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February 20, 2007

Daniel Rosenhouse
Assistant Attorney General
1515 SW Fifth Ave, Suite 410
Portland, Or 97201

William Gary
Jillian Bruce
Attorneys at Law
360 E 10th ave, Suite 300
Eugene, Or 97401

RE: State of Oregon v City of Salem, et al
Case # 05C 18435

Dear Counsel:

This matter came before the Court on November 20, 2006 for a hearing on the parties' cross-motions for summary judgment. Pursuant to ORCP 47C, defendant Urban Renewal Agency of the City of Salem moved for summary judgment against plaintiff's Amended Complaint. Plaintiff moved for partial summary judgment as to its claim that workers on the Phoenix Grand Hotel were entitled to receive prevailing wage rate pay. Plaintiff was represented by assistant attorney general Daniel Rosenhouse. Defendant Urban Renewal Agency of the City of Salem was represented by William Gary and Jillian Bruce, attorneys at law. At the conclusion of argument, I took the case under advisement.

I have carefully reviewed the motions, memoranda in support and in opposition, including reply briefs, supporting affidavits, attachments and exhibits, together with the pleadings and the record. Now, being fully advised, this letter sets forth my decision.

Legal Standard for Summary Judgment

When the pleadings, depositions and admissions on file, together with affidavits or declarations, if any, show there is no genuine issue as to a material fact, the moving party is entitled to judgment as a matter of law. ORCP 47C provides:

> "No genuine issue as to a material fact exists if, based upon the record before the court, viewed in a manner most favorable to the adverse party, no objectively reasonable juror could return a verdict for the adverse party on the matter that is the subject of the motion for summary judgment."

The party moving for summary judgment has the burden of demonstrating the absence of a genuine issue of fact. *Jones v. General Motors Corp.,* 325 Or 404, 939 P2d 608 (1997). Once the moving party has met its initial burden, the party opposing the motion for summary judgment has the obligation to produce evidence sufficient to demonstrate the existence of one or more genuine issues of fact. *Pelege v. Chrysler,* 278 Or 223, 227 n 2, 563 P2d 701, 702 n 2 (1977). The non-moving party may not rest on the allegations of its pleadings. ORCP 47D. The parties generally agree that the material facts are not in dispute.

The parties

Plaintiff State of Oregon, acting by and through Dan Gardner, Commissioner of the Bureau of Labor and Industries ("BOLI") filed this action against the Urban Renewal Agency of the City of Salem ("Agency"), and other defendants, most of who have been dismissed, and none whose interests affect the outcome of these motions. The Salem Group, LLC ("The Salem Group") includes members Winston Development Company ("Winston Development") and VIP'S Hotels, Inc. ("VIP'S"). The Salem Group was dismissed from this action, but its role in the development activities that gave Salem a conference center make it an integral piece of the fabric of this dispute.

Issues presented

The question presented in this case is whether a privately owned hotel, designed, constructed, financed and operated by a private company, in concert with a public agency's construction of a contiguous conference center is a "public work" subject to the Oregon prevailing wage law. *Former* ORS 279.348 to

ORS 279.380.[1] The corollary question is whether workers who performed construction work on the Hotel were entitled to be paid at prevailing wage rates for that specific work, pursuant to *former* ORS 279.348 *et seq*.

Under Oregon law, the prevailing rate of wage (as set by BOLI) must be paid to all workers who perform work on "public works." ORS 279.350(1). "Public works" is defined to include:

> "roads, highways, buildings, structures and improvement of all types, the construction, reconstruction, major renovation or painting of **which is carried on or contracted for by any public agency to serve the public interest** but does not include the reconstruction or renovation of privately owned property which is leased by a public agency."ORS 279.348(3). (Emphasis supplied).

The law governs wages paid for the publicly financed construction of facilities. A primary purpose of the prevailing wage law is to ensure that contractors competing for public contracts "compete on the ability to perform work competently and efficiently" and not by undercutting the labor market through payment of below market wages. ORS 279.349(1).

