to employees, including the right to organize into a labor union and "to bargain collectively through representatives of their own choosing." *Id.* § 157. It is an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of those rights. *Id.* § 158(a)(1). Bargaining unit employees are entitled to select, by majority vote, their exclusive representatives "for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment." *Id.* § 159(a). An employer may insist that the employees' selection of their exclusive representative be determined by a secret ballot election conducted by the National Labor Relations Board (NLRB) in accordance with the NLRA. *Id.* §§ 158(a)(3), 159(e)(1).

An employer may, and often does, voluntarily agree with a labor union to forego its right to insist on a secret ballot election under the NLRA and to permit the use of an alternative procedure considered more favorable to union interests. One common alternative procedure is called a card check neutrality agreement, under which the employer agrees to maintain a neutral position concerning employees' efforts to organize into a union and pledges to recognize a particular union as the exclusive bargaining representative if the union collects and produces authorization cards signed by a majority of the bargaining unit employees.

C. Proposed Neutrality Provision for the Project

The proposed Neutrality Provision sets forth a detailed procedure that any business employer at the Project, including Ritz-Carlton and Whole Foods Market, would need to follow to determine if a labor union seeking to organize employees should be recognized by the employer as the exclusive bargaining representative for its employees. This procedure allows a union to request a "card check" from any business employer and, within three days thereafter, to gather signed authorization cards from the bargaining unit employees. If the union produces authorization cards signed by a majority of the bargaining unit employees, the employer will recognize the union as the exclusive bargaining representative of those employees. The employer also agrees to adopt a neutral approach regarding unionization and to not take any action or make any statement opposing the employees' selection of their exclusive bargaining representative.

As noted above, the first failed motion concerning the ENA at the November 9 meeting of the Council would have amended the ENA to obligate the City and Cisterra to negotiate for inclusion of the Neutrality Provision in the DDA.[2] Steve Black, Chairman of Cisterra, testified that Cisterra has taken actions reasonably within its control to address labor-related concerns in the Project. According to Mr. Black, Cisterra has entered into a project labor agreement under which Cisterra has committed to hire unionized labor to complete construction of the Project. However, Mr. Black testified that Ritz-Carlton and Whole Foods Market are unwilling to abide

[2] Before voting to continue the item to December 8, the Council also failed to pass a motion to approve the ENA, with a suggestion that staff merely consider the Neutrality Provision in DDA negotiations with Cisterra, and a motion to approve the ENA as recommended by staff, with no mention of the Neutrality Provision.

by the Neutrality Provision as to their respective hotel and retail operations at the Site. He specifically characterized the Neutrality Provision as a "non-starter" with Whole Foods Market. He maintained that Cisterra cannot control the established policies of Ritz-Carlton and Whole Foods Market in opposition to the Neutrality Provision.

ANALYSIS

I. THE CITY IS FEDERALLY PREEMPTED FROM IMPOSING THE NEUTRALITY PROVISION

Federal laws preempt state and local laws if at least one of three circumstances is present: (1) the federal law contains an express preemption provision; (2) the state or local law is in "actual conflict" with the federal law; or (3) there is no clear conflict, but Congress intended the federal law to "occupy the field." *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 372-73 (2000). The NLRA contains no express preemption provision. *Building & Constr. Trades Council v. Associated Builders & Contractors of Mass/RI, Inc.*, 507 U.S. 218, 224 (1993) (hereinafter, *Boston Harbor*). Accordingly, the discussion below focuses on whether the Neutrality Provision conflicts with federal law, namely the NLRA, such that the City is preempted from imposing the Neutrality Provision.

