

DEPARTMENT OF INDUSTRIAL RELATIONS
OFFICE OF THE DIRECTOR
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November 25, 2008

David H. Mann, Esq.
Leibold McClendon & Mann, P.C.
23422 Mill Creek Drive, Suite 105
Laguna Hills, CA 92653

Re: Public Works Case No. 2008-029
Atlantic Avenue Moderate Income Housing Development
Redevelopment Agency of the City of Long Beach

Dear Mr. Mann:

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 Atlantic Avenue Moderate Income Housing Development in the City of Long Beach ("Project") is not a public work subject to prevailing wage requirements.

Facts

The Project entails the construction of 48 affordable housing units for sale to moderate-income households. It encompasses 2.64 acres of real property on Atlantic Avenue ("Site") within the Downtown Long Beach Redevelopment Project Area in the City of Long Beach ("City"). The Project is being undertaken by Brookfield Atlantic Avenue LLC ("Developer") pursuant to a Disposition and Development Agreement ("DDA") entered into with the Long Beach Housing Development Company ("LBHDC"). LBHDC is a non-profit public benefit corporation¹ funded with monies from the Low- and Moderate-Income Housing Set-Aside Fund ("Set-Aside Fund"). The Set-Aside Fund was established by the Redevelopment Agency of the City of Long Beach under Health & Safety Code section 33334.3 for the purpose of increasing the supply of low-income and moderate-income housing. Pursuant to a Regulatory Agreement appended to the DDA, the units comprising the Project will be restricted to occupancy by moderate income households as verified by LBHDC for a period of 45 years from the date of purchase.

Title to the Site is presently held by LBHDC, which acquired the Site for approximately \$11.3 million drawn solely from the Set-Aside Fund. The DDA provides that LBDHC will convey the Site to Developer for a purchase price of \$1.00. Additionally, LBDHC will provide Developer with construction financing in the form of an interest-free loan in the amount of \$7.01 million. As with the acquisition cost, the construction loan is drawn solely from the Set-Aside Fund. Apart from the Set-Aside Fund monies, Developer is building the Project with privately-raised funds.

¹LBHDC was created by, and is acting as an agent of, City to promote, develop and preserve affordable housing for City residents. The governing board of LBHDC is appointed by the Mayor and is subject to confirmation by the City Council. City provides all staff and administrative support for LBDHC, which operates under bylaws approved by City. The DDA between Developer and LBDHC was "approved as to form" by a deputy City attorney.

Discussion

Labor Code section 1771² generally requires the payment of prevailing wages to workers employed on public works. Section 1720 (a) (1) 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" This Project clearly will entail construction work done under contract. At issue here is whether the Project is "paid for in whole or in part out of public funds." Section 1720 (b) provides:

(b) For purposes of this section, "payment 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.

(2) Performance of construction work by the state or political subdivision in execution of the Project.

(3) Transfer by the state or political subdivision of an asset of value for less than fair market price.

(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.

(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.

Section 1720 (c), however, provides that:

(c) Notwithstanding subdivision (b):

...
(4) The construction or rehabilitation of affordable housing units for low-income 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 3334.2 or

²Subsequent statutory references are to the Labor Code unless otherwise indicated.

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.

Health and Safety Code section 33334.2 requires certain tax revenues allocated to a redevelopment agency to be used "for the purposes of increasing, improving, and preserving the community's supply of low-income and moderate-income housing, available at affordable housing costs" Subdivision (e) of that section provides in pertinent part:

(e) In carrying out the purposes of this section, the agency may exercise any or all of its powers for the construction, rehabilitation, or preservation of affordable housing for extremely low, very low, low- and moderate-income persons or families, including the following:

(1) Acquire real property or building sites subject to Section 33334.16.

(2) (A) Improve real property or building sites with onsite or offsite improvements but only if both (i) the improvements are part of the new construction or rehabilitation of affordable housing units for low- or moderate-income persons that are directly benefited by the improvements, and are a reasonable and fundamental component of the housing units, and (ii) the Agency requires that the units remain available at affordable housing cost to, and occupied by, persons and families of extremely low, very low, low, or moderate income for the same time period and in the same manner as provided in subdivision (c) and paragraph (2) of subdivision (f) of section 33334.3.