In this case the question is whether the Hotel is a "public work" within the meaning of ORS 279.348. Three questions require analysis.

1. Was construction of the Hotel "carried on" by the Agency?, or
2. Was construction of the Hotel "contracted for" by the Agency?, and
3. Was construction of the Hotel undertaken "to serve the public interest"?

If the answer to questions 1 or 2 is yes, and the answer to question 3 is yes, the fourth question is:

4. Does any exemption under (former) ORS 279.357 apply?

Findings of Fact

In 2000, VIP'S Hotels, Inc. ("VIP'S") purchased the one-block site of the old Ramada Inn in downtown Salem for investment purposes and as a potential hotel site. VIP'S' goal was to build a quality, private hotel to serve as the

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[1]The prevailing wage laws were repealed and recodified at ORS 279C.800 *et seq*. The statutes in force at the time of the parties' dispute are cited herein.

centerpiece in downtown Salem. The Urban Renewal Agency of the City of Salem ("Agency") long had considered the development of a conference center in Salem, and over the years had identified potential sites in Salem. The VIP'S property was not one of those identified potential sites. It had been the Agency's desire to have a facility that was proximate to a hotel, but no opportunity had presented itself with respect to a hotel being built downtown, and none existed. The agency never contemplated actually building a hotel or owning a hotel, only locating nearby a hotel as a draw for the conference center. VIP'S' acquisition and plans led city leaders to meet with it in 2002 to propose a coordinated public/private development of a hotel and conference center complex on the VIP'S property. This discussion eventually led to a series of transactions which resulted in the coordinated development of the publicly financed and owned Salem Convention Center and Parking Garage and the privately financed and owned Phoenix Grand Hotel on the downtown property that VIP'S had purchased.

In 2002, the parties signed a non-binding Memorandum of Understanding to recite their intended structure and business points, based on early negotiations. They specifically referenced the project as a public/private partnership, consisting of a number of components. In furtherance of the Agency's development of the conference center, in early 2003, the Agency purchased one-half interest in the VIP'S property at market price to provide it a footprint for the conference center. At approximately the same time, VIP'S sold its interest in the property to The Salem Group, a limited liability company created by VIP'S to develop the hotel property. Prior to construction of the Conference Center and the Hotel, the property was separated into two lots through a lot line adjustment. The Agency owns the real property beneath the Conference Center ("Conference Center Parcel"), and The Salem Group owns the real property beneath the Hotel ("Hotel Parcel"). The Salem Group granted an easement to the Agency for construction of the public parking garage, which extended beneath both structures.

Four contracts shaped the construction activities of the private developer and the Agency. Other contracts addressed leases, easements, operational and management agreements. The agency intentionally hired its own architect and contracted directly with the General Contractor, to retain autonomy from the Hotel and to keep the projects separate in order to control the conference center project.

The Salem Group and VIP'S financed and constructed the Phoenix Grand Hotel ("Hotel"). The Salem Group, owner of the Hotel, chose Rushforth Construction

Co., Inc., ("Rushforth Construction") to build the Hotel. The Hotel was built by Rushforth Construction pursuant to a contract entered into between The Salem Group and Rushforth Construction. The Agency was not a party to this agreement and did not have any legal responsibility, obligation or interest relating to the construction of the Hotel. Winston Development managed the construction of the Hotel. The Salem Group privately financed construction of the Hotel based upon its own resources and credit. The Agency did not pay any of the construction cost for the Hotel, nor did it extend any tax incentives to the private developer or Hotel owner. All profits and losses of the Hotel are borne by the private owners. The Hotel is responsible for all taxes levied by the appropriate taxing authorities. The Hotel owners can admit or deny guests in conformance with applicable laws, and the Agency has made no commitment to rent rooms in the Hotel. Nor has the Hotel agreed to make rooms available to or through the Agency. The Agency does not have an option or right of first refusal to purchase the Hotel. The work performed under this contract is the basis for plaintiff's claim.

