STATE OF CALIFORNIA EDMUND G. BROWN JR., *Governor*

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RE: Public Works Case No. 2013-024
South Gate Senior Villas
City of South Gate

Dear Interested Parties:

This constitutes the determination of the Director of Industrial Relations regarding the 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 the South Gate Senior Villas in the City of South Gate (Project) is a public work subject to both state and federal prevailing wage requirements.

Facts

South Gate Senior Villas, L.P. (Developer), owns the existing South Gate Senior Villas mixed-use residential/commercial project (Existing Project) located at 9927 San Antonio Avenue, South Gate, California. Developer has requested that the California Department of Industrial Relations (DIR) issue a prevailing wage coverage determination with respect to a 4-unit addition (Project Addition) to the Existing Project that was recently approved by the City of South Gate (City) and Developer.

The Existing Project is a mixed-use project consisting of 75 residential apartment units and approximately 17,408 square feet of commercial space. Pursuant to a Regulatory Agreement and Declaration of Covenants and Restrictions (as amended) entered into between City's former

Community Development Commission and Developer and recorded against the Project Site in 1998 (amended in 2009), 74 of the 75 apartment units (all except the 1 on-site manager's unit) are restricted for rental to lower income seniors at affordable rents.

On June 25, 2013, the City Council approved and the City and Developer entered into an Affordable Housing Agreement (Project Addition Agreement). The Project Addition Agreement provides for the following: (1) City will loan to Developer the sum of Three Hundred Forty Thousand Dollars ($340,000) in federal HOME Investment Partnerships Program (HOME) funds received by the City[1]; (2) Developer will utilize the HOME funds and private funds to construct the Project Addition (the total Project Addition Budget is $431,100); (3) Developer will execute a promissory note in favor of City in the amount of the City's HOME fund loan (Project Addition Promissory Note), and the Project Addition Promissory Note will be secured by a deed of trust executed in City's favor and recorded against the Project Site (the Project Addition Deed of Trust); and (4) Developer will also execute in favor of the City and record against the Project Site a Project Addition Regulatory Agreement and Declaration of Covenants and Restrictions (Project Addition Regulatory Agreement) memorializing Developer's obligation to restrict occupancy of all 4 units in the Project Addition to lower income seniors at affordable rent for a minimum of twenty-five years.

Under the Project Addition Promissory Note, the maturity date on the HOME Fund loan to be provided by the City is December 1, 2097. No interest or principal accrues on the City's $340,000 loan unless Developer fails to timely make any installment payment due, in which case the applicable interest rate is the lesser of 7% per annum or the maximum legal rate from the delinquency date through the date of payment. Developer is required to make annual installment payments on the Project Addition Promissory Note in amounts that will fully pay off the City's loan by the maturity date. Developer is given a full credit, however, against each annual installment payment if Developer is not in default of its obligations under the Project Addition Agreement, the Project Addition Promissory Note, the Project Addition Deed of Trust, and the Project Addition Regulatory Agreement on the payment due date.[2] Finally, Developer is permitted to prepay all or any portion of the outstanding loan balance under the Project Addition Promissory Note at any time prior to the maturity date.

Discussion

Labor Code section 1771[3] generally requires the payment of prevailing wages to workers employed on public works. Section 1720, subdivision (a)(1),[4] defines "public works" to mean

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[1] The HOME Investment Partnerships Program was established under Title II of the 1990 Cranston-Gonzalez National Affordable Housing Act and provides block grants to states and local public entities to increase affordable housing.

[2] The actual language used in the Project Addition Promissory Note states in relevant part "each of the annual installment payments due from Borrower hereunder shall be fully and ***irrevocably forgiven and excused*** (or Borrower shall be deemed to have been given a full credit against such payment(s) unless, on the applicable payment date(s), Borrower has committed a material default of its obligations . . ." (Id. at p. 2, emphasis added.)

[3] All subsequent references are to the Labor Code unless otherwise specified.

[4] Subsequent subdivision references are to section 1720.

"[c]onstruction, alteration, demolition, installation, or repair work done under contract and paid for in whole or in part out of public funds...." Subdivision (b) defines public funds in relevant part as follows:

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 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.
> (5) Money loaned by the state or political subdivision that is to be repaid on a contingent basis.
> (6) Credits that are applied by the state or political subdivision against repayment obligations to the state or political subdivision.

Title 8, California Code of Regulations § 16001(b) states: "[f]ederally Funded or Assisted Projects. The application of state prevailing wage rates when higher is required whenever federally funded or assisted projects are controlled or carried out by California awarding bodies of any sort."

