STATE OF CALIFORNIA

DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Requests for Review of:

Wayne Maples Plumbing & Heating, Inc. and R.D. Olson Construction L.P.	Cases Nos. 10-0093-PWH and 10-0094-PWH

From a Civil Wage and Penalty Assessment issued by:

Division of Labor Standards Enforcement

DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS

Affected subcontractor Wayne Maples Plumbing & Heating, Inc. ("Maples"), and affected contractor R.D. Olson Construction L.P. ("Olson") filed timely requests for review from a civil wage and penalty assessment ("Assessment") issued by the Division of Labor Standards Enforcement ("Division") with respect to The Fairways at San Antonio Affordable Family Housing Project ("Project"). The requests for review were consolidated and presented on a stipulated record to hearing officer John Cumming. Stipulations were entered and written briefs were filed by Carrie E. Bushman on behalf of Maples, by David F. McPherson on behalf of Olson, and by Ramon Yuen-Garcia on behalf of the Division. The matters were submitted for decision on January 25, 2011.

The issues presented for determination are:

- whether the Project is exempt from California's prevailing wage law;
- assuming the project is statutorily exempt, whether the Division nevertheless may enforce a contractual agreement to pay prevailing wages using the same mechanisms provided for statutory violations under Labor Code section 1741;[1]
- whether proper credit was given for training fund contributions;
- whether Olson is liable for penalties under section 1775; and
- whether any party is liable for liquidated damages.

For the reasons set forth below, I find that the Labor Code did not require the payment of prevailing wages for work performed on the Project. I also find that that insofar as Maples and Olson may have agreed by contract to pay statutory prevailing wage rates, such an agreement is not subject to enforcement by the Division pursuant to section 1741. Accordingly, I am dismissing the Assessment. For the purposes of these proceedings, all other issues are moot.

FACTS

The parties stipulated to the following facts.

1. On or about November 1, 2007, the City of San Jose ("City") entered into a [L]oan [A]greement with San Jose Family Housing LP, a California Limited Partnership, and its administrative general partner, Affirmed Housing Group (collectively "Developer"), for the development of The [Project], an affordable family housing development located in the City of San Jose consisting of 5 three story buildings containing 86 apartment units. . . .[2]

2. In conjunction with the Loan Agreement, the Developer executed a Promissory Note, ...

3. Development of the project was funded solely by a $5,700,000 private conventional construction and permanent loan from Citibank, a $9,501,778 subordinate loan from the City, and $16,801,040 in federal low income housing tax credits.

4. The City's loan was made solely with monies from its Low and Moderate Income Housing Fund established pursuant to California Health & Safety Code Sections 33334.2 and 33487.

5. On or about November 27, 2007, the Developer entered into a Construction Contract ("Construction Contract") with Olson for construction of the Project. . . .

6. On or about December 11, 2007, Olson entered into a subcontract

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[1] All statutory references hereinafter are to the Labor Code unless otherwise indicated.

[2] A concluding sentence stating that the referenced document, in this case the Loan Agreement, has been incorporated as an exhibit in the stipulated record, has been omitted and replaced with an ellipsis (. . .) in this and several

with Maples to perform the plumbing portion of the Construction Contract. Maples performed work only on the residential portion of the Project. . . .

7. The City's Office of Equality Assurance ("OEA") is responsible for the administration and compliance with prevailing wage requirements on City of San Jose and San Jose Redevelopment Agency projects.

8. By letter dated May 1, 2007, the OEA requested that the Division of Labor Statistics & Research ("DLSR") to provide it with an Advisory Residential Wage Determination for the next twelve months, June 2007 through June 2008, for various City of San Jose Housing Department/Private Developer and San Jose Redevelopment Agency/Private Developer new construction residential housing projects. . . .

9. On or about June 1, 2007, in response to the request of OEA on May 1, 2007, DLSR faxed the City a list of advisory residential rates ("Advisory Residential Rates"). . . .

10. On June 27, 2007, the OEA sent a letter to the Developer referencing the Project and enclosing a copy of the Advisory Residential Rates . . ..

11. The General Prevailing Wage Determination in effect at the time the Construction Contract was executed is Determination No. STC-2007-2. . . .

