

DEPARTMENT OF INDUSTRIAL RELATIONS

OFFICE OF THE DIRECTOR

1515 Clay Street, 17th Floor

Oakland, CA 94612

(415) 703-5050



To All Interested Parties:

Re: Public Works Case No. 2009-010

Vista del Sol Senior Housing Complex – City of Redlands

The Decision on Administrative Appeal, dated April 23, 2010, in PW 2009-010, *Vista del Sol Senior Housing Complex – City of Redlands*, was affirmed in a published Fourth District Court of Appeal opinion dated June 15, 2012. See *Housing Partners I, Inc. v. John C. Duncan, in his official capacity as the Director of Industrial Relations for the State of California* (2012) 206 Cal.App.4th 1335.

DEPARTMENT OF INDUSTRIAL RELATIONS
OFFICE OF THE DIRECTOR
455 Golden Gate Avenue, Tenth Floor
San Francisco, CA 94102
(415) 703-5050



November 2, 2009

Michele R. Justice, Director
CANDO
P.O. Box 642
Buckeye, Arizona 85326-0047

Re: Public Works Case No. 2009-010
Vista Del Sol Senior Housing Complex
City of Redlands

Dear Ms. Justice:

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 Code of Regulations, title 8, section 16001(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 Vista Del Sol Senior Housing Complex ("Project") in the City of Redlands ("City") is a public work subject to prevailing wage requirements.

Facts

The Project entails the construction of a two-story structure that includes 71 rental housing units for seniors. The Project is sited on 3.63 acres of real property in City. Pursuant to an affordability covenant recorded against the property, 53 of the Project's 71 units will be available to low-income seniors for 55 years. Of those 53 units, 11 will be available to very-low income residents and 42 will be available to low-income residents.¹ Of the 18 remaining units, 17 will be rented to seniors at market rates and one will be reserved for the property manager.

Housing Partners I, Inc. ("HPI") is the owner and developer of the Project. HPI is a non-profit public benefit association organized to acquire, develop, rent, sell and manage affordable housing. HPI holds title to the Project site, which was purchased by HPI from the Housing Authority of the County of San Bernardino ("HACSB") for its fair market value of \$1.85 million, as determined by an appraisal. A Density Bonus Agreement between City and HPI permitted the Project to go forward with greater density, parking, and building size than ordinarily would be allowed by City's zoning standards. HPI awarded the construction contract to J.D. Diffenbaugh, Inc.

¹Very-low income households are defined as those earning 50 percent or less of the area's median income; low-income households are those earning 80 percent or less of the area's median income.

Construction financing is from a combination of sources. One source is HACSB, which extended a construction loan to HPI in the amount of \$6.15 million, to be repaid over a 55-year term at three percent interest ("HACSB Loan").

HPI borrowed an additional \$1,702,591 in federal HOME Investment Partnership Program funds ("HOME Loan") from the County of San Bernardino. Proceeds from the HOME Loan must be used for the construction of the 11 units intended for very-low income seniors. The HOME Loan bears a 3 percent interest rate. Repayment will be deferred for at least five years and the deferral period may be extended another five years. At the end of the deferral period, HPI is obligated to start repaying the principal and accrued interest out of the residual receipts.² Based on projected residual receipts, HPI intends to repay the HOME Loan in full. Any loan balance remaining after 20 years, however, will be forgiven if the affordability conditions are met.

A third source of financing is in the form of a \$4 million no-interest "loan" from the Redevelopment Agency of the City of Redlands ("Agency Loan"). The Agency Loan was funded with moneys from a Low and Moderate Income Housing Fund established under Health & Safety Code sections 33334.2 and 33334.6. The Agency Loan provides that it will be forgiven in its entirety upon the recording of an affordability covenant and the issuance of certificates of occupancy. The affordability covenant was recorded on September 14, 2006. HPI anticipates that certificates of occupancy will be recorded in late February 2010.

HPI estimates the cost of construction to be \$9.25 million.³

Discussion

Labor Code section 1771⁴ generally requires the payment of prevailing wages to workers employed on public works. Section 1720, subdivision (a)(1)⁵ defines public works to include: "Construction, alteration, demolition, installation, or repair work done under contract and paid for in whole or in part out of public funds" Subdivision (b) provides:

(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.

...

²Residual receipts are defined as the amount by which revenue (primarily rental income) exceeds operating expenses and debt service.

³The HACSB Loan, the HOME Loan and the Agency Loan total \$11,852,591. The proceeds not allocated to payment of construction costs are allocated to the payment of other development costs, such as architectural and legal expenses, City-imposed fees and interest payments.

⁴Subsequent statutory references are to the Labor Code unless otherwise indicated.

⁵Subsequent statutory subdivision references are to section 1720.

(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.

...

Subdivision (c), however, provides that:

(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 or 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 section 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.

...

(6) 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:

...

(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.