A. The City Is Preempted from Imposing the Neutrality Provision on the Basis that the Card Check Aspect Conflicts with NLRA Requirements

The United States Supreme Court has articulated two distinct NLRA preemption principles. *Boston Harbor*, 507 U.S. at 224. Of relevance to this memorandum, one of those principles – known as "*Garmon* preemption" – prohibits state and local regulation of activities that the NLRA "protects, prohibits, or arguably protects or prohibits." *Wisconsin Dept. of Industry v. Gould Inc.*, 475 U.S. 282, 286 (1986); *see also San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 246 (1959).[3] *Garmon* preemption is intended to preclude state interference with the NLRB's effort to interpret and enforce the regulatory scheme established by the NLRA. *Golden State Transit Corp. v. City of L.A.*, 475 U.S. 608, 613 (1986). *Garmon* preemption has been applied to conduct related to the process for determining union representation. *Penn Nurses Ass'n v. Penn. State Educ. Ass'n* 90 F.3d 797, 802-03 (1996). The challenged regulatory conduct does not need to be protected or prohibited by the NLRA; "it is enough that the conduct upon which the state causes of action are based is 'arguably' [protected or] prohibited." *Id.* at 802.

The most factually similar court decision in this instance is *Aeroground, Inc. v. City & County of San Francisco*, 170 F. Supp. 2d 950, 953 (2001). In that case, an airport commission adopted a rule to minimize the perceived threat of labor unrest arising out of union-organizing drives at the airport. The rule required certain airport-based employers to enter into a labor peace and card

[3] The second principle – known as "*Machinists* preemption" – prohibits state and local regulation of areas that have been left "to be controlled by the free play of economic forces." *Lodge 76, Int'l Ass'n of Machinists & Aerospace Workers, AFL-CIO v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132, 140 (1976). Whereas *Garmon* preemption has been applied to the use of a card check procedure to determine union representation, *Machinists* preemption does not apply in the current situation.

check agreement allowing the intent of employees with respect to union representation to be determined by a card check procedure, in lieu of the statutory secret ballot election conducted by the NLRB. *Id.* The plaintiff, a business that furnished cargo-handling services to the airport, challenged the airport commission's rule. The court held that the plaintiff had met its burden for a preliminary injunction against enforcement of the rule because, among other things, the plaintiff had shown a "significant probability" that the rule is preempted under the *Garmon* doctrine. *Id.* at 954-56. The court reasoned that the card check procedure appears inconsistent with the substantive requirements of the NLRA. More specifically, the card check procedure requires conduct that conflicts with certain statutory rights of employers protected by the NLRA, including the right to insist on the use of a secret ballot election to determine whether union representation is supported by a majority of employees.[4] *Id.* at 956.

As with the airport commission's challenged rule in *Aeroground*, the City is precluded from imposing the Neutrality Provision in light of *Garmon* preemption. The Neutrality Provision requires any business employer at the Site to waive its right to demand a secret ballot election conducted by the NLRB and mandates the use of the alternative card check procedure to determine the intent of employees to organize into a union. Therefore, the Neutrality Provision conflicts with a material provision of the NLRA and deprives business employers of a material right protected by the NLRA. Due to this direct conflict, *Garmon* preemption applies.[5]

B. The City, in its Capacity as Housing Successor, Does Not Fall Within the "Market Participant" Exception to the Doctrine of Federal Preemption

The United States Supreme Court has "held consistently that the NLRA was intended to supplant state labor regulation, not all legitimate activity that affects labor." *Boston Harbor*, 507 U.S. at 227. Consequently, a public agency is not subject to preemption by the NLRA when acting as a market participant related to a proprietary interest, rather than as a regulator. *Id.* A public agency has a proprietary interest if it is pursuing its own economic interests by providing financial assistance to a private sector employer and receiving significant ongoing revenue, such as rent under a lease. A public agency is shown to have a proprietary interest in a particular project by having a direct interest in the performance of the project. *Id.*

The courts evaluate two factors to distinguish between a public agency's proprietary and regulatory actions: (1) whether the challenged action essentially reflects the agency's own interest in its efficient procurement of needed goods and services, similar to the typical behavior

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[4] The court referred to a "significant probability" that the airport commission's rule is preempted, not because the court questioned its own conclusion regarding federal preemption, but because the legal standard for granting a preliminary injunction required the court to examine, among other factors, whether the plaintiff had demonstrated a probability of success on the merits. According to the court, the defendants essentially conceded that the airport commission's rule conflicted with a business employer's right to insist on a secret ballot election under the NLRA. *Id.* at 956. As discussed below, the defendants instead tried to argue, unsuccessfully, that the "market participant" exception to federal preemption applied in this situation.

