STATE OF CALIFORNIA GAVIN NEWSOM, *Governor*

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June 23, 2020

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Re: Public Works Case No. 2018-023
Summit-Grove Low Income Housing Project
City of Pasadena

Dear Ms. Mazor, Ms. Deddens, and Ms. Bagneris:

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 Summit-Grove Low Income Housing Project (Project) in the City of Pasadena (City) is not subject to prevailing wage requirements.

Facts

A. The Parcel at Orange Grove Boulevard and Summit Avenue.

The Project was built on a parcel located at the corner of Orange Grove Boulevard and Summit Avenue in Northwest Pasadena. The area surrounding the parcel has historically had issues with nuisance liquor stores and the City sought to curtail the effects

[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.

of those liquor stores, with various degrees of success.[2] The parcel itself was formerly home to a couple of private residences and several small businesses, including a liquor store, Andy's Liquor, which for many years had been a magnet for crime and was targeted for closure by the community.

In 2014, after Andy's Liquor's lease had expired, HHP-Summit, LLC and its related entities (HHP-Summit) purchased the parcel with plans to develop a residential project. At around the same time, the City, HHP-Summit, and a developer for a nearby project, City Ventures, were contemplating an arrangement for the transfer of City Ventures' inclusionary housing obligations to HHP-Summit. Those obligations would be satisfied by HHP-Summit's construction of affordable units on the parcel as part of the Project.

B. The Transfer of Inclusionary Housing Obligations.

1. The City's Inclusionary Housing Ordinance.

"As one means of addressing the lack of a sufficient number of housing units that are affordable to low and moderate income households, more than 170 California municipalities have adopted what are commonly referred to as 'inclusionary zoning' or 'inclusionary housing' programs. [citations omitted.]" (*California Building Industry Assn. v. City of San Jose* (2015) 61 Cal.4th 435, 441.) By way of its inclusionary housing ordinance, the City has employed this tool to combat "the significant problems arising from a scarcity of affordable housing." (*Ibid.*)

First enacted in 2005, the City's inclusionary housing ordinance currently requires that for all new residential projects with 10 or more units for sale, "a minimum of 20 percent of the total number of units in the project shall be sold to low or moderate-income households." (Pasadena Mun. Code, § 17.42.040, subd. (A)(1).)[3] These inclusionary units must be built on the same site as the market rate, non-inclusionary units and be comparable to them in size, appearance, materials, and build quality. (Pasadena Mun. Code, § 17.42.070, subd. (A).) At the discretion of the City, a developer may satisfy the inclusionary housing requirements through the development of off-site units. (Pasadena Mun. Code, § 17.42.050, subd. (B).) In lieu of building inclusionary units altogether, a developer may pay an "in-lieu" fee, in an amount determined by the City. (*Id.* at subd. (A).) Each developer subject to the ordinance must enter into an Inclusionary Housing Agreement with the City. (Pasadena Inclusionary Housing Regulations, II.B.)

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[2] Super Liquor, located directly across the street from the Project, was investigated and disciplined by the Department of Alcoholic Beverage Control. The City's Code Enforcement Commission also determined that Super Liquor operated as a public nuisance and imposed a number of operating conditions. (See *Kum Man Jhae v. City of Pasadena* (Oct. 3, 2013, B244435) 2013 WL 5492572 [nonpub. opn.].) Despite these actions, Super Liquor continues to operate at the same location.

[3] The ordinance was recently amended on November 4, 2019 to increase the minimum requirement from 15 percent to 20 percent. (See Pasadena Ord. No. 7353, § 2.) Different inclusionary housing requirements apply to residential projects with rental units.

2. HHP-Summit's Assumption of City Ventures Project's Inclusionary Housing Requirements.

City Ventures is the developer of a 70-unit residential project in what is now known as the Ambassador Gardens development, located at the campus of the former Ambassador College. Because the 70-unit residential project was subject to inclusionary housing requirements, City Ventures entered into an Inclusionary Housing Agreement with the City on December 12, 2011 to build seven inclusionary *rental* units, the minimum required by the inclusionary housing ordinance in effect at the time.