Separate and distinct from the construction of the Hotel, in July 2003, the Agency entered into a Master Lease and Commercial Sublease with The Salem Group. Under the Master Lease, the Agency leased certain specified areas within the Hotel from The Salem Group. These Leased Areas include a restaurant space, emergency exit areas and stairway, a loading dock receiving area, administrative offices, a catering kitchen, storage areas, a mechanical room and employee locker rooms. Under the Commercial Sublease, the restaurant portion of the Leased Areas is subleased back from the Agency to The Salem Group. This arrangement allowed the Agency to fulfill the need for a catering kitchen and other facilities to serve the Conference Center without having to duplicate within the Conference Center facilities available in the Hotel. Approximately six months after the other Conference Center and Hotel agreements were signed, The Salem Group, along with Winston Development, contracted with Rushforth Construction for the build-out of the Leasehold Improvements ("Leasehold Improvements"). The Agency reimbursed The Salem Group for the costs associated with the build out of the Leasehold Improvements. Pursuant to the separate contract for the construction or build out of the Leasehold Improvements, The Salem Group and Winston Development required that prevailing wages be paid to all workers involved in the construction of the Leasehold Improvements. There is no claim made for the wages paid workers involved in the leasehold improvements.

The construction of the Conference Center and Parking Garage was financed, in part, by a $7.2 million loan guarantee from the U.S. Department of Housing and

Urban Development (“HUD”) pursuant to Section 108 of Housing and Community Development Act ("HCD"), 42 USC § 5308 (“Section 108”). The construction of the Conference Center and the Parking Garage was undertaken by Rushforth Construction pursuant to a construction agreement for the Conference Center and Parking Garage, between the Agency as owner and Rushforth Construction as the contractor. Because of the partial financing of the Conference Center with Section 108 funds, the agreement required that prevailing wages be paid pursuant to the federal Davis-Bacon Act. HUD also determined that the demolition and preparation of the entire property was subject to Davis-Bacon, since it was necessary for construction of the publicly funded conference center and garage, and workers performing that demolition received Davis-Bacon prevailing wages. HUD determined that the privately financed Hotel in the complex was a separate construction work from the conference center and was therefore not subject to Davis-Bacon wage rates.

The public Parking Garage structure is physically located beneath both the Hotel and the Conference Center. The Salem Group granted the Agency an easement which allowed the placement and construction of the Agency-owned Parking Garage partially beneath the real property owned by The Salem Group. As consideration for the easement, the Agency granted The Salem Group an easement to use a certain number of spaces in the Parking Garage for Hotel customer parking. None of the spaces are identified as exclusive to the Conference Center or the Hotel. There is no claim made for the wages paid workers involved in the construction of the conference center or the garage.

Separate from its own contract with Rushforth Construction for construction of the Hotel, The Salem Group and Winston Development also entered into a Professional Services Development Agreement - Hotel, to which the Agency was a signatory. That Agreement did not obligate the Agency to pay any portion of the construction costs of the Hotel, undertake any responsibilities in connection with the Hotel construction, or acquire any legal interest in the Hotel. For purposes of this agreement, the term “hotel” was defined to include the Hotel Parcel, “but does not include the Parking Facility or the Support Facilities as defined in the Master Lease and located on the Hotel Parcel.” The parties were careful to delineate the aspects of the project which were wholly private, from those which would benefit the public. The agreement gave the Agency the right to review and approve construction drawings for the Hotel, and the right to recover damages if VIP’s did not properly complete the construction of the Hotel on a timely basis. The parties were all concerned that the two buildings, which shared a common fire wall to ensure separation of the buildings in the event of a fire or earthquake, and were accessible to each other by a connecting hallway on

the first floor, be aligned properly. The construction completion guarantee appears no different in scope or purpose than similar provisions in projects for which BOLI has determined prevailing wage liability does not exist, such as the Meier & Frank Redevelopment Project and the Salem YWCA Project. There is no claim for wages paid for any services performed in fulfillment of the professional services development agreement.

