STATE OF CALIFORNIA GAVIN NEWSOM, *Governor*

DEPARTMENT OF INDUSTRIAL RELATIONS
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December 30, 2020

Doug M. Larsen
Fishman, Larsen & Callister
7112 North Fresno Street, Suite 450
Fresno, California 93720

Re: Public Works Case No. 2020-002
Celestina Gardens Low Income Senior Home
Sonoma County Community Development Commission

Dear Mr. Larsen:

This constitutes the determination of the Director of Industrial Relations regarding coverage of the above-referenced project under California's prevailing wage laws and is made pursuant to California Labor Code section 1773.5[1] and California Code of Regulations, title 8, section 16001, subdivision (a). Based on my review of the facts of this case and an analysis of the applicable law, it is my determination that the construction of the Celestina Gardens Low Income Senior Home (Project) is not subject to prevailing wage requirements.

Facts

The Project consists of a 40-unit senior housing rental community on a 1.3 acre site located at 125 Dorene Way (formerly 17310 Highway 12) in unincorporated Sonoma County. The development includes parking spaces, laundry rooms, a fitness room, a reading lounge, a community room, a courtyard, a patio, a community garden, access to Central Sonoma Valley Bike & Pedestrian Trail, and surrounding landscape. The Project is owned by MP Springs Senior Associates, L.P., a California limited partnership (Owner). As of June 2, 2014, the partners in this entity were MP Springs Senior, LLC, a California limited liability company, and MidPen Housing Corporation, Inc., a California nonprofit public benefit corporation (MidPen). On August 29, 2018, MidPen withdrew from the partnership, and Wells Fargo Affordable Housing Community Development Corporation, a North Carolina corporation, was admitted to the partnership.[2]

[1] Unless otherwise indicated, all further statutory references are to the California Labor Code and all subdivision references are to the subdivisions of section 1720.

[2] Per the Amended and Restated Agreement of Limited Partnership dated August 29, 2018, the capital contribution of general partner MP Springs Senior, LLC was $100,

The Owner purchased the Project site in 2015 from the Vailetti Family Trust[3] in a below market rate (BMR) sale. The sale of the property included the Project site, as well as an adjacent playfield site intended to be transferred to the Sonoma Charter School. The sales price of the property was $503,306, of which $231,622 was attributable to the playfield, and $271,684 was attributable to the Project site. The entire property was appraised at $1,380,000.

According to the Sonoma County Fund for Housing Funding Loan Awards and County Fund for Housing Annual Report (CFH Annual Report) dated December 12, 2017, all 40 units of the development are restricted to be affordable for a minimum of 55 years, with 39 of the units restricted to seniors with income at 60% of the area median income (AMI) or below,[4] and the remaining unit set aside for a resident manager.

The record reflects that in order to fund the Project, it was necessary for MidPen to obtain a tax credit. According to the December 12, 2017 CFH Annual Report, MidPen submitted three unsuccessful applications to the California Tax Credit Allocation Committee (TCAC), which administers low income housing tax credit programs. (Cal. Code Regs., tit. 4, § 10300.) The CFH Annual Report noted that the Project previously received $2,273,440 in funding from the Sonoma County Community Development Commission (Sonoma County CDC) through the Sonoma County Fund for Housing Program, and that MidPen requested an additional $1.5 million in funding to improve the competitiveness of its TCAC application for the necessary tax credit allocation from the TCAC. MidPen secured a low income housing tax credit allocation from the TCAC in the minimum amount of $1,397,107 annually for ten years.[5]

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and the capital contribution of investor limited partner Wells Fargo Affordable Housing Community Development Corporation was $14,032,319.

[3] The Project is named in honor of Celestina Vailetti, the matriarch of the Vailetti family.

[4] Specifically, eight units are restricted to extremely low income households (30% AMI), ten units are restricted to very low income households (50% AMI), and twenty-one units are restricted to low income households (60% AMI).

[5] Although no TCAC reservation letter was provided, this entitlement to the LIHTC allocation is referenced in the August 22, 2018 loan agreement between Wells Fargo Bank, N.A. and the Owner for an $11,123,010 construction loan.

The record reflects the Project was funded by the following sources:

Wells Fargo Bank, N.A. (Construction Loan)[6]	$11,123,010
California Community Reinvestment Corporation (CCRC Loan)[7]	$830,500
Sonoma County Community Development Commission through the Sonoma County Fund for Housing Program (CFH Loan)[8]	$3,773,440
Federal Home Loan Bank of San Francisco Loan funded by Wells Fargo Financial National Bank through the Affordable Housing Program (AHP Loan)[9]	$800,000
Federal Low Income Housing Tax Credits (LIHTC)	$13,971,070
Total	**$30,498,020**

On August 23, 2018, the Owner contracted with Midstate Construction Corporation (Midstate), the general contractor. On April 13, 2017, Midstate published a notice for bids for subcontractors in all trades on the Project. The bid notice specifically stated that the Project was not subject to either state or federal prevailing wages. On February 1, 2019, Midstate contracted with Kertel Communications, Inc. doing business as Sebastian for electrical and low voltage work. The Project was completed by January 2020.