12. The General Prevailing Wage Apprentice Determination in effect at the time the Construction Contract was executed is Determination No. STC-2007-2. . . .

13. The Advisory Residential Rates provided by DLSR to the City are not the rates contained in the General Prevailing Wage Determination or the General Prevailing Wage Apprentice Determination in effect at the time the Construction Contract was executed.

14. The City did not request nor had the Director issued any Special

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other paragraphs of the stipulated fact statement.

Determinations pursuant to 8 C.C.R. § 16100 on the Project.

15. For all hours worked on the Project, Maples paid its journeyman plumbers the "Residential Plumber" rates contained in the Advisory Residential Rates . . . and paid its apprentice plumbers a percentage of the "Residential Plumber" rates contained in the Advisory Residential Rates based on the applicable period of apprenticeship.

16. Maples did not pay its journeymen plumbers the General Prevailing Wage Rates under Determination STC-2007-2 . . ..

17. Maples did not pay its apprentice plumbers the Apprentice General Prevailing Wage Rates under Determination STC-2007-2 . . ..

18. On February 22, 2010, [the Division] issued and served upon Olson and Maples a[n] . . . Assessment . . . as provided in . . . section 1741 assessing the sum of $86,291.44 in wages and $7,080.00 in penalties. The wage deficiencies are attributable to the difference between the Advisory Residential Rates . . . paid by Maples to its employees for the work performed on the Project and the prevailing wage rates and predetermined increases under Determination No. STC-2007-2, ...

19. The Assessment was issued for work performed on The . . . Project in San Jose.

* * * [3]

The Loan Agreement and Promissory Note (Joint Exhibits 1 and 2) show that all of the Project's 86 housing units were subject to a 55 year affordability restriction, with all but two of the units made available to households earning no more than 50% of the "Area Median Income," and the remaining two "managers units" to be made available to households earning no more than 80% of the Area Median Income.

The Promissory Note (Joint Exhibit 2) pertained to the Developer's repayment of money

[3] Paragraphs 20 through 35, which pertain to penalties, credits, and additional facts of disputed relevance have been omitted from this summary.

loaned by the City for the Project and included a reference to the Developer's fee. Section 1 of Promissory Note provided that the principal loan amount would accrue simple interest at the rate of four percent (4.00%) per annum, subject to additional conditions and specifications that are not relevant here. Section 3 of the Promissory Note set forth the terms for repayment, with subsection 3(a) specifically providing that "[Developer] is entitled to 100% of the Net Cash Flow until the deferred developer fee . . . and accrued interest at the rate of 2% simple interest per annum are paid in full."

Section 4.09 of the Loan Agreement also imposed a prevailing wage requirement on the Developer as follows.

> Developer shall abide by all of the City's prevailing wage requirements during the construction of the Project. Developer shall pay, or cause to be paid, prevailing wages for all construction work on the Project. For purposes of this Agreement, "prevailing wages" means not less than the general prevailing rate of per diem wages as defined in Section 1773 of the Labor Code and Subchapter 3 of the Chapter 8, Division 1, Title 8 of the California Code of Regulations (Section 16000 et seq.), and as established by the Director of the California Department of Industrial Relations ("DIR"), or in the absence of such establishment by the DIR, by the City's Office of Equality Assurance ("OEA") for the respective craft classification. In any case where the prevailing rate is established by the DIR or by OEA, the general prevailing rate of per diem wages shall be adjusted annually in accordance with the established rate in effect as of such date.

The same prevailing wage requirement was imposed on Olson under section 4(c) of the Construction Contract (Joint Exhibit 3). The prevailing wage requirement and advisory rates in turn were incorporated into the subcontract between Olson and Maples (Joint Exhibit 4).

As noted in the Introduction, Maples and Olson filed timely requests for review

DISCUSSION

Sections 1720 and following set forth a scheme for determining and requiring the payment of prevailing wages to workers employed on public works construction projects.

> The overall purpose of the prevailing wage law ... is to benefit and protect employees on public works projects. This general objective subsumes within it a number of specific goals: to protect employees from substandard wages that might be paid if contractors could recruit labor from distant cheap-labor areas; to permit union contractors to compete with nonunion contractors; to benefit the

> public through the superior efficiency of well-paid employees; and to compensate nonpublic employees with higher wages for the absence of job security and employment benefits enjoyed by public employees.

