

DEPARTMENT OF INDUSTRIAL RELATIONS

Office of the Director
455 Golden Gate Avenue, 10th Floor
San Francisco, CA 94102
Tel: (415) 703-5050 Fax: (415) 703-5059/8

MAILING ADDRESS:
P. O. Box 420603
San Francisco, CA 94142-0603



March 22, 2006

Jeffrey M Oderman, Esq.
Rutan & Tucker, LLP
611 Anton Blvd, 14th Floor
Costa Mesa, CA 92628-1950

Re: Public Works Case No. 2006-002
Affordable Senior Housing Project
City of Montebello

Dear Mr. Oderman:

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 Title 8, California Code of Regulations, 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 Affordable Senior Housing Project in the City of Montebello ("Project") is not a public work, and therefore is not subject to prevailing wage requirements.

The Project is to be developed by Montebello Downtown Plaza LLC, a California limited liability company ("MDP"). It will be a mixed use project consisting of 54 affordable rental units for senior citizens (plus one on-site manager's unit), approximately 25,000 square feet of retail commercial improvements and related parking and landscaping, to be located on approximately 2.49 acres of land at the corner of Whittier Boulevard and Cleveland Avenue in the City of Montebello ("Property"). Pursuant to a regulatory agreement, the residential units are restricted for a period of 99 years to occupancy by households earning no more than 80% of the area median income.

The estimated cost of the overall development is \$13,395,000, of which \$8,283,750 is attributable to the affordable residential units. The Project is to be privately financed, with the sole exception of a "loan"