Discussion

All workers employed on public works projects must be paid at least the applicable prevailing wage rates. (§ 1771.) Section 1720, subdivision (a)(1) defines "public works" to mean construction, alteration, demolition, installation, or repair work done under contract and paid for in whole or in part out of public funds. It is undisputed that the construction of

[6] The private Construction Loan from Wells Fargo Bank, N.A. for $11,123,010 was a 20-month loan, with one 6-month extension option, with a floating interest rate of 1.75 percent plus the one-month London InterBank Offered Rate (LIBOR), subject to a 2.75 percent cap, which limited the total interest rate to 4.5 percent. On August 22, 2018, the California Community Reinvestment Corporation (CCRC), a California nonprofit public benefit corporation, purchased the Construction Loan. CCRC is a lender that specializes in affordable housing loans, and is funded by retail banks operating in California.

[7] The private CCRC Loan for $830,500 is a 15-year loan bearing interest at 5.79 percent.

[8] The CFH Loan for $3,773,440 is a 55-year residual receipts loan bearing interest at 3 percent. The source of funds for the CFH loan was, at least in part, a HOME Investment Partnership Program grant from the United States Department of Housing and Urban Development to the Sonoma County CDC under the Cranston-Gonzalez National Affordable Housing Act of 1990.

[9] The private AHP Loan for $800,000 is a 55-year loan without interest. The Affordable Housing Program is a Federal Home Loan Bank program that provides subsidized loans through local bank members to support affordable housing development.

the Project meets the first and second requirements for public works coverage, in that it constitutes "construction" that is "done under contract." Thus, the only issues presented are whether the Project is "paid for in whole or in part out of public funds," and if so, whether an exception to the prevailing wage requirements applies.

Public funds in this context are not limited to a direct payment of money from a public entity to a contractor. Instead, subdivision (b) provides in relevant part that "paid for in whole or in part out of public funds" means all of the following:

> (1) The payment of money or the equivalent of money by the state or political subdivision directly to or on behalf of the public works contractor, subcontractor, or developer.
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> . . .
>
> (4) Fees, costs, rents, insurance or bond premiums, loans, interest rates, or other obligations that would normally be required in the execution of the contract, that are paid, reduced, charged at less than fair market value, waived, or forgiven by the state or political subdivision.
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> . . .
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> (§ 1720, subds. (b)(1), (b)(4).)

In this regard, a below-market interest rate loan is considered a subsidy of public funds under subdivision (b)(4).

Subdivision (c), however, provides that:

> (c) Notwithstanding subdivision (b):
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> . . .
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> (5) Unless otherwise required by a public funding program, the construction or rehabilitation of privately owned residential projects is not subject to the requirements of this chapter if one or more of the following conditions are met:
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> . . .
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> (E) The public participation in the project that would otherwise meet the criteria of subdivision (b) is public funding in the form of below-market interest rate loans for a project in which occupancy of at least 40 percent of the units is restricted for at least 20 years, by deed or regulatory agreement, to individuals or families earning no more than 80 percent of the area median income.
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> (§ 1720, subd. (c)(5)(E).)

The LIHTCs are not considered public funds under the prevailing wage law.[10] The Wells Fargo Construction Loan, CCRC Loan, and AHP Loan are all private loans. The CFH Loan, which charges 3 percent interest, is public funding, as it is a below-market interest rate loan provided by Sonoma County CDC. (§ 1720, subd. (b)(4).)

Despite the existence of a below-market interest rate loan, a residential project may qualify for an exemption if it meets certain criteria. The exemption under subdivision (c)(5)(E) is interpreted narrowly and limited to affordable housing projects where the public funding is “in the form of below-market interest rate loans.” (*Housing Partners I, Inc. v. Duncan* (2012) 206 Cal.App.4th 1335, 1345 (*Housing Partners*).)

To qualify for the exemption, an affordable housing project must meet specific earnings and occupancy criteria where at least 40 percent of the units are restricted for 20 years to individuals or families earning no more than 80 percent of the area median income. (§ 1720, subd. (c)(5)(E).) The earnings and occupancy criteria of subdivision (c)(5)(E) appear to be satisfied for this Project. Although no deed or regulatory agreement was provided, the Amended and Restated County Fund for Housing Funding Agreement dated August 21, 2018, referenced an accompanying Amended and Restated County Fund for Housing Affordable Rental Housing Agreement that was intended to implement the requirement that 39 units on the Property remain affordable to low-income households for not less than 55 years. The CFH Annual Report dated December 12, 2017, also referenced the requirement that 39 of the 40 units be restricted to seniors with income at 60% of the area median income or below.

In addition to the affordability criteria, the subdivision (c)(5)(E) exemption also requires that the affordable housing project’s “public funding [be] limited to below-market interest rate loans.” (*Housing Partners*, *supra*, 206 Cal.App.4th at p. 1339.) Here, the contractor Sebastian admits that the Owner received a below-market interest rate loan from the Sonoma County CDC through the Sonoma County Fund for Housing Program. Because the remaining funding of the Project was not public funding, the subdivision (c)(5)(E) exemption applies to the Project.

Given that the criteria of section 1720, subdivision (c)(5)(E) are satisfied, the Project is not subject to prevailing wage requirements despite receiving public subsidies in the form of the below-market interest rate loan from the Sonoma County CDC through the Sonoma County Fund for Housing Program.

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[10] Low income housing tax credits are not considered “public funds” as that term is used in section 1720. (See *State Building & Construction Trades Council of California v. Duncan* (2008) 162 Cal.App.4th 289, 311 [holding that providing state low income housing tax credits “does not amount to paying out public funds.”].)

Conclusion

For the foregoing reasons, the construction of the Celestina Gardens Low Income Senior Home in Sonoma County is not subject to prevailing wage requirements.

I hope this determination satisfactorily answers your inquiry.

Sincerely,

Katrina S. Hagen

Katrina S. Hagen
Director of Industrial Relations