[5] The City would not be federally preempted from imposing a narrower version of the Neutrality Provision that requires each business employer at the Site to take a neutral approach to unionization, but omits any mention of the card check procedure as a substitute for the secret ballot election. Of course, a narrower version of this nature would not have any practical effect because it would simply restate each employer's existing obligations under the NLRA.

of a private party; and (2) whether the narrow scope of the challenged action defeats an inference that the agency's primary goal was to encourage a general policy rather than address a specific proprietary problem. *Cardinal Towing & Auto Repair, Inc. v. City of Bedford, Texas*, 180 F.3d 686, 693 (1999). These factors are intended "to isolate a class of government interactions with the market that are so narrowly focused, and so in keeping with the ordinary behavior of private parties, that a regulatory impulse can be safely ruled out." *Id.* In *Aeroground*, the court applied these factors and determined that the airport commission's mandatory card check procedure operated essentially as a regulatory licensing scheme that controlled the conditions under which certain business employers could contract with private third parties, specifically the airlines. *Aeroground,* 170 F. Supp. 2d at 957. The court emphasized that the airport commission did not impose the card check procedure to advance any proprietary interest, such as to procure goods and services for the airport in an efficient manner. *Id.*

The City, as housing successor, has a legitimate proprietary interest in ensuring that the affordable housing units are constructed and operated on the Site, assuming that the DDA is eventually approved. By contrast, the City has no legitimate interest as a market participant in the market-rate components of the Project, such as the hotel and retail operations. The City will not provide any subsidy toward the market-rate components, will not be involved in the procurement of goods and services at the Project, and will not receive ongoing revenue from any aspect of the Project. If the City uses the DDA as a vehicle to impose the Neutrality Provision on the hotel and retail operations at the Site, this action plainly will be designed to further the City's regulatory objective to protect the economic interests of hotel and retail employees. Like the mandatory card check procedure in *Aeroground*, the City's imposition of the Neutrality Provision would enable the City to control the conduct of business employers at the Site in their future interactions with employees and unions. While the Neutrality Provision would advance the City's regulatory objective, it would not serve to protect the City's proprietary interest with respect to the affordable housing component or to address a specific proprietary problem.[6] Therefore, if the City seeks to impose the Neutrality Provision, the market participation exception will not be available to shield the City from federal preemption under the NLRA.

In sum, the City is preempted under the NLRA from imposing the Neutrality Provision on the hotel and retail operators at the Site. The City can try to negotiate for Cisterra (and, by extension, the hotel and retail operators at the Site) to consent voluntarily to the Neutrality Provision. Nonetheless, the City cannot unilaterally impose the Neutrality Provision as a condition to approval of the DDA.

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[6] Some municipalities in California, including San Francisco, Los Angeles, Santa Cruz, Marin County, Watsonville, and Fairfax, have enacted a labor neutrality ordinance. In each instance, this ordinance is narrowly tailored, imposing labor requirements on business employers only when the municipality asserts a legitimate proprietary interest. The narrow application of the ordinance is designed to avoid any conflict with the NLRA's requirements and thus to avoid a federal preemption argument. The City has not enacted any regulation or policy requiring the imposition of a Neutrality Provision or any similar labor-oriented requirements in development agreements or other City contracts. Even if the City had enacted a regulation or policy in this regard, the doctrine of federal preemption would likely prevent the City from imposing the Neutrality Provision on the hotel and retail operations at the Site because the City does not have a proprietary interest in those market-rate components of the Project.