Developer acknowledges that the Project Addition to be undertaken pursuant to the Project Addition Agreement constitutes "construction, alteration, [or] installation work done under contract and paid for in whole or in part out of public funds" within the meaning of Labor Code sections1720(a)(l) and 1720(b)(4), (5), and (6) and, therefore, such work constitutes a "public work" within the meaning of California's prevailing wage law.

Developer contends, however, that the Project Addition falls within two exemptions to prevailing wage rules set forth in the Labor Code: (1) the exemption in § 1720(c)(1), which applies to "[p]rivate residential projects built on private property ... unless the projects are built pursuant to an agreement with a state agency, redevelopment agency, or local public housing authority"; and (2) the exemption in § 1720(c)(6), which states in pertinent part that "[u]nless 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 financing 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."

A. Labor Code§ 1720(c)(l).

Contrary to Developers contention the Project Addition is a not private residential project that will be built on private property as that term is used in subdivision (c)(1). The Project Addition will be built pursuant to an agreement with the City of South Gate, which is a California general law city.

The City is not a state agency, redevelopment agency[5], or public housing authority.[6] While cities are not included in subdivision (c)(1) that does not prevent application of subdivisions of section 1720(b) from applying to this project. Subdivision (c)(1) gives no indication that it applies to projects that are at least partially publicly funded and it would be improper to read such language into a statute designed to benefit and protect employees on public works projects. (See *Lusardi Construction Company v. Aubry* (1992) 1 Cal.4th 976.[7]) Other parts of section 1720 apply to publicly financed projects.[8] Developer concedes the work on this project falls within the meaning of Labor Code sections 1720(a)(l) and 1720(b)(4), (5), and (6). The exemption set forth in section 1720(c)(l) does not apply to the Project Addition because the project is receiving a public subsidy within the meaning of subdivision (b) of section 1720.

B. Labor Code section 1720(c)(6)(E).

There is no dispute that the Project Addition meets the occupancy and low income requirements of subdivision (c)(6)(E). City's financial participation in the Project Addition is, however, not solely a below-market interest rate loan. In this regard, City's $340,000 contribution to Project Addition costs is not a "loan" as that term is normally interpreted. As set forth in the Project Addition Promissory Note the principal "shall be fully and ***irrevocably forgiven and excused*** (or Borrower

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[5] Since February 1, 2012, all redevelopment agencies in the State of California have been dissolved and have ceased to exist-see in this regard California Health & Safety Code §§ 34172(a) and *Community Redevelopment Association v. Matosantos* (2011) 53 Cal.4th 231,274-275 [extending dissolution date from October 1, 2011, to February 1, 2012]).

[6] See Health & Safety Code § 34240 *et seq.*, 34310, and 34311 [providing for creation of housing authorities, which are separate public bodies from the city];*People v. Holtzendorff* (1960) 177 Cal.App.2d 788 [housing authority is created as a state agency, a public body corporate and political not an agency of the city in which it functions].

[7] As explained in Lusardi:

> The overall purpose of the prevailing wage law, as noted earlier, 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. . . (*Id.* at p. 843.)

[8] As explained in *Goodman v. Lozano* (2010) 47 Cal.4th 1327. 1332.):

> In interpreting a statute, our primary goal is to determine and give effect to the underlying purpose of the law. "Our first step is to scrutinize the actual words of the statute, giving them a plain and commonsense meaning." " 'If the words of the statute are clear, the court should not add to or alter them to accomplish a purpose that does not appear on the face of the a statute or from its legislative history.' " In other words, we are not free to "give words an effect different from the plain and direct import of the terms used." However, " 'the "plain meaning" rule does not prohibit a court from determining whether the literal meaning of a statute comports with its purpose or whether such a construction of one provision is consistent with other provisions of the statute.' " (Citations omitted.)

shall be deemed to have been given a full credit against such payment(s)) as long as the loan in not in default."[9]

As noted in Public Works Case No. 2009-010, Vista Del Sol Senior Housing Complex, City of Redlands (April 23, 2010, Decision on Administrative Appeal at pp. 2-3; see also November 2, 2009, initial decision at p. 5), "the words of a statute themselves provide the most reliable indicator" of the Legislature's intent and "if the language is clear and unambiguous, it is not necessary to resort to other indicia of the intent of the Legislature." Here, the Legislature clearly referred to a forgivable or contingent loan in multiple places in Labor Code § 1720(b) [10] as a form of loan but it did not expand or define the term "loan" in 1720(c)(6)(E) to include forgivable or contingent loans from the scope of that exemption from prevailing wage rules. If the Legislature had wanted to expand the scope of the § 1720(c)(6)(E) to include forgivable or contingent loans it was capable of making such an expansion if it wanted to do so. It did not. (See *State Building & Construction Trades Council of California v. Duncan* (2008) 162 Cal.App.4th 289, 306, quoting *Mcintosh v. Aubry* (1993) 14 Cal.App.4th 1576, 1588-1589, for the proposition that "[c]ourts will liberally construe prevailing wage statutes, but they cannot interfere where the Legislature has demonstrated the ability to make its intent clear and chosen not to act."[11]