In early 2014, City Ventures, HHP-Summit, and the City negotiated an agreement under which HHP-Summit would assume City Ventures' inclusionary housing obligations by building six inclusionary *for-sale* units as a part of the Project. In exchange for building the six units, City Ventures would pay HHP-Summit $980,000. On March 3, 2014, the three parties entered into several written agreements to memorialize this arrangement.

Between 2014 and 2016, the deal underwent a series of changes for various reasons, including changes that doubled the number of required inclusionary units that City Ventures was obligated to build. Concurrent with the execution of the Development Agreement, HHP-Summit and the City amended their Inclusionary Housing Agreement to include the requirement that HHP-Summit construct 12 inclusionary for-sale units as part of the Project to assume City Ventures' inclusionary housing obligations. According to the City, City Ventures paid HHP-Summit approximately $2.76 million to take on the obligation to build the 12 inclusionary units.

C. The Development Agreement and the City's Required Impact Fees.

On June 15, 2016, the City and HHP-Summit entered into a Development Agreement for the Project. HHP-Summit envisioned demolishing the existing structures at the parcel to make way for a "condominium complex consisting of 21 dwelling units to be sold to Low- and Moderate-Income persons or families at Affordable Housing Cost." Out of the 21 units, 14 were reserved for sale at affordable housing cost to low-income households with the remaining seven being made available to moderate-income households. The City states that 12 of the low-income units were built pursuant to HHP-Summit's assumption of City Ventures' inclusionary housing obligations.

To ensure that the residential units would continue to be affordable, the City provided incentives for HHP-Summit to record regulatory and restrictive covenants to maintain the affordability of the units for at least 45 years. The Development Agreement described these incentives as follows:

> In consideration for the City's reduction of certain City fees related to the construction and development of the Project, Developer has agreed to recordation of a regulatory and restrictive covenant with respect to the Project for purposes of ensuring, among other things, the affordability of the residential units in the Project.

Although this provision makes reference to a “reduction” of City fees, another section of the Development Agreement expressly states that the cost of developing the Project “shall be borne by Developer.” In response to a request from the Department for clarification, the City asserted that there was no discretionary waiver of City fees, and any “reduction” was merely by operation of the Pasadena Municipal Code, which charged either no fees or reduced fees for certain categories of affordable housing developments.

D. The City Loan Agreement and the New Markets Tax Credit.

To support development of the Project, the City agreed to loan no more than $1.3 million to HHP-Summit for a term of 7 years at a rate of 3 percent simple, fixed interest with “provisions for forgiveness of accrued interest upon issuance of the Certificate of Completion.” The terms were reflected in a Loan Agreement.

According to the Loan Agreement, the City made the loan specifically for HHP-Summit to use as one of the sources of a “leverage loan” to a New Markets Tax Credit (NMTC) investment fund. This leverage loan will be combined with other equity from a tax credit investor to make an equity investment in two community development entities that provide the NMTC tax allocation. The community development entities will in turn make NMTC loans, as a qualified low-income community investment, back to HHP-Summit to fund the Project. The NMTC loans presumably come with much more favorable terms than those available on the open market, because the tax credit investor is receiving a healthy tax credit in exchange for making the investment that funds the NMTC loans.

E. CalHome Mortgage Assistance.

During the planning stages, HHP-Summit submitted a proposal to the Department of Housing and Community Development (HCD) to obtain funding from the CalHome Program, in response to HCD’s $43 million Notice of Funding Availability. HHP-Summit was awarded $1 million for use as mortgage assistance to qualified low-income purchasers of units at the Project.

HHP-Summit contracted with general contractor RAAM Construction, Inc. to build the Project, which was completed in 2018. Residents moved in to their units in late 2018. HHP-Summit estimated the Project’s total development cost to exceed $13 million.

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.

The construction of the Project constitutes public works, as it indisputably involves construction done under contract by general contractor RAAM and its subcontractors, and is funded in part by a $1.3 million dollar below-market interest rate loan from the City, which all parties concede constitutes public funds. HHP-Summit and the City argue, however, that an exception to the prevailing wage requirements applies, because the

Project is an affordable housing project where the public funding is in the form of below-market interest rate loans. (See § 1720, subd. (c)(5)(E).)