Pursuant to a separate Professional Services Development Agreement, Winston Development also acted as the developer of the Conference Center on behalf of the Agency. Both professional services development agreements contained the parties' acknowledgment of the close proximity of the structures and provided for the developer to "attempt to achieve the greatest efficiencies in design and maximum reduction in construction costs in developing the structures." It also acknowledged the parties' promise to cooperate so that the building's designs were complementary and coordinated. According to the Agency's public works director, the Agency did not have any formal input into the design of the Hotel. The Salem Group paid for and approved the design of the Hotel.

To facilitate efficient coordination between development and construction of the Hotel and of the Conference Center, the Agency and The Salem Group each hired the same developer, Winston Development, and the same general contractor, Rushforth Construction. Although the same developer and general contractor provided services both to the Agency and the Hotel owner, those services were provided under different, separate contracts. Although the construction of the two buildings occurred at approximately the same time, the general contractor assigned two different project superintendents to each of the Conference Center and the Hotel. While there was some use of the same subcontractors, a number were different. Those who worked on both contracts did not work on both the Hotel and Conference Center on any given single work day, nor were construction materials relating to either the Conference Center or the Hotel used on the other project.

As built, the Conference Center and Hotel have distinct key physical characteristics – the height and exterior architectural features as well as interior finishes of each structure are completely different. Neither owner was authorized under any of the contracts to specify the use of a particular construction material by the other. The two buildings, viewed from inside or outside, do not form a single logical entity. There are no common lateral structural components, no shared utility lines or mechanical systems. The main and only exterior public entrances for the buildings are completely separate, with access on different

streets. A gate prohibits public access to the Conference Center from the Hotel when the Conference Center is closed.

Following its application for the Section 108 federal funding, the City requested a binding determination from HUD as to the applicability of the Davis-Bacon Act to the overall Conference Center/Hotel project. On or about May 8, 2003, HUD issued a determination that the Davis-Bacon Act required the payment of prevailing wages for construction of the Conference Center, the Parking Garage, and site demolition in preparation for the construction of those structures, as well as the Hotel. Consequently, federal prevailing wages were paid for all work performed on the Conference Center and Parking Garage and the demolition. HUD determined that the Davis-Bacon Act did not require the payment of prevailing wages on the privately owned, constructed, and operated Hotel, or on the Leasehold Improvements. Despite the fact that HUD determined that prevailing wages were not required to be paid on construction of the Leasehold Improvements, the Agency determined, as a matter of policy, that state prevailing wages should be paid on those improvements because they were being financed with public funds. Accordingly, the Agency directed The Salem Group to require Rushforth Construction to pay state prevailing wages for all work done on the build-out of the Leasehold Improvements.

Before and during construction, the Conference Center and Hotel had completely separate ownership and financing. The Conference Center is still owned by the Agency and the Hotel is still under separate private ownership. The Agency does not participate in any of the financial gains or losses incurred by the Hotel. The structures are devoted to different types of uses and functions.

In July 2003, BOLI received a complaint regarding the construction of the Hotel, alleging a failure to pay state prevailing wages on the Hotel construction. BOLI first contacted the Agency in March 2004. The Hotel was completed and opened March 1, 2005.

Conclusions and Analysis

The Phoenix Grand Hotel Is Not a "Public Work" Under Oregon Public Contracting Law. Construction of the Hotel was not “carried on” by a public agency; no public agency “contracted for” construction of the Hotel; the primary purpose of the Hotel is not “to serve the public interest;” and no funds of a public agency were used, directly or indirectly, in construction of the Hotel.

