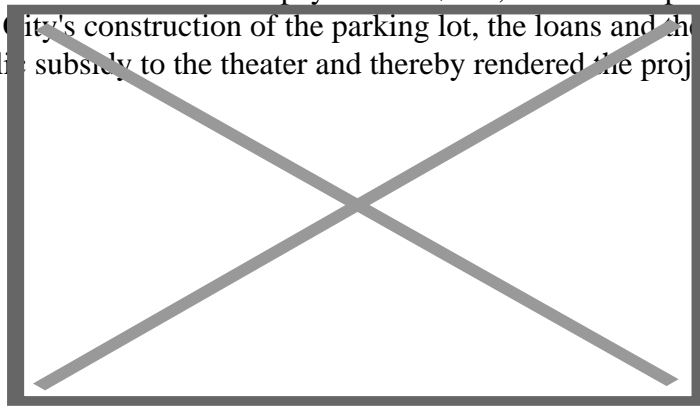


Promised Public Subsidies Need Not Actually Be Received to Trigger Prevailing Wage

A contractual commitment by a public agency to provide financial subsidies to a project triggers prevailing wage even if the subsidies are ultimately never received. *Cinema West, LLC. v. Baker*, 3 Cal. App. 5th 194 (2017). Cinema West and the City of Hesperian entered into a development agreement under which Cinema West undertook to build a 12-screen cinema, and the City agreed to construct a parking lot adjacent to the theater for the non-exclusive use of cinema patrons. Cinema West agreed to operate the theater for a minimum of ten years. As consideration for this operating covenant, the City agreed to provide two, interest-bearing loans to Cinema West with a ten-year term together with a one-time payment of \$102,529. The Department of Industrial Relations determined that the City's construction of the parking lot, the loans and the one-time payment collectively constituted a public subsidy to the theater and thereby rendered the project a public work requiring

payment of prevailing wage.



Cinema West challenged

this determination contending that (1) No public funds had, in fact, been received because Cinema West had not fully performed its obligations under the operating covenant; and (2) the parking lot and the theater constituted separate projects, hence the City's construction of the parking lot did not render the cinema a public work. The court rejected both arguments, ruling that even if Cinema West never actually received the promised payments, the agreement contractually bound the City to make the loans, and the one-time payment was unconditional. The evidence also showed that Cinema West "hoped to negotiate" compensation for those parts of the operating covenant it was able to perform. Allowing a developer to accept public benefits but later disclaim them to avoid paying prevailing wages, the court said, "would seriously undermine the prevailing wage law . . . incentiviz[ing] gamesmanship on the part of local government bodies and developers whereby projects would be publicly subsidized but constructed without [prevailing wage] compliance." Further, even without any direct financial subsidy, the project was a public work because of the City's construction of the parking lot. Under prevailing wage law, "[p]erformance of construction work by the [public agency] in execution of the project" constitutes a public subsidy to the project. The evidence – including a recital in the development agreement that the parking lot was "necessary to ensure adequate parking for the theater" -- showed that the theater, the parking lot and related amenities were part of single, integrated project paid for in part by public funds. Accordingly, payment of prevailing wage was required for the entire project.

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