Although the Project was also supported by the NMTC tax credits generated from the below-market interest rate loan, the reduced impact fees, and the CalHome Program mortgage assistance, HHP-Summit and the City do not consider such funds public funding under section 1720, subdivision (b). They also assert that HHP-Summit's assumption of City Ventures' inclusionary housing obligations, in exchange for $2.76 million, does not constitute the payment of public funds.

Given these circumstances, the issues to be resolved are whether the Project was funded by public funds other than the City's $1.3 million below-market interest rate loan, and whether any exceptions to prevailing wage requirements apply.

Under the prevailing wage law, "paid for in whole or in part out of public funds" means, in relevant part:

> (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.
>
> . . .
>
> (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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> . . .
>
> (§ 1720, subds. (b)(1), (b)(4).)

Notwithstanding the fact that a project receives public subsidies, certain residential projects are not subject to prevailing wage requirements if specified conditions are met. Section 1720, subdivision (c)(5) (hereafter section 1720(c)(5)) provides, in relevant part:

> (c) Notwithstanding subdivision (b):
>
> . . .
>
> (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:
>
> . . .

> (C) Assistance is provided to a household as either mortgage assistance, downpayment assistance, or for the rehabilitation of a single-family home.
>
> . . .
>
> (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, subds. (c)(5)(C), (c)(5)(E).)

A. The City's $1.3 Million Loan is a Public Subsidy, But the Project Qualifies for the Section 1720(c)(5)(E) Exception.

The City agreed to loan no more than $1.3 million to HHP-Summit for a term of 7 years at a rate of 3 percent simple, fixed interest with "provisions for forgiveness of accrued interest upon issuance of the Certificate of Completion." HHP-Summit and the City concede that the loan charges below-market interest. In addition, the provision that the accrued interest would be forgiven effectively translates the loan into an interest-free loan, which, under normal market conditions, is below market rate. Accordingly, the City's $1.3 million loan qualifies as a public subsidy. (§ 1720, subd. (b)(4) [paid for in public funds means "loans, interest rates . . . charged at less than fair market value . . . by the state or political subdivision."])

Section 1720, subdivision (c)(5)(E) (hereafter section 1720(c)(5)(E)), however, provides an exemption from the prevailing wage requirements for certain affordable housing projects that receive public funding "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 affordability 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 affordability criteria of section 1720(c)(5)(E) appear to be satisfied for this Project. The Development Agreement requires 14 of the 21 units (66 percent) be made available to low-income households that earn no more than 80 percent of the area median income. The recorded regulatory covenant will require these affordability criteria to be in place for at least 45 years.

In addition to the affordability criteria, the section 1720(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.) If there are other forms of public subsidy, the project is still exempt as long as it meets any other of the exemptions enumerated in section 1720(c)(5). (§ 1720, subd. (c)(5) ["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*"], italics added.)

The Project satisfies all the criteria of the section 1720(c)(5)(E) exemption, because the City made an admittedly below-market interest rate loan for the express purpose of enabling HHP-Summit to obtain financing for the Project, and HHP-Summit used the loan to obtain subsidies generated by the federal NMTC program.

B. The New Markets Tax Credits are not "Public Funds" under Section 1720, Subdivision (b).

The NMTC program is provided for under Section 45D of the Internal Revenue Code. (26 U.S.C. § 45D.) The purpose of the NMTC is to encourage investment in low-income community businesses, while also effectively reducing the borrowing or financing costs to the businesses.

A community development entity (CDE) is an intermediary[4] that receives the "qualified equity investment" (QEI) from the tax credit investor and uses those proceeds to make "qualified low-income community investments" (QLICIs). (26 U.S.C. § 45D(b)(1)(B).) QLICIs can be loans to "qualified active low-income community businesses" (QALICBs). (26 U.S.C. § 45D(d).) To effectuate the purpose of the NMTC program, a QALICB must be located in a low-income community. (See 26 U.S.C. § 45D(d)-(e).) In this case, HHP-Summit, or the Project, is presumably the QALICB receiving the QLICI in the form of "NMTC loans" with very competitive terms.