1. Was construction of the Hotel "carried on" by the Agency?

In order for a public agency to "carry on" the construction of a project, the agency must have *actual control* over the project. "To determine whether a [public] agency carried on construction, we look at a number of factors, the most important of which is who exercised the most control over the project." *Columbia Pacific Bldg. and Construction Trades Council v. Oregon Comm'n on Public Broadcasting ("OPB"),* 102 Or App 212, 219 (1990). Here the design and construction of the Hotel was controlled by the Hotel owner, not the Agency. The Hotel owner, not the Agency, entered into the Hotel construction agreement. The Agency did not control the selection of or select the Hotel's contractors, did not control the selection of or select the Hotel's architect, and did not control the selection of or select any of the parties with whom the Hotel owner contracted. It did not specify any material aspect of the Hotel's design or construction, except for the agreement that the two buildings would be constructed at approximately the same time and that the parties' developer would look for synergies to the mutual benefit of both projects' bottom lines. The Agency employed Winston Development to act as its agent in overseeing the development of the Conference Center and to "help coordinate the construction of the Conference Center with that of the Hotel." VIP'S also retained Winston Development to act as its agent in overseeing the development of the Hotel and to ""help coordinate the construction of the Hotel with that of the Conference Center." The Agency did not select or require the selection of Winston Development as the Hotel's developer. Once built, the Agency did not have an option to purchase the Hotel or a right of first of refusal.

While the Professional Services Development Agreement-Hotel ("Hotel Development Agreement") entitled the Agency to recover damages if the construction of the Hotel was not completed properly and on time, and contained an anti-assignment provision that prohibited the Hotel owner and developer from assigning or transferring their interests, assets, or ownership without first obtaining the Agency's approval, these provisions, and the "cooperation" language simply do not equate to the Agency wielding the sort of majority control required by law. The damages and anti-assignment provisions, are typically included in most development agreements and are no different in scope and purpose than similar provisions in projects for which BOLI has determined prevailing wage liability does not exist, such as the Meier and Frank Redevelopment Project and the Salem YWCA Project, as well as the Housing Authority of Portland's Civic Redevelopment Project, for which BOLI determined state prevailing wages did not apply to the privately constructed and owned condominium tower.

The provisions in the Hotel Development Agreement that BOLI relies upon to prove that the Agency "carried on" construction of the Hotel are reasonable provisions designed to protect the Agency's investment in the Conference Center, but do not constitute evidence of control of the Hotel project. They do not transfer responsibility for or control of the Hotel construction from its owners to the Agency.

The ability of the Agency to review and object to the design plans, intended to insure that the parties were constructing complementary structures which could support each other, was never in fact exercised. The fact that the Agency had access and input to the Hotel's design does not amount to control. Nor does the fact that early on the Agency indicated its preferences for certain design elements (restaurant and more rooms than in traditional VIP'S properties), which the Hotel owner incorporated in its own design plans lead me to conclude that the Agency's desires were ever couched as ultimatums. The Hotel owner's representative testified that the Hotel was always intended to be an upgraded product given its placement in the City's center. The final design, number of rooms and other characteristics of the Hotel were decisions that were ultimately made by the Hotel owner.

Here, as in the *OPB* case, the private owner of the Hotel, not the Agency, had the most control over the Hotel project. The Salem Group was entirely responsible for financing the Hotel, through private lenders, at market rates. The Salem Group contracted with Rushforth Construction to build the Hotel and the Agency was not a party to that contract. The Agency played no role in managing the construction of the Hotel. It did not inspect the work, hire or approve the hiring of subcontractors, purchase or approve the purchase of construction materials, purchase or choose hotel furnishings or have design approval. The Agency does not have an option to purchase the Hotel or a right of first refusal. It does not manage the Hotel or have any right to direct management policy. It does not control or have any special right to rent rooms, has no financial interest in the Hotel and does not share in the profits or losses of the Hotel. The Hotel is strictly a privately-owned and operated business, designed, constructed, financed and managed by The Salem Group. Under *OPB*, the Agency did not "carry on" construction of the Hotel as defined by ORS 279.348(3).