II. THE CITY'S LIVING WAGE REQUIREMENTS WILL NOT APPLY TO THE HOTEL AND RETAIL OPERATORS AT THE SITE

In 2005, the Council passed the Living Wage Ordinance (LWO), contained in Chapter 2, Article 2, Division 42 of the San Diego Municipal Code (SDMC). The LWO "requires *covered employers* and their subcontractors to pay their employees a wage that will enable a full-time worker to meet basic needs and avoid economic hardship." SDMC § 22.4201. Covered employers must pay "the hourly wage rate and *health benefits rate* posted on the City's web site for that fiscal year[,]" provide a minimum amount of compensated leave and uncompensated leave, and pay the state prevailing wage rate if such rate is higher than the wage rate specified. *Id.* § 22.4220. Covered employers also must follow certain reporting and notification requirements, such as the inclusion of living wage provisions in applicable subcontracts, the filing of a living wage certification with the City within thirty days after becoming a covered employer, and the notification to employees of their rights under the LWO. *Id.* § 22.4225. Various remedies are available to enforce the provisions of the LWO, including a civil lawsuit by a covered employee or an investigation and enforcement action by the City for any violation by a covered employer. *Id.* § 22.4230.

The LWO applies to certain taxpayer-funded agreements awarded by the City to businesses that provide services to the public and to the City and that are intended to promote economic development, job creation, and retention. *Id.* § 22.4201. The living wage requirements are triggered when the City awards one of three types of agreements to a business, including financial assistance agreements, service contracts, and City facilities agreements. *Id.* § 22.4210. The LWO defines all three types of agreements and provides that the definitions must be "liberally interpreted as to further the policy objectives of [the LWO]" *Id.* § 22.4215. In this instance, the DDA, if ultimately finalized and approved, will pertain to the sale and development of a City-owned site and clearly will not qualify as a service contract or a City facilities agreement as defined in the LWO. Therefore, the discussion below focuses on whether the DDA will qualify as a financial assistance agreement under a liberal interpretation of that defined term tied to the LWO's policy objectives.

In pertinent part, a "financial assistance agreement" means "an agreement between the *City* and a *business* to provide direct financial assistance with the expressly articulated and identified purpose of encouraging, facilitating, supporting, or enabling . . . economic development, job creation, or job retention . . . ." *Id.* § 22.4205. "Direct financial assistance" as used in this definition "includes funds, below-market loans, rebates, deferred payments, forgivable loans, land write-downs, infrastructure or public improvements, or other action of economic value identified in the *financial assistance agreement*." *Id.* A financial assistance agreement includes "subcontracts to perform *services* at the site that is the subject of the *financial assistance agreement* or for the program that is the subject of the *financial assistance agreement*. . . ." *Id.* "As to economic development, job creation, or job retention, [the LWO] applies to *financial assistance agreements* with a combined value over a period of five years of $500,000 or more." *Id.* Any business receiving benefits under a financial assistance agreement for economic development must comply with the LWO "for a period of five years after the threshold amount has been received by the *business*." *Id.* § 22.4210(a)(2).

Acting in its capacity as the housing successor to the former RDA, the City will sell the Site to Cisterra in exchange for Cisterra's agreement to develop a minimum number of affordable housing units on the Site and pay a purchase price at or near fair market value to the City for the benefit of the LMIHAF. The purchase price for the Site has not been determined yet and will be a material part of the DDA negotiations. The transaction will likely involve a "land write-down" (i.e., a reduction in purchase price) attributable to the diminution in property value related to the on-site affordable housing requirement. The amount of any land write-down is unknown at this point. For purposes of discussion only, it is assumed the DDA transaction will meet the monetary threshold of $500,000 for "direct financial assistance" under the LWO's definition of a financial assistance agreement. The reduced purchase price, however, will constitute the City's partial subsidy solely toward the affordable housing component of the Project. The City, as housing successor, is precluded from subsidizing any portion of the Project other than the affordable housing component. The City will not provide any financial assistance to the market-rate components. As with the typical affordable housing transaction administered by the Former RDA and now the City as housing successor, the DDA will implement the City's housing objectives, which will not involve the "expressly articulated and identified purpose of . . . facilitating . . . economic development, job creation, or job retention."[7] *Id.* § 22.4205.