The NMTC is generated when a tax credit investor-controlled investment fund makes a QEI to a CDE. The NMTC available to the investor equals 39% of the QEI, and is spread out over 7 years – 5% in the first 3 years and 6% in the final 4 years. (26 U.S.C. § 45D(a).) The 39% NMTC return on the QEI spread over 7 years is not a particularly attractive investment for most investors, especially when the time value of money is taken into account. The QLICI into the QALICB is also unlikely to generate any meaningful return, given that the QALICB must be located in a low-income community. To counteract these low returns, investors devised a form of NMTC investment in which a tax credit investor makes an equity investment into an NMTC investment fund and a lender makes a "leverage loan" to the fund. The combined proceeds of the equity investment and the leverage loan are then used by the investment fund to make the QEI in the CDE.

The purpose of this leveraged model is to magnify the value of the NMTC for the tax credit investor. The leverage loan effectively reduces the amount of the equity investment that the tax credit investor must make for the same target return. By bundling the leverage loan with the investor's equity investment, the QEI can be several times the amount of the tax credit investor's equity investment, because even though the QEI is technically comprised of non-equity from the leverage loan, the Internal Revenue Service

[4] A CDE's primary mission must be to serve, or provide investment capital for, low-income communities or persons. To support that mission, the CDE must be accountable to low-income communities in the areas it intends to serve through a board that either advises, or acts as, the governing board of the CDE. (26 U.S.C. § 45D(c).)

treats the combined proceeds as a QEI of the investment fund. In this way, the tax credit investor will receive 39% of the value of the bundled QEI, garnering a healthy return on its investment. In Revenue Ruling 2003-20, the Internal Revenue Service authorized this leverage loan form of NMTC investment.

The City made the $1.3 million loan expressly for HHP-Summit's use as a "leverage loan" to an NMTC investment fund. The NMTC investment fund takes the leverage loan, combines it with other equity from the tax credit investor, and makes the QEI into two CDEs that provide the NMTC tax allocation to the tax credit investor. The two CDEs will in turn make NMTC loans, as a QLICI investment, back to HHP-Summit for the Project. The NMTC loans presumably come with much more favorable terms than those available on the open market, because the tax credit investor is receiving a sizable tax credit in exchange for making the equity investment that funds the NMTC loans.

Underlying this complex funding scheme is ultimately a subsidy from the federal government in the form of the NMTC tax credits. After receiving the QEI, the two CDEs allocate tax credits to the investor, which reduces the amount of federal tax the tax credit investor owes. Having received the QEI from the investor in exchange for the tax credit incentive, the CDEs are able to pass along part of the federally-granted incentive and make the NMTC loan to HHP-Summit at below-market interest for the Project. The Court of Appeal held that even *state* low-income housing tax credits are not considered public funds for the purposes of the prevailing wage law, on the ground that tax credits do not fall into any of the statutory definitions of public funds under section 1720, subdivision (b).[5] (*State Building & Construction Trades Council of California v. Duncan* (2008) 162 Cal.App.4th 289, 318 (*State Building Trades*).) The reasoning employed in *State Building Trades* applies here, particularly because the NMTC program is administered solely by the federal government and the NMTC tax credit is a credit against *federal* taxes. (See PW 2004-016, *Rancho Santa Fe Village Senior Affordable Housing Project* (May 26, 2005/Feb. 25, 2005) [*federal* low-income housing tax credits are not public funds under subdivision (b).]) Accordingly, the NMTC tax credits under these facts are not considered public funds within the meaning of section 1720, subdivision (b).

C. Waiver or Reduction of Impact Fees under City Ordinances.

The City, like most other local agencies, impose a number of development impact fees, which are fees collected by local agencies to mitigate the impact of new development. (See Gov. Code, § 66000 et seq. [Mitigation Fee Act]; see also Gov. Code, § 66477 [Quimby Act].) Although the Development Agreement mentions a "reduction" of fees, the City claims that there was no discretionary reduction of any required City fees. In support of this assertion, the City pointed to certain provisions of the Pasadena Municipal Code that either exempt fees or provide an automatic fee reduction for

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[5] *State Building Trades* held that state low-income housing tax credits do not "qualify as an asset of value to the state" when they were allocated by the state. (*State Building Trades, supra,* 162 Cal.App.4th at p. 317.) Therefore, the court held that the tax credits "do not amount to either the 'payment of money or the equivalent of money' within the scope of subdivision (b)(1) or the transfer of 'an asset of value for less than fair market value' within the scope of subdivision (b)(3)." (*Id.* at p. 318.)

affordable housing projects. The City did not offer a breakdown of what fees were charged, waived, or reduced, but merely asserted that fees were charged and collected according to the City's various fee ordinances.