Lusardi Construction Co. v. Aubry (1992) 1 Cal.4th 976, 987 (*Lusardi*) (citations omitted). The Division enforces prevailing wage requirements not only for the benefit of workers but also "to protect employers who comply with the law from those who attempt to gain competitive advantage at the expense of their workers by failing to comply with minimum labor standards." (§ 90.5(a), and see *Lusardi, supra.*)

Section 1771 requires the payment of prevailing wages to workers employed on public works. When the Division determines that a violation of the prevailing wage laws has occurred, a written civil wage and penalty assessment is issued pursuant to section 1741. An affected contractor or subcontractor may appeal that assessment by filing a request for review under section 1742. In that appeal the contractor or subcontractor "ha[s] the burden of proving that the basis for the civil wage and penalty assessment is incorrect." (§1742(b).)

The Project Was Not a Public Work and Therefore Not Covered by California's Prevailing Wage Statute.

The Division determined that the Project was subject to statutory prevailing wage requirements both by application of the coverage provisions of section 1720 and by the Developer's and contractors' contractual agreement to be bound by those requirements. Section 1720, subdivision (a)(1) defines "public works" as "[c]onstruction . . . done under contract and paid for in whole or in part out of public funds, ..." The term "paid for in whole or in part out of public funds" is more extensively defined in subdivision (b), subject exceptions in subdivisions (c). The parts of these subdivisions that are relevant to this case state as follows:

> (b) For purposes of this section, "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.
>
> * * *
>
> (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.

* * *

(c) Notwithstanding subdivision (b):

* * *

(4) The construction or rehabilitation of affordable housing units for low or moderate income persons pursuant to paragraph (5) or (7) of subdivision (e) of Section 33334.2 of the Health and Safety Code that are paid for solely with moneys from a Low and Moderate Income Housing Fund established pursuant to Section 33334.3 of the Health and Safety Code or that are paid for by a combination of private funds and funds available pursuant to Section 33334.2 or 33334.3 of the Health and Safety Code do not constitute a project that is paid for in whole or in part out of public funds.

* * *

The Project plainly involved "construction . . . done under contract." However, the parties dispute whether it was "paid for in whole or in part out of public funds" within the meaning of subdivision (b) and relevant exceptions.

Paragraphs 3 and 4 of the parties' stipulated fact statement identify three sources of funding for the project: a private loan, the City's loan which was derived "solely . . . from its Low and Moderate Income Housing Fund established pursuant to California Health & Safety Code Sections 33334.2 and 33487", and federal low income housing tax credits. The private loan does not constitute a payment of money by a political subdivision. It also is undisputed that low income housing tax credits do not constitute a form of payment of public funds within the meaning of section 1720 (*State Building and Construction Trades Council of California v. Duncan* (2008) 162 Cal. App.4th 289). The City's loan is the only ostensible source of public funds identified in the Stipulated Facts. Assuming the City's loan is a public fund under (b)(4) [below market loan], it fits squarely within the subdivision (c)(4) exemption. In light of this exemption, the Project is not a public work within the meaning of section 1720.

The Division contends that the deferred payment of the Developer Fee referred to in section 3 of the Promissory Note is itself a discrete below market interest rate loan that qualifies as public funds under section 1720(b)(4). However, the Division provides no factual or legal analysis to support the characterization of the deferred Developer's Fee as a form of subsidy provided

by the City to the Project; if anything, the deferral of the fee suggests that it is a subsidy or advance from the developer rather than the City. Therefore, the deferred fee does not constitute a payment of public funds.

The Non-Statutory Contractual Agreement to Pay Prevailing Wages Cannot be Enforced Through an Assessment Under Section 1741.

Whether Maples and Olson were contractually bound to pay statutory prevailing wage rates determined by the Director of Industrial Relations under state law presents a much closer question. The contractual obligation spelled out in section 4.09 of the Loan Agreement (quoted above at page 5) may have required the payment of prevailing wage rates as determined by the Director under applicable law, irrespective of whether the Project is a public work within the meaning of section 1720.[4]

It is not necessary to resolve these issues here because I am persuaded that the Division cannot enforce the contractual agreement through issuance of a civil wage and penalty assessment under section 1741. That section authorizes the Division to issue an assessment only in cases involving "a violation of this chapter," referring specifically to Chapter 1 (commencing with section 1720), Part 7, Division 2 of the Labor Code. For the reasons discussed above, Maples did not violate any statutory obligation in this Chapter of the Labor Code because the Project was not a public work under section 1720.