The term "economic development" is not defined in the LWO. It is a term commonly used in the public arena in various different contexts, but is not easily susceptible to a precise or universal definition. For purposes of this memorandum, this Office has not attempted to arrive at a precise definition of economic development as used in the LWO, but instead has focused on whether economic development, when liberally construed to further the policy objectives of the LWO consistent with SDMC section 22.4215, encompasses affordable housing. For the reasons discussed below, we believe the more reasonable interpretation is that economic development is not intended to encompass affordable housing in the regulatory context of the LWO.[8]

A stated policy objective of the LWO is to ensure compliance with living wage requirements where the City uses public funds to facilitate economic development, job creation, or job retention. *Id.* § 22.4201. In the LWO, economic development is equated with increasing the financial compensation and benefits of workers in traditionally low-paying jobs, enabling them to meet basic needs and avoid economic hardship. *Id.* Economic development, job creation, and job retention are listed successively in multiple parts of the LWO, suggesting a strong connection between the three concepts in terms of achieving the City's job-oriented regulatory objective in the LWO. *Id.* §§ 22.4201, 22.4205. Public policies favoring the payment of living wages to workers and the production of residential units affordable to low-income households are similar

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[7] The standard practice of the Former RDA and the City since the inception of the LWO in 2005 has been to not impose living wage requirements on subsidized affordable housing projects, including mixed-use projects featuring both affordable and market-rate components. To now conclude that the LWO applies to these mixed-use projects would not only represent a significant departure from the standard practice over the past ten years, but also is not warranted based on the discussion in this memorandum. Of course, the Council could amend the LWO at any time to broaden its application or to define or clarify the scope of economic development as used in the LWO.

[8] The analysis in this memorandum regarding applicability of the LWO is necessarily fact-specific, and any conclusions herein are limited to the current factual circumstances.

in that they seek to help keep individuals and families out of poverty. However, whereas the production and retention of well-paying jobs is a clear regulatory motive behind the LWO, the production of affordable housing units is not. Simply put, the production of affordable housing units is not a stated policy objective of the LWO. Thus, interpreting economic development very broadly to encompass affordable housing would not further any stated policy objective of the LWO and would imply a new policy objective that is not found in the actual text of the LWO. The City's articulated purpose in subsidizing any affordable housing project is to produce affordable housing units, not to promote economic development, job creation, or job retention (even if one incidental benefit of the City's subsidy is to create temporary construction jobs).

Finally, assuming for the sake of discussion that economic development encompasses affordable housing in this regulatory context, the LWO still would not apply to the market-rate components of the Project, such as the hotel and retail operations. As discussed above, the sole purpose of any land write-down in the DDA transaction will be to provide a partial subsidy for the affordable housing component of the Project. This subsidy bears no nexus to the market-rate components of the Project and, therefore, cannot fairly constitute the basis for imposing regulatory requirements under the LWO with respect to market-rate components that receive no public subsidy or funds. Consistent with this analysis, the LWO exempts "contracts subject to federal or state law or regulations that preclude the applicability of [the LWO's] requirements." *Id.* § 22.4215(a)(1). It is reasonable to conclude that, even if economic development generally encompasses affordable housing, the DDA will be exempt from the LWO because the City, as housing successor, is precluded from providing any subsidy toward the market-rate components of the Project that might otherwise trigger application of the City's living wage requirements to the hotel and retail operators on the Site.

For the reasons discussed above, the DDA will not qualify as a financial assistance agreement as defined in the LWO and will not trigger the City's living wage requirements. Given that the LWO does not apply, the City cannot legally compel Cisterra, Ritz-Carlton, or Whole Foods Market to comply with the LWO in relation to the hotel and retail operations on the Site.[9] Of course, those entities could voluntarily comply with the LWO if they so choose.