The City charges a fee under its traffic reduction and transportation improvement ordinance. (Pasadena Mun. Code, § 4.19.040.) The fee was $2,480 per unit for new residential projects, subject to increases tracking the Consumer Price Index. (Ord. 7076, § 2 (part) 2006, former Pasadena Mun. Code, § 4.19.040, subds. (A), (C).) The City reports the fee for fiscal year 2016 had increased to $2,747.20 per unit. A list of exceptions from the fee includes one for affordable housing, where the fee is "waived for all for-sale or rental affordable housing units built on-site." (Pasadena Mun. Code, § 4.19.050.) Off-site affordable housing units "receive a 50 percent discount" on the fee. (*Ibid.*) The City stated that it considered the Project's units as all on-site units. As a result, HHP-Summit was deemed exempt from paying any fees under the City's traffic reduction and transportation improvement ordinance.

The City also charges certain residential impact fees under its impact fee ordinance for new residences. (Pasadena Mun. Code, § 4.17.050.) The fees due are set forth in a fee schedule, but the fee applicable to qualified affordable housing projects built pursuant to the City's inclusionary housing regulations is set at $756 per unit, subject to increases tracking the Consumer Price Index. (Pasadena Mun. Code, § 4.17.050, subd. (F)(1).) The City reports the fee for fiscal year 2016 had increased to $910.10 per unit. HHP-Summit presumably paid the reduced rate of $910.10 per unit for fiscal year 2016, for a total of $19,112.10.

"Fees . . . 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" are considered public subsidies. (§ 1720, subd. (b)(4), italics added.) Because the City's traffic reduction and transportation improvement ordinance waives fees for *all* on-site affordable housing units, the fee would not "*normally* be required in the execution" of an affordable housing project. It is also unclear that the City has actually "waived" the fees, since the City was never entitled to collect those fees for on-site affordable housing units. Similarly, under the residential impact fee ordinance, the "reduced" fee of $910.10 is actually *the fee* for affordable housing projects. The City was never entitled to receive more than $910.10 per unit, so it did not reduce the fee, and collecting a fee over $910.10 per affordable housing unit would also not "*normally* be required in the execution" of the Project. For these reasons, the City's collection of impact fees in accordance with its ordinances is not a public subsidy under subdivision (b)(4).

D. CalHome Program Mortgage Assistance Financing Falls Within the Section 1720(c)(5)(C) Exception.

The CalHome Program was established, in part, to "support existing homeownership programs aimed at lower and very low income households" to "increase homeownership, encourage neighborhood revitalization and sustainable development." (Health & Saf. Code, § 50650, subd. (c).) Funds from the CalHome Program, which is administered by HCD, may be used for first-time homebuyer mortgage assistance. (Health & Saf. Code, § 50650.3, subd. (b)(1).) Only "lower-income" households are eligible for CalHome funding. (Cal. Code Regs., tit. 25, § 7720; see Health & Saf. Code, § 50079.5 [lower-income households generally earn less than 80 percent of the area median income.]) CalHome funds are distributed to local government agencies or nonprofit corporations to provide mortgage assistance for the purchase of a residential unit. (Cal. Code Regs., tit. 25, §§ 7716, subd. (c); 7729-30.) In response to HCD's 2014 Notice of Funding Availability, HHP-Summit applied for and was awarded $1 million to provide lower-income homebuyers with mortgage assistance to purchase its homes.

Prevailing wage requirements do not apply in situations where public "[a]ssistance is provided to a household as either mortgage assistance, downpayment assistance, or for the rehabilitation of a single-family home." (§ 1720, subd. (c)(5)(C).) In this instance, CalHome Program funds are made available expressly to assist lower-income households with downpayment assistance[6] to purchase affordable homes in the Project. Accordingly, the exemption in section 1720, subdivision (c)(5)(C) (hereafter section 1720(c)(5)(C)) applies to the Project. (See also PW 2003-017, *Farm Worker Housing Assistance – City of Orange Cove* (June 30, 2003) [Section 1720(c)(5)(C) exemption applies to project funded with HCD downpayment mortgage assistance provided to low-income farm worker families under Joe Serna, Jr. Farm Worker Housing Grant Program.])