The Division has cited several cases affirming the enforceability of a contractual agreement to pay statutory prevailing wages even though the project or work may otherwise be exempt from prevailing wage requirements. However, the Division has cited no authority which suggests that the contract may be enforced through use of a specific statutory remedy that, by its express terms, is only available to enforce statutory violations. The federal Davis Bacon Act (40

[4] Section 4.09 did not expressly give the City discretion to determine the rates except in the absence of any legal determination by the Director. The advisory residential rates obtained by the City from DLSR on their face may not be determinative because they were provided "strictly for informational purposes only." As the DLSR's cover memo plainly stated, these rates did not constitute a determination of the published prevailing wage rate. The contractors themselves sidestep the question of whether the advisory residential rates were in fact prevailing, arguing instead that the Division is procedurally barred from enforcing the state's higher commercial rates. In contrast to the facts of this case, where a project is subject to the statutory obligation to pay prevailing wages, the advisory rates are not considered prevailing; and parties cannot contract to avoid paying the statutorily required prevailing wage. This is consistent with a decision I am issuing at the same time as this decision. *Quality Plumbing v. Division of Labor Standards Enforcement*, No. 09-0090-PWH.

U.S.C. sections 3141 – 3142) does not appear to provide a useful analogy because the enforcement mechanisms and remedies are themselves contractual in nature, and there is no specific enforcement statute for statutory violations comparable to section 1741.[5]

On the other hand, it does not follow that the absence of a remedy under section 1741 deprives the Division of any power to enforce a contractual agreement to pay prevailing wages. The Division has the authority to represent employees in court actions against employers, including for the recovery of wage claims that have been assigned by an employee. (§ 96(c); *Aubry v. Tri-City Hospital District* (1992) 2 Cal.4th 962, 971, and at 975 (J. Kennard dissenting) and *Noble v. Draper* (2003) 160 Cal.App.4th 1, 15.)[6] However, the nature and extent of that authority is not for me to decide in the context of a review proceeding under section 1742.

Accordingly, I am dismissing the Assessment without reaching the other issues raised by the parties. This decision should not be construed as a determination on the enforceability of a contractual claim to prevailing wages by the Division or any other party, nor should it be construed as a determination on the merits of any underlying claim.

FINDINGS

1. Affected subcontractor Wayne Maples Plumbing & Heating, Inc. and affected contractor R.D. Olson Construction L.P. filed timely requests for review from a civil wage and penalty assessment issued by the Division of Labor Standards Enforcement with respect to The Fairways at San Antonio Affordable Family Housing Project.

2. The record shows that the Project was exempt from the statutory obligation to pay prevailing wages by subdivision (c)(4) of the Labor Code.

3. Labor Code section 1741 could not be used to enforce any contractual agreement

[5] While the court in *Alcala v. Western Ag Enterprises* (1986) 182 Cal.App.3d 546, stated that "when California's laws are patterned on federal statutes, federal cases construing those federal statutes may be looked to for persuasive guidance" (*id.* at 550, citations omitted); it also found the converse to be true, *i.e.* that when California's requirements differ from comparable provisions of federal law, federal guidelines are not applicable. *See id.* at 551.

[6] Maples misconstrues *Noble v. Draper (2003)* 160 Cal.App.4th 1, 15.as precluding the Division from enforcing contractual provisions. What *Noble* addressed and carefully distinguished was between the Division's jurisdiction to administratively adjudicate an employee's wage claim under section 98 and its broader authority to assert assigned rights on behalf of an employee under section 96.

between the parties. Accordingly, the Assessment must be dismissed without prejudice to any other remedies that may be available to the parties or any other person.

ORDER

The Assessment is dismissed. The Hearing Officer shall issue a Notice of Findings which shall be served with this Decision on the parties.

Dated: 3/3/11

John C. Duncan
Director of Industrial Relations