...
(5) Construct buildings or structures.

...
Health and Safety Code section 33334.3 provides in part that:

(a) The funds that are required by section 33334.2 or section 33334.6 to be used for the purpose of increasing, improving, and preserving the community's supply of low-income and moderate-income housing shall be held in a separate Low and Moderate Income Housing Fund until used.

(b) Any interest earned by the Low and Moderate Income Housing Fund and any repayments or other income to the agency for loans, advances, or grants, of any kind from the Low and Moderate Income Housing Fund, shall accrue to and be deposited in, the fund and may only be used in the manner prescribed for the Low and Moderate Income Housing Fund.

(c) The moneys in the Low and Moderate Income Housing Fund shall be used to increase, improve, and preserve the supply of low-income and moderate-income housing within the territorial jurisdiction of the agency.

...
(f) (1) The requirements of this subdivision apply to all new or substantially rehabilitated housing units developed or otherwise assisted with moneys from the

Low and Moderate Income Housing Fund, pursuant to an agreement approved by an agency on or after January 1, 1988. Except to the extent that a longer period of time may be required by other provisions of law, the agency shall require that housing units subject to this subdivision shall remain available at affordable housing costs to, and occupied by, persons and families of low-income or moderate-income and very low income and extremely low income households for the longest feasible time, but not for less than the following periods of time:

...
(B) Forty-five years for owner-occupied units. ...

In analyzing the issue whether the project was paid for in whole or in part out of public funds under section 1720(b), LBHDC, acting in its capacity as agent for City, is deemed a political subdivision of the state. LBHDC provided Developer an interest-free construction loan in the amount of \$7.01 million and sold Developer the Site, which LBHDC had acquired for \$11.3 million, for a purchase price of \$1.00. Ordinarily, a no-interest loan from a political subdivision of the state to a developer would be considered a payment of public funds under section 1720(b)(4); and, the sale of real property by a political subdivision of the state for less than its fair market price would be considered a payment of public funds under section 1720(b)(3). Section 1720(c)(4), however, provides an exemption to the definition of "paid for in whole or in part out of public funds" set forth at section 1720(b). Under section 1720(c)(4), an affordable housing project is not treated as having been paid for with public funds where the public funds are monies from a Low- and Moderate-Income Housing Fund that has been established pursuant to the Health & Safety Code sections set forth above. Under Health & Safety Code section 33334.2, funding from a Low- and Moderate-Income Housing Fund may be allocated to property acquisition as well as construction.

Based on the specific facts of this case, the Project meets the conditions of the section 1720(c)(4) exemption, an exemption that by its terms applies to affordable housing projects. The Project encompasses the acquisition of the Site and the construction of affordable housing units for moderate-income persons. Property acquisition and construction are among the activities specifically authorized by Health & Safety Code section 33334.2(e) to increase the supply of affordable housing. The Project is being paid for by a combination of private funds and monies from the Set-Aside Fund, a Low- and Moderate-Income Housing Fund established pursuant to Health & Safety Code section 33334.3. As such, by operation of the exemption in section 1720(c)(4), the Project "does not constitute a project that is paid for in whole or in part out of public funds."

The facts and analysis of this case are similar to that of a prior public works coverage determination in PW 2004-003, *Cottage Homes Project, Bakersfield Redevelopment Agency* (October 12, 2004). In that case, the redevelopment agency used monies from its Low- and Moderate-Income Housing Fund to purchase a 7.4 acre parcel for the purpose of building an affordable housing project. The property was then purchased by the developer for \$1.00. With no other public funds being devoted to the project, it was determined that the exemption under section 1720(c)(4) applied.³


³See also PW 2006-002, *Affordable Senior Housing Project, City of Montebello* (March 22, 2006) [an affordable housing project funded with a grant from a Low- and Moderate-Income Housing Fund is not a public work despite the fact that the project included the construction of a privately-financed commercial building]; and PW 2006-005, *Central*

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For the foregoing reasons, the Project is not a public work subject to prevailing wage requirements.

I hope this determination satisfactorily answers your inquiry.

Sincerely,

A handwritten signature in black ink, appearing to read "John C. Duncan". The signature is fluid and cursive, with the first name "John" and last name "Duncan" clearly legible.

John C. Duncan
Director