The other form of public subsidy to this Project is the below-market interest rate loan. Section 1720(c)(5)'s exemptions operate when "one or more" of the enumerated exemptions apply. Here, the requirements of section 1720(c)(5)(C) *and* section 1720(c)(5)(E) are both satisfied to exempt the Project from prevailing wage requirements.

E. The Transfer of Inclusionary Housing Obligations Does Not Trigger Prevailing Wage Requirements in This Case.

The Division of Labor Standards Enforcement (DLSE) asserts that the transfer of inclusionary housing obligations from City Ventures to HHP-Summit triggers prevailing wage requirements on the construction of the Project. DLSE claims that City Ventures would have had to pay $2.76 million to the City as an inclusionary in-lieu fee, but instead was able to avoid that fee by transferring its obligations to the Project and paying the $2.76 million to HHP-Summit instead. The argument appears to be that HHP-Summit's Project received an indirect subsidy in the form of the $2.76 million that would have otherwise gone to the City. DLSE, however, presents no evidence to support the amount of inclusionary in-lieu fees that City Ventures would have owed the City.

As the name "in-lieu" fee indicates, a developer has the option, but not the obligation, of paying a fee *in lieu* of building the required inclusionary units. (Pasadena Mun. Code, § 17.42.050, subd. (A).) Another option is for the developer to build the inclusionary units off-site. (*Id.* at subd. (B).) The default obligation is to build the inclusionary housing on-site. (Pasadena Mun. Code, § 17.42.070, subd. (A).) It is not entirely clear how City Venture's choice to build off-site, rather than selecting the option to pay fees, caused the City to forgo the in-lieu fees, nor does DLSE explain how that choice results in a subsidy to HHP-Summit's Project in this case.

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[6] "Another term for mortgage assistance is 'downpayment assistance'". (Cal. Code Regs., tit. 25, § 7716, subd. (dd).)

F. DLSE's Section 1720(a)(3) Argument is Unsupported.

Aside from its argument that the transfer of inclusionary housing obligations is a public subsidy, DLSE also claims the Project is a public work under section 1720, subdivision (a)(3) (hereafter section 1720(a)(3)), which applies to street, sewer, or other improvement work "done under the direction and supervision or by the authority" of the state or its political subdivisions. DLSE points out that coverage of a project as public works under section 1720(a)(3) requires no public funding and cites an Attorney General Opinion in support of that proposition. Yet there is no dispute as to that point, as public funding need not be present in a section 1720(a)(3) public works project. DLSE makes no other effort to explain its argument, making it difficult to ascertain what aspect of the City's involvement rises to the level of the "direction and supervision" or "authority" necessary for coverage under section 1720(a)(3).

The inclusionary housing ordinance requires the City to consent to a developer's construction of inclusionary housing units off-site. (Pasadena Mun. Code, § 17.42.050, subd. (B).) Granting that consent, providing the below-market interest rate loan, and exercising its normal functions as a local municipality with respect to residential projects appear to be the extent of the City's involvement. The affordable housing project was built not on public property, but on a privately-owned parcel located at the corner of Orange Grove Boulevard and Summit Avenue. The City does not appear to be ordering the construction on threat of some enforcement action or under some other authority, nor is it directing or supervising who will perform the construction or how, why, when, or even where it will be done. The level of oversight is no greater than what the City exercises over other similar private residential projects. Without any facts to demonstrate otherwise, the Project does not constitute a public work under section 1720(a)(3).

Given that the criteria of section 1720(c)(5)(C) and section 1720(c)(5)(E) are satisfied, the Project is not subject to prevailing wage requirements despite receiving public subsidies in the form of (1) CalHome-funded downpayment or mortgage assistance; and (2) the $1.3 million below-market interest rate loan.

Conclusion

For the foregoing reasons, the construction of the Summit-Grove Low Income Housing Project in the City of Pasadena 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