STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS
OFFICE OF THE DIRECTOR
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Arnold Schwarzenegger, *Governor*

October 25, 2007

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Re: Public Works Case No. 2005-038
Rosedale Project
City of Azusa

Dear Mr. Carroll:

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 development of the Monrovia Nursery Company ("MNC") property, pursuant to the Monrovia Specific Plan and Project ("Rosedale Project" or "Project") is a public work. In this case, however, the requirement to pay prevailing wages is restricted to the construction of the public facilities and infrastructure improvements (jointly referred to as "Public Facilities").

Facts

The Project is a mixed-use development situated on a 517.5 acre site previously owned by MNC in the City of Azusa ("City"). The Project, referred to by the interested parties as the Rosedale Project, envisions the creation of a master planned community including up to 1,575 dwelling units, 50,000 square feet of commercial uses, parks and open space, a school, a fire station and a light rail transit center consisting of a train station and transit-oriented development. Utility and other infrastructure improvements are also proposed.

On May 4, 2004, the City Council passed Ordinance No. 04-I-B authorizing City to execute a development agreement with MNC regarding the Project. Attached to the ordinance is a copy of the proposed agreement including Exhibit C, which sets forth the conditions of approval for the Project, including construction of the Public Facilities. On May 27, 2004, City and City of Azusa Light and Water Department (jointly referred to as "City/Department") and MNC entered into the development agreement approved by the City Council ("Agreement"). Subsequently, Azusa Land Partners, LLC[1] ("Developer") succeeded to the legal interests of MNC under the Agreement.

To facilitate the Project, City/Department sold property known as the Heth Reservoir property ("Heth") to Developer for $475,000. Prior to sale, City/Department and Developer jointly selected

[1]Azusa Land Partners, LLC is a partnership of PLC Land Co., Fieldstone Homes and two equity partners named Rockpoint Group and Starwood Capital.

R.P. Laurain & Associates,[2] a professional real estate appraisal firm, to appraise the fair market value of Heth. The highest and best use of Heth was determined to be low density residential development. The fair market value of Heth at that use was determined to be $475,000.

On August 1, 2005, City/Department and Developer entered into a Funding and Acquisition Agreement ("FAA"). The purpose of the FAA is to provide for the funding of the Public Facilities. Under both the Agreement and FAA, a Community Facilities District ("CFD") is to be established as the funding mechanism pursuant to the Mello-Roos Community Facilities Act of 1982, Government Code section 53311 et seq. ("Mello-Roos Act").[3] The Public Facilities include:

- Azusa Unified School District K-8 school and adjoining park area;
- Metropolitan Transportation Authority freight undercrossings;
- Sanitation District facilities; and
- City of Glendora and City of Azusa backbone and in-tract street, bridge, storm drain, sewer, water/reservoir, dry utilities, park and landscaping improvements.

Pursuant to the Agreement, the local public entities listed above are to assume responsibility for the ownership, operation and maintenance of the completed Public Facilities. Under the FAA, the purchase price for each facility shall be equal to the "actual cost" of construction.

The Environmental Impact Report ("EIR") and Traffic Impact Analysis Report studied the transportation/circulation improvements necessary to alleviate the Project's impact on traffic flow and determined the total traffic impact fee for these improvements to be $1,132,500. While Developer's share of cost was only $384,715, Developer paid the total traffic impact fee of $1,132,500.

The Project is anticipated to cost over $456 million. An estimated $57 million in CFD bond funds are allocated to reimburse Developer for its costs in constructing the Public Facilities.

Discussion

Labor Code section 1720(a)(1)[4] generally 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 ... ." Section 1720(b) defines "paid for in whole or in part out of public funds" to include the following: "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

[2]Ronald P. Laurain is an Accredited Senior Appraiser. He is state certified and has several professional industry designations from the Appraisal Institute.

[3]On June 5, 2006, Resolution No. 06-C39 was adopted by the City Council establishing CFD No. 2005-1 (Rosedale). Also on June 5, 2006, Resolution No. 06-C42 was adopted declaring the results of the consolidated special elections approving the bonded indebtedness to be incurred by CFD No. 2005-1 and authorizing the City Clerk to record a notice of special tax lien on the property within the CFD.

[4]All section references are to the Labor Code, unless otherwise provided.

developer" (§ 1720(b)(1)); a "[t]ransfer by the state or political subdivision of an asset of value for less than fair market price" (§ 1720(b)(3)); and "fees ... 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" (§ 1720(b)(4)). Lastly, section 1720(c)(2), sets forth the following exemption:

> (c) Notwithstanding subdivision (b): ....
>
> (2) If the state or a political subdivision requires a private developer to perform construction, alteration, demolition, installation, or repair work on a public work of improvement as a condition of regulatory approval of an otherwise private development project, and the state or political subdivision contributes no more money, or the equivalent of money, to the overall project than is required to perform this public improvement work, and the state or political subdivision maintains no proprietary interest in the overall project, then only the public improvement work shall thereby become subject to this chapter.