2. Was construction of the Hotel "contracted for" by the Agency?

The Agency did not "contract for" the construction of the Hotel by entering into certain agreements that relate peripherally to the Hotel. The term "contracted for" by a public agency language of ORS 279.348(3), given its "plain, natural and

ordinary meaning" (as required by the Oregon Supreme Court in P*GE v. BOLI*, 317 Or 606, 610 – 611), means to enter into a contract in order to obtain something. Here, that something would have to be the structure in issue or to obtain use of the structure in issue. In order for a public agency to have "contracted for" a building project, the language of the statute requires that a public agency enter into a contract that results in the Agency obtaining a legal interest in the building project. The focus of the "contracted for" language, like the entire definition of a "public work", is on the same manner in which public agencies acquire or construct public facilities. It is not concerned with the way that public agencies encourage, facilitate or regulate private development. An examination of the statute reveals the phrase "contracted for" requires that the contracts to which an agency is a party must result in the Agency obtaining some legal interest in the building project. The focus of the "contracted for" language is on the manner in which public agencies acquire an interest in or construct public facilities. The Agency did not "contract for" the construction of the Hotel because the Agency did not enter into a contract by which it acquired a legal interest in the Hotel which was to be built.

Moreover, despite the agreements and cross agreements between the parties, the Hotel does not owe its existence to a contractual commitment from the Agency, therefore the Agency did not "contract for" the construction of the Hotel. In undisputed testimony, the Hotel owner's representative, Steve Johnson, declared that the Hotel would have been built regardless of whether the Conference Center was built and regardless of whether the Agency had leased space in the Hotel. The Hotel was unique because of its location and proximity to a conference center and it was always intended to be an upgraded product from the Hotel owner's other hotels.

The argument that a public body "contracts for" a construction project whenever it enters into a contract that is related in any way to the project is an expansion that is not supported by the text or context of the statute. Just because the Agency entered into a series of agreements with The Salem Group that *contemplated* construction of the Hotel and that provided for *coordination* of that construction with the publicly constructed Conference Center and Parking Garage, does not permit the Court to conclude that the Agency "contracted for" construction of the Hotel itself. Were this the case, whenever a public agency enters into a contract of any kind relating to a private construction project, it thereby converts the project into a public work. If a city seeks to encourage the development of a downtown hotel or department store by agreeing to build a public parking garage adjoining or under the building, or if the state seeks to facilitate construction of a factory by agreeing to enhance the City's water

treatment facilities or to waive system development charges, BOLI would claim that a public agency has "contracted for" construction of a hotel, department store or factory. The text and context of ORS 279.348(3), preclude this interpretation.

As for the master lease and the easement agreement, these agreements govern the Agency's lease of the Leased Areas within the Hotel, and the build out of those areas was completed pursuant to a separate contract under which prevailing wages were paid. This was no different than the case where a public agency leases space in a new building and contracts for tenant improvements, making those improvements subject to prevailing wages, but not the other private tenants' improvements, or the structure itself. As for the contract for the construction of the Parking Garage, the Agency acquired no interest in the Hotel through this contract, even if part of the top of the Parking Garage became the foundation for the Hotel. None of the construction contracts demonstrate the Agency "contracted for" the construction of the Hotel.

Both sides raised the legislative history of ORS 379.348(3), as evidence of the meaning of the "contracted for" language. The *PGE v. BOLI* analysis requires consideration of legislative history if the text and context of the statute are ambiguous. Since the court finds the plain and ordinary meaning of the terms readily apparent, especially in context, further analysis is unnecessary. The Agency's reading of the statute is correct.

3. Was construction of the Hotel undertaken "to serve the public interest"?

While the statute only requires consideration of the third question if Question 1 or 2 is answered in the affirmative, and neither is, it bears answer and explanation because it bolsters the earlier determinations.

ORS 279.348(3) requires not only that a public work must be "carried on or contracted for" by a public agency, but also that the public agency do so "to serve the public interest." BOLI's rules interpret the "public interest" requirement to mean that the *primary purpose* of the construction, reconstruction or major renovation of the building, structure or improvement in question must be "to serve the public interest regardless of whether the title thereof is in a public agency." OAR 839-016-0004(19).