The Project meets the elements of a public work in that the Project involves construction work done under contract. As to the funding element, the below-market interest rate HOME Loan⁶ and HACSB Loan constitute the payment of public funds under subdivision (b)(4) as "loans ... charged at less than fair market value" The Agency Loan is also a payment of public funds under subdivision (b)(4) as "loans ... that are ... forgiven" Because the Agency Loan does not

⁶Although the HOME Loan includes terms providing for partial forgiveness under certain circumstances, HPI expects to repay the HOME Loan in full. Consequently, for purposes of the coverage analysis in this determination, the HOME Loan will be treated as a below-market interest rate loan. This is consistent with the treatment of similar loans in PW 2006-001, *Horizons at Indio Apartments, City of Indio* (March 12, 2007).

contemplate repayment, the Agency Loan may appropriately be characterized as a “payment of money ... directly to ... developer” under subdivision (b)(1) rather than a loan.⁷

Because the Project involves construction work done under contract and the Project is wholly paid for with public funds, the payment of prevailing wages ordinarily would be required. The question presented, however, is whether any of the exemptions in subdivision (c) apply. HPI, HACSB and Agency have jointly submitted legal argument contending that the Project qualifies for the exemptions in subdivisions (c)(4) and (c)(6)(E).

Subdivision (c)(4) provides that an affordable housing development is not a project paid for in whole or in part out of public funds where it is “paid for *solely*” with moneys from a Low and Moderate Income Housing Fund established by a redevelopment agency pursuant to Health and Safety Code sections 33334.2 or 33334.3, *or* by a combination of such funds and private funds. (Emphasis supplied.) Only the Agency Loan is drawn from a qualifying Low and Moderate Income Housing Fund. The HACSB Loan and the HOME Loan are not. Because the Project is neither paid for “*solely*” with moneys from a Low and Moderate Income Housing Fund nor by a combination of such funds and private funds, this exemption does not apply. This conclusion is consistent with prior determinations involving the subdivision (c)(4) exemption, albeit ones in which the exemption was found to apply. See PW 2004-003, *Cottage Homes Project, Bakersfield Redevelopment Agency* (October 12, 2004); PW 2006-002, *Affordable Senior Housing Project, City of Montebello* (March 22, 2006); PW 2006-005, *Central Village Apartments, City of Los Angeles* (July 12, 2006). Each of those cases involved no other public funds aside from a redevelopment agency’s Low and Moderate Income Housing Fund.

The subdivision (c)(6)(E) exemption is limited to affordable housing projects where the public participation that would otherwise meet the criteria of subdivision (b) is “public funding *in the form of* below-market interest rate loans.” (Emphasis supplied.) The Home Loan and the HACSB Loan meet the requirements of this provision. If these two loans were the only form of public funding, the Project would be eligible for this exemption.⁸ The third publicly-funded loan, however, the Agency Loan, is not a below-market interest rate loan. It is a forgiven loan or, more precisely, a grant. Because public participation in the Project is public funding not solely “*in the form of*” below-market interest rate loans but also in the form of a forgiven loan/grant, the Project does not qualify for the subdivision (c)(6)(E) exemption.

Anticipating these conclusions, HPI, HACSB, and Agency advocate an expansive construction of the statutory scheme in an attempt to bring the Project within both of these exemptions. Their argument starts by pointing out that the subdivision (c)(6)(E) exemption refers to the criteria found in subdivision (b) for determining whether a construction project is “paid for in whole or in part out of public funds.” They argue that the reference to subdivision (b) signifies that all of

⁷This conclusion is consistent with PW 2000-043, *13th and F Street Townhouse Development, City of Sacramento* (January 23, 2001) in which the Director found that a forgiven loan was not a loan, but a payment of public funds under the then existing statutory scheme. In that determination, it was pointed out that the Internal Revenue Service considers the forgiving of debt, unlike a loan, to constitute a taxable transfer for gift tax purposes.

⁸The Project would otherwise be eligible for the subdivision (c)(6)(E) exemption because the Project meets the exemption’s earnings and occupancy requirements in that occupancy of 53 out of 71 of the units will be restricted for 55 years to seniors earning no more than 80 percent of the area median income.

subdivision (b) is imported into the subdivision (c)(6)(E) exemption. The “public participation” referred to in subdivision (c)(6)(E) is therefore not limited to “public funding in the form of below-market interest rate loans,” as they contend, but also includes loans that are waived or forgiven within the meaning of subdivision (b)(4). They argue that such waived and forgiven loans are within the scope of the exemption by virtue of the reference in subdivision (c)(6)(E) to subdivision (b). Under this construction of the statute, it is argued that the subdivision (c)(6)(E) exemption applies despite the fact that the Agency Loan is not a below-market interest rate loan.