The Project entails construction done under contract. The issues are whether the Project is paid for, in whole or in part, out of public funds as defined by section 1720(b) and, if so, whether the exemption set forth in section 1720(c)(2) applies.

There are three potential sources of public funds payments. The first source is the CFD bond funds issued pursuant to the Mello-Roos Act. The Mello-Roos Act is referred to throughout the statutory scheme as a public financing mechanism. See, e.g., Gov. Code §§ 53311.5 and 53313.5. The Mello-Roos Act authorizes the formation of a CFD[5] and gives the CFD timely access to financing through the sale of bonds. The bond proceeds are used by the CFD to fund public works of improvement.

Developer argues that CFD bond funds are not public funds by analogizing them to conduit bond funds. The conduit bond financing mechanism was discussed at length in PW 2004-016, *Rancho Santa Fe Village Senior Affordable Housing Project* (February 25, 2005) ("*Rancho Santa Fe*"). Briefly stated, in the conduit bond context, because the issuer assigns all of its rights to a bond trustee, the issuer never has possession of either the bond proceeds or the loan repayments. Conduit bond financing does not involve a payment of public funds because the money does not flow into or out of public coffers. That is not the case here. The CFD controls issuance of the Mello-Roos bonds and disbursement of the proceeds. Additionally, the Mello-Roos bond indebtedness is not being assigned to or assumed by Developer. Rather, it will be paid by taxes levied on property owners within the CFD, and the taxes will be collected by the CFD through the County. As such, the CFD bond funds constitute public funds within the meaning of section 1720(b)(1), which defines "paid for in whole or in part out of public funds" to include the payment of money by the state or political subdivision to a developer.

[5]As defined by Government Code section 53317, a CFD is a "legally constituted governmental entity established pursuant to this chapter for the sole purpose of financing facilities and services."

The second potential source of public funds payment is the purchase of Heth by Developer from City/Department for $475,000. Section 1720(b)(3) defines payment of "public funds" to include a "[t]ransfer by the state or political subdivision of an asset of value for less than fair market price." R.P. Laurain & Associates, an independent professional appraisal firm, determined the highest and best use of Heth to be low density residential development and its fair market value at that use to be $475,000. The Director has consistently found fair market value to be synonymous with fair market price. See, e.g., PW 2003-040, *Sierra Business Park/City of Fontana* (January 23, 2004). Here, there is no evidence to suggest that City/Department transferred Heth for less than fair market price. As such, it is presumed that the transfer of Heth is for fair market price and therefore is not a payment out of public funds within the meaning of section 1720(b)(3).

Finally, the third potential source of public funds payment concerns the traffic impact fees. Section 1720(b)(4) defines payment of public funds to include "fees" that are normally 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. Here, Developer paid the traffic impact fee of $1,132,500 in full even though its share of cost was only $384,715. As such, the fee is not paid, reduced, charged at less than fair market value, waived or forgiven and therefore is not a payment out of public funds within the meaning of section 1720(b)(4).

In sum, the Project is paid for in part out of public funds in the form of approximately $57 million in CFD bond funds and therefore meets the definition of a public work under section 1720(a)(1). The next issue is whether the Project falls within the exemption set forth in section 1720(c)(2).

The Project must satisfy the following requirements to qualify for the exemption in section 1720(c)(2). First, the Public Facilities must be required as a condition of regulatory approval; second, the Project must be an otherwise private development; third, City must not contribute more money, or the equivalent of money, to the overall Project than is required to construct the Public Facilities; and fourth, City must not maintain a proprietary interest in the overall Project.

Here, the elements of section 1720(c)(2) are met because City required Developer to construct the Public Facilities as a condition of City's regulatory approval of the Project. The Project is an otherwise private development. CFD bond funds are used just to pay for the cost of constructing the Public Facilities. City and other local public entities will own, operate and maintain only the Public Facilities, but City will have no proprietary interest in the overall Project. Accordingly, the Project falls within the section 1720(c)(2) exemption and prevailing wages need only be paid for the construction of the Public Facilities.[6]

Southern California Labor/Management Operating Engineers Contract Compliance Committee ("Operating Engineers") contends that the Project does not meet the first two elements of the

[6]Developer asserts that CFD bond funds may or may not cover the total cost of constructing the Public Facilities and argues that only those individual facilities receiving such funds are subject to coverage. Developer's argument is without merit. As discussed above, the CFD bond funds are public funds and section 1720(c)(2) only requires that City contribute no *more* money than is required to construct the public works of improvement. Accordingly, the Public Facilities, which constitute the public works of improvement Developer was required to build as a condition of regulatory approval of the Project, are subject to prevailing wage requirements within the meaning of the section 1720(c)(2) exemption.

exemption. They contend that the Public Facilities are not required as a condition of regulatory approval and the Project is not an otherwise private development project.