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[9] CivicSD's role in negotiating the DDA transaction on the City's behalf will not independently trigger any living wage requirements. Section 6.10 of CivicSD's bylaws requires CivicSD's compliance with the City's policies to the extent those policies do not conflict with any policies adopted by CivicSD's board of directors. CivicSD's existing policies are silent with respect to living wage requirements. Thus, CivicSD generally must adhere to the City's living wage requirements in CivicSD's corporate contracts with third parties to the extent those requirements are triggered in a given scenario. However, even if CivicSD had an existing policy on living wage requirements, the City's living wage requirements would trump in this situation. The City, not CivicSD, will be a party to the ENA and the DDA, and the Council (subject to the Mayor's veto authority) will decide whether the City executes those contracts. In other words, the ENA and the DDA will be City contracts, not CivicSD contracts. In negotiating these contracts for the Project, CivicSD is merely acting as a consultant to the City as housing successor.

CONCLUSION

The City is preempted from imposing the Neutrality Provision through the DDA in an effort to regulate the conduct of the eventual hotel and retail employers at the Site. However, the City can try to negotiate for Cisterra (and, by extension, the hotel and retail operators at the Site) to consent voluntarily to the Neutrality Provision.

The DDA will not qualify as a financial assistance agreement as defined in the LWO and thus will not trigger application of living wage requirements to the hotel and retail aspects of the Project. Although the City and Cisterra have not yet negotiated the purchase price for the Site, this memorandum assumes that the reduction in price attributable to the on-site affordable housing requirement will meet the monetary threshold of $500,000 for direct financial assistance within the City's definition of a financial assistance agreement. Yet, the reduced purchase price will constitute the City's partial subsidy solely toward the affordable housing component of the Project and will not be provided for the express purpose of facilitating economic development, job creation, or job retention as required under the definition of a financial assistance agreement.

JAN I. GOLDSMITH, CITY ATTORNEY

By: */s/ Kevin Reisch*
Kevin Reisch
Chief Deputy City Attorney

By: */s/ Katherine Anne Malcolm*
Katherine Anne Malcolm
Deputy City Attorney

KAM:als
Attachment
MS-2015-26
Doc. No.: 1175790
cc: Scott Chadwick, Chief Operating Officer
David Graham, Deputy Chief Operating Officer, Neighborhood Services
Andrea Tevlin, Independent Budget Analyst

ATTACHMENT A

For the purposes of providing good jobs and labor peace, the following procedure shall apply to determine if a labor union seeking to organize employees at an employer operating a business at 7th Avenue and Market Street in Downtown San Diego should be recognized by the employer as the exclusive bargaining representative for its employees.

(1) The labor union will provide proof of its majority status in the form of authorization cards for verification by an agreed upon neutral party.

(2) The employer will provide the labor union with a list of bargaining unit employees as of the date the labor union requests a card check.

(3) The labor union will produce the original authorization cards signed by members of the bargaining unit within 3 days of requesting a card check.

(4) The employer shall keep these authorization cards confidential and shall not disclose the names of or any other identifying information about the employees who have signed these cards to any other employee or representative of the employer.

(5) If the number of bargaining unit employees who have signed authorization cards is more than half of the number of employees in the bargaining unit as of the date the of the production of the list in paragraph (1) above, then the employer will recognize the labor union as the exclusive representative of these bargaining unit employees.

(6) If the number of bargaining unit employees who have signed authorization cards is not more than half of the number of employees in the bargaining unit as of the date the list required in paragraph (2) above, then the employer will return the cards presented to it pursuant to paragraph (3) above to the labor union and will destroy any notes, photocopies or other records relating to such cards.

(7) The employer is waiving its right to demand a representation election at the National Labor Relations Board. This procedure t is the sole means of determining whether a union has obtained majority status.

(8) The employer its supervisors, management officials and agents will take a neutral approach to unionization at the employer's business. The employer, its supervisors, management officials and agents will not take any action nor make any statement that will directly or indirectly state or imply any opposition to the selection by the employees working at the employer's business as their collective bargaining agent.