HPI, HACSB, and Agency also argue that the Project meets the requirements for the subdivision (c)(4) exemption by suggesting that the term “private funds” is sufficiently elastic as to encompass the publicly-funded Home Loan and HACSB Loan. They argue that the introductory language of subdivision (c), “Notwithstanding subdivision (b),” negates subdivision (b) thereby allowing the phrase “private funds” in subdivision (c)(4) to be broadly interpreted to include public funds that qualify a project for a statutory exemption. Their argument is based on the proposition that “public funding mechanisms,” rather than projects, enjoy the exemptions of subdivision (c).⁹ As the below-market interest rate HOME Loan and HACSB Loan would qualify the Project for the subdivision (c)(6)(E) exemption, they argue that these loans are transmuted from public funds to private funds. They conclude that the subdivision (c)(4) exemption therefore applies because the Project is funded by a combination of private funds (the HOME Loan and the HACSB Loan) and funds made available from a Low and Moderate Income Housing Fund (the Agency Loan).

HPI, HACSB, and Agency do not cite legal authority for their position. Instead, they refer to the Legislature’s intent to increase the stock of affordable housing and to exempt certain forms of affordable housing from California’s prevailing wage law. Longstanding rules of statutory construction, however, do not support the interpretation of section 1720 advanced by these parties. The basic rule for interpreting statutes is that the words of the statute should be given their usual and ordinary meaning. *McIntosh v. Aubry* (1993) 14 Cal.App.4th 1576, 1588. Statutes conferring exemptions from regulatory schemes are narrowly construed. *Board of Medical Quality Assurance v. Andrews* (1989) 211 Cal.App.3d 1346, 1355. Words in a statute are to be construed in context, mindful of the nature and purpose of the statute where they appear. *DuBois v. Workers’ Comp. Appeals Bd.* (1993) 5 Cal.4th 382, 388. “The construction [of section 1720] is not to be reached by examining bits and pieces of the statute, but after a consideration of all parts of section 1720 in order that we may effectuate the Legislature’s intent.” *State Building and Construction Trades Council of California v. Duncan* (2008) 162 Cal.App.4th 289, 310.

With these rules of statutory construction in mind, a properly narrow reading of subdivision (c)(6)(E) does not support the notion that subdivision (b), which defines the phrase “paid for in whole or in part out of public funds” in six subparts, may be shoehorned into subdivision (c)(6)(E) to broaden the exemption beyond the single type of public funding specified therein. The subdivision (c)(6)(E) exemption is plainly limited to projects in which the public funding is “in the form of below-market interest rate loans.” The other types of public subsidies found in subdivision (b)(4) (including paid, reduced, waived or forgiven loans as well as other types of payments and transactions involving fees, costs, rents, premiums and interest rates) were clearly not

⁹April 18, 2009 letter from attorneys for HPI and HACSB, p. 19.

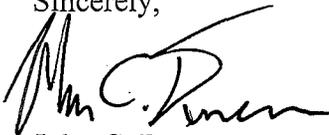
contemplated within the scope of the subdivision (c)(6)(E) exemption. If all of subdivision (b)(4), let alone all of subdivision (b), were imported wholesale into subdivision (c)(6)(E), the result would be impossible to square with the precise language of the exemption limiting its applicability to below-market interest rate loans. For this reason, the proposition that subdivision (c)(6)(E) can be read to exempt a project in which the public funding includes anything other than below-market interest rate loans must be rejected.

The parties' other argument that the term "private funds" in subdivision (c)(4) can encompass public funds if those public funds qualify a project for one of the other exemptions, such as the one found in subdivision (c)(6)(E), is similarly unpersuasive. Subdivision (c)(5)'s exemption concerning certain tax credits is the only place in all of subdivision (c) where a funding source is clearly taken out of the definition of "paid for in whole or in part out of public funds."¹⁰ With that single (and now obsolete) exception, the exemptions conferred in subdivision (c) are all directed toward *projects*. They exempt eligible projects from the application of prevailing wages; they do not exempt public funding mechanisms from the definition of "paid for in whole or in part out of public funds." In other words, subdivision (c) does not change or modify the phrase "paid for in whole or in part out of public funds." Rather, the exemptions in subdivision (c) operate "*notwithstanding*" the fact that projects subject to the exemptions are paid for in whole or in part out of public funds. (Subd. (c) [emphasis supplied].) For this reason, any interpretation of the statutory scheme that re-characterizes public funds as private funds in order to expand an exemption beyond its plain meaning must also be rejected.

For the foregoing reasons, the Project is paid for in whole or in part out of public funds, no exemption applies, and the Project is subject to the prevailing wage requirements of the Labor Code.

I hope this determination satisfactorily answers your inquiry.

Sincerely,



John C. Duncan
Director

¹⁰The subdivision (c)(5) exemption refers to the California Manufacturers' Investment Credit in Revenue and Taxation Code sections 17053.49 and 23649, which has been repealed by its own terms and not reenacted.