The usual and ordinary meaning of the term "loan" is "a sum of money lent, often for a specified period and repayable with interest (Webster's New World Dictionary, 3rd ed. (1988), at p.792). Similarly, Black's Law Dictionary, 6th Ed, (1990) defines a loan to be "delivery by one party to and receipt by another party a sum of money upon agreement, express or implied, to repay it with

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[9] The loan provides for no payment of interest as long as Developer fully complies with the terms of the Project Addition Agreement, the Project Addition Promissory Note, the Project Addition Deed of Trust, and the Project Addition Regulatory Agreement. For purposes of subdivision (c)(6)(E), no interest is indistinguishable from low interest.

[10] In another coverage determination, DIR has referred to forgivable and contingent loans similar to the loan the City will provide to Developer as a form of loan for purposes of the prevailing wage laws subject to prevailing wage requirements. See Public Works Case No. 2012-037, Cinema West Movie Theater and Related Facilities, City of Hesperia, March 8, 2013, pp. 3-4 (loans forgiven at end of 10 years if theater is operated for that entire period characterized as "forgivable loans" and loans "to be repaid on a contingent basis").

[11] *As noted in Housing Partners I, Inc. v. Duncan* (2012) 206 Cal.App.4th 1335, 1346:

> Although we understand the public policy appeal of HPI's position, it does not comport with the express language of the statute, which states nothing about a project being partly financed by public loans at below-market interest rates in combination with other financing. Had that been the legislative intent, it could have been accomplished much more easily, without requiring the circuitous interpolations to arrive at the statute's meaning as suggested by HCI's analysis. The Legislature could have drafted section 1720, subdivision (c)(6)(E) similarly to subdivision (c)(4) so that an exemption from the prevailing wage law would apply to projects financed solely by low-interest public loans or by a combination of low-interest public loans and another kind of funding. The fact that the Legislature did not draft section 1720, subdivision (c)(6)(E) like subdivision (c)(4) "tips the scales." This court may not alter the words of a statute to change its meaning. The project did not qualify for an exemption under section 1720, subdivision (c)(6)(E). (Citations omitted.)

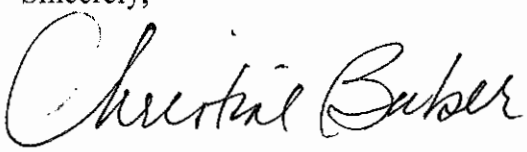
or without interest." (Id. at p. 936.)[12] Here, the Project Addition Promissory Note itself states that the principal "shall be fully and ***irrevocably forgiven and excused"*** so it is not a loan as dictionaries define the term.

Developer contends that excluding forgivable or contingent loans from the scope of subdivision (c)(6)(E) results in an arbitrary and capricious distinction that serves no legitimate public policy. It is not within DIR's discretion to refashion the plain terms of a statute to effectuate a policy not set forth by the Legislature.[13] Section 1720(c)(6)(E) does not apply to the Project Addition because the project is receiving a public subsidy other than a low-interest loan within the meaning of subdivision (b) of section 1720.

For the foregoing reasons, the Project is a public work subject to the prevailing wage requirements of the Labor Code.

I hope this determination satisfactorily answers your inquiry.

Sincerely,



Christine Baker
Director

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[12] Dictionary definitions are commonly used to interpret the plain meaning of prevailing wage statutes. (See *City of Long Beach v. Department of Industrial Relations* (2004) 34 Cal.4th 942, 951; *McIntosh v. Aubry* (1993) 14 Cal.App.4th 1576, 1588.

[13] As also noted in *Housing Partners I, Inc. v. Duncan, supra,* at pp. 1346-47:

> HPI invokes public policy supporting affordable housing as another reason to read the two subdivisions together. By exempting certain narrow categories of affordable housing projects from the prevailing wage law, the Legislature has already balanced the public policy favoring the payment of prevailing wages on public works projects against the public policy favoring the construction of affordable housing. In considering the adverse impact of extending the prevailing wage law, thereby reducing the willingness of developers to expand the stock of low-income housing, another court commented: "These are issues of high public policy. To choose between them, or to strike a balance between them, is the essential function of the Legislature, not a court. 'Our role is confined to ascertaining what the Legislature has actually done, not assaying whether sound policy might support a different rule.'" (*State Building & Construction Trades Council of California v. Duncan, supra,* 162 Cal.App.4th at p. 324, 76 Cal.Rptr.3d 507.) Like the Director, we decline to usurp the Legislature's treatment of these competing interests.