The prevailing wage law does not to apply to private construction solely on the basis that it is coordinated with a public project which is intended "to serve the

public interest." The first two elements of the definition illustrate this point. For starters, a public agency must either carry on or contract for construction. If all that is required is the Agency's involvement in the contract(s), then the requirement that the construction itself be "to serve the public" interest is redundant. The examples of a promise of a new parking garage or water facility (*supra*) to lure private development may result in a public contract expressing the mutual agreement by the parties to construct the hotel, department store or factory as the impetus for the related public improvement. The "public interest" requirement requires the court to focus on the primary purpose of the *private* construction when determining whether the private structure's construction is subject to Oregon's prevailing wage requirements.

The involvement and coordination of a public agency is insufficient to prove that the private construction "serves the public interest." Under this theory, the decision of a large corporation to locate its headquarters in a City as long as the City agrees to build a conference center, and the agreement by the City to do just that, would expose the corporate headquarters construction to a prevailing wage rate claim. Existing statutes do not support this expansive view of the prevailing wage law. One could argue that any private development benefits the community more than, say, a blighted area does, but that is not the test. Something more is required.

The construction of the Hotel was not undertaken to serve the public interest, but rather the primary purpose was serve the private interests of the Hotel owner. Here, it was the Hotel's decision to build a downtown hotel that encouraged and facilitated the Agency's development of the Conference Center, not the other way around. It was the Agency that was hoping some private developer would come along and build a hotel. There is no evidence that The Salem Group bought a downtown lot hoping for a conference center to spring up. In this case, the Agency took advantage of a private development as an opportunity to both achieve economies and a chance to convince people a new conference center might actually be viable. The Hotel was never the Agency's "project." It is readily apparent that the construction of a luxury hotel by a government agency that is owned, operated and controlled by a private entity with all the profits going to that private entity would never gain public support, because it's primary purpose could never be defended as being "to serve the public interest." BOLI has not established that construction of the Hotel was undertaken to serve the public interest.

The Agency did not violate ORS 279.357(2)(a)

Plaintiff makes much of the fact that the parties were careful to separate their respective roles, rights and obligations, so as to be clear about what aspects of the construction projects were privately controlled and paid for, and what parts were publicly controlled and paid for. Separate contracts were drafted to insure that there could be no doubt as to which entity - public or private - was obliged for what structure, and on what terms. The parties also assiduously arranged that no public funds were expended in the construction of the Hotel. There is no support for the notion that the Agency was deliberately trying to avoid its prevailing wage rate obligation in violation of ORS 279.357(2)(a). The Hotel construction project was never within the control of the Agency to spin off or contract for separately. The parties' efforts to keep their roles and their finances well-defined and delineated reflect a prudent steward of the public's funds who was committed to its obligations under state and federal law to pay prevailing wage rates, and an equally prudent private business entity.

Conclusion

The private Phoenix Grand Hotel is not a public work. Therefore, the prevailing wage law does not apply. The Agency developed its Conference Center and Parking Garage in cooperation with the private developer of the Hotel. Its' own project was a "public works" as defined by the statute, because the Agency contracted for the construction of the conference center and parking garage to serve the public interest and it was built with public money. There is however, no evidence that the Hotel was designed or built with public funding. Both parties benefitted from the synergies created by their cooperation. While this sort of development may be called a public-private partnership, that label does not make the Agency the owner or the developer of the Hotel, and it in no way converts the private side of the partnership – the Hotel – into a public works project. The Court finds that defendant Urban Renewal Agency of the City of Salem is entitled to summary judgment against plaintiff's Amended Complaint.

Would Mr. Gary or Ms. Bruce please prepare an order containing appropriate findings consistent with this opinion, and a judgment?

Very truly yours,

MARY MERTENS JAMES
Circuit Court Judge

MMJ/sg

cc: Court File