First, regarding the "condition of regulatory approval" element of the section 1720(c)(2) exemption, Operating Engineers contends that section 1720(c)(2) is only available where a developer initiates a project, approaches the city and invokes the land use entitlement process. Land use entitlements are the public approvals that allow a project to proceed. Entitlements include public works of improvement for the project required of the developer by the city in order to obtain the city's approval of the project. Operating Engineers contends that when the entitlements are embodied in a development agreement under Government Code section 65864 et seq., they cannot be viewed as conditions of regulatory approval within the meaning of section 1720(c)(2).

The relevant Labor and Government Code sections do not support Operating Engineers' contention. The pertinent part of Government Code section 65864 concerning development agreements states as follows:

> The Legislature finds and declares that:
>
> (a) The lack of certainty in the approval of development projects can result in a waste of resources, escalate the cost of housing and other development to the consumer, and discourage investment in and commitment to comprehensive planning which would make maximum efficient utilization of resources at the least economic cost to the public.
>
> (b) Assurance to the applicant for a development project that upon approval of the project, the applicant may proceed with the project in accordance with existing policies, rules and regulations, and subject to conditions of approval, will strengthen the public planning process, encourage private participation in comprehensive planning, and reduce the economic costs of development.
>
> (c) The lack of public facilities, including, but not limited to, streets, sewerage, transportation, drinking water, school, and utility facilities, is a serious impediment to the development of new housing. Whenever possible, applicants and local governments may include provisions in agreements whereby applicants are reimbursed over time for financing public facilities.

Government Code section 65864(c) and section 1720(c)(2) are wholly consistent. Both sections refer to development projects that are subject to conditions of approval. The Government Code provides a mechanism for local governments to reimburse developers for the cost of constructing public facilities required for the development. The Labor Code provides that while the construction of the public facilities is subject to prevailing wage requirements, the otherwise privately paid for development is not.

Development agreements under Government Code section 65864 encourage private development, and strengthen the planning process, by providing assurances to both the developer and the public

entity that the development will not be sidelined by subsequent changes in policy, rules or regulations. Subdivision (b) of Government Code section 65864 specifically allows the public entity to include conditions of approval in the development agreement, as was done here. A 29-page document attached to the Agreement as Exhibit C sets forth the conditions of approval, including the specific requirements for the construction of the Public Facilities.

Per Government Code section 65867.5, a city's decision to enter into a development agreement concerning a proposed land use is a legislative act. Cities and counties regulate land use in exercise of their inherent police powers. Cal. Const., art. 11, § 7 ["A county or city may make and enforce within its limits all local, police, sanitary and other ordinances and regulations not in conflict with general laws"]; *Alameda County Land Use Association v. City of Hayward* (1995) 38 Cal.App.4th 1716, 1724. In *Santa Margarita Area Residents Together v. San Luis Obispo County* (2000) 84 Cal.App.4th 221, the court found that "[t]he County concluded that the zoning freeze in the [development] Agreement advances the public interest by preserving future options. This type of action by the County is more accurately described as a legitimate exercise of governmental police power in the public interest than as a surrender of police power to a special interest." *Id.* at p. 233. Government Code section 65850 is also instructive. It states in pertinent part that "the legislative body of any . . . city may . . . adopt ordinances that do any of the following: (1) Regulate the use of buildings, structures, and land ... ." As such, it is reasonable to conclude here that in passing Ordinance No. 04-I-B approving the Agreement, City was acting pursuant to its police powers to regulate land use and that the construction of the Public Facilities enumerated in Exhibit C to the Agreement was a condition of City's regulatory approval of the Project within the meaning of section 1720(c)(2).

Operating Engineers also asserts that a statement in the Agreement that City "could not legally require" certain things renders section 1720(c)(2) inapplicable. City might be without power to command Developer outright to construct, for example, the K-8 school. That does not mean that City could not *condition* its regulatory approval of the overall Project on construction of that school to meet the needs of the expanding community within the meaning of section 1720(c)(2).

Second, Operating Engineers contends that the Project is not an "otherwise private development" under section 1720(c)(2) because of City's involvement in initiating the Project and exercising, if necessary, its powers of eminent domain to facilitate the Project. Operating Engineers asserts that these facts suggest a "partnership" between City and Developer, relying on several passages from *Santa Margarita Area Residents Together v. San Luis Obispo County, supra,* 84 Cal.App.4th 221, which discuss the cooperation between private developers and public entities under the statutory scheme authorizing development agreements. Operating Engineers suggests that this type of cooperation negates the overall private nature of a development project. Operating Engineers' reliance on *Santa Margarita* is misplaced because section 1720(c)(2) does not differentiate between private development projects undertaken pursuant to a development agreement and those undertaken in a different manner. Section 1720(c)(2) does not draw a distinction between private development projects initiated by developers and those initiated by public entities, nor does it disqualify a project involving the exercise of eminent domain. Also, there is no indication that City has in fact used its powers of eminent domain. And, even if is has, for purposes of section 1720(c)(2), the only relevant considerations would be whether in exercising such power the City

retains a proprietary interest in the Project or contributes more money, or the equivalent of money, than is required to construct the Public Facilities.

Contrary to Operating Engineers' assertion, the facts do not support the existence of a partnership between City and Developer that would negate the otherwise private nature of the Project and render the exemption in section 1720(c)(2) inapplicable. City does not own the land to be developed. Aside from the Public Facilities, the Project is privately funded and, upon completion, will be privately owned. Mere encouragement and support of the overall Project by City does not, by itself, turn the Project into a public work.[7] As such, the record as a whole supports the finding that the Project is an "otherwise private development project" within the meaning of section 1720(c)(2).

Finally, unrelated to the elements or applicability of section 1720(c)(2), Operating Engineers argues that the Project in its entirety is subject to prevailing wages because it is a single, integrated and interdependent project, relying on *Santa Margarita Area Residents Together v. San Luis Obispo County, supra,* 84 Cal.App.4th 221 and a prior public works coverage determination, PW 2000-016, *Vineyard Creek Hotel and Conference Center, Redevelopment Agency, City of Santa Rosa* (October 16, 2000). It should be noted that *Vineyard Creek* pre-dates the enactment of section 1720(c)(2) and involves a wholly distinct set of facts. Further, while this matter was pending, the Department decided it would no longer designate public works coverage determinations as "precedential" under Government Code section 11425.60. Consequently, *Vineyard Creek* no longer has precedential effect. Public notice of the Department's decision to discontinue the use of precedent decisions can be found at http://www.dir.ca.gov/DLSR/09-06-2007(pwcd).pdf. Notwithstanding the Department's decision, *Vineyard Creek* is irrelevant because it does not address the sole issue raised by the facts here, which is whether this Project as a whole meets the elements of section 1720(c)(2). Here, the elements are met because City required Developer to construct the Public Facilities as a condition of City's approval of the Project in its exercise of regulatory authority over land use; apart from construction of the Public Facilities, the Project is an otherwise private development; City contributed no more money than is required to construct the Public Facilities; and City and other local public entities will own the Public Facilities but City will not maintain a proprietary interest in the overall Project. Consequently, by operation of section 1720(c)(2), only that portion of the Project encompassing the Public Facilities is subject to prevailing wage requirements. As discussed above, the analysis herein is consistent with prior public works coverage determinations interpreting the section 1720(c)(2) exemption and is not altered by the discussion in *Santa Margarita* about the relationship between public entities and developers under the statutory scheme authorizing development agreements.

For the foregoing reasons, the Project entails construction that is done under contract and is paid for in part with public funds in the form of CFD bonds. Under the facts of this case, however, the

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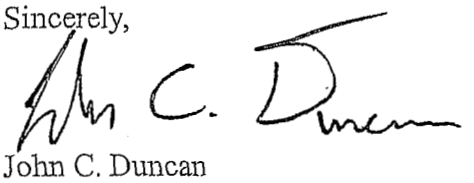
[7]The Department's prior public works coverage determinations have consistently found the exemption in section 1720(c)(2) to apply notwithstanding the fact that a city had either initiated or otherwise encouraged a private development project or had entered into an agreement with a developer. See PW 2002-099 (*Lowe's Home Improvement Center*)/PW 2002-100 (*Costco Retail Building) Pacheco Pass Retail Center, City of Gilroy* (July 10, 2003) [section 1720(c)(2) applied to project initiated by city]; PW 2003-040, *Sierra Business Park/City of Fontana* (January 23, 2004); [section 1720(c)(2) applied to project that was "part of a larger plan by the city... "].

Project falls within the section 1720(c)(2) exemption and prevailing wages need only be paid for the construction of the Public Facilities.

I hope this determination satisfactorily answers your inquiry.

Sincerely,



John C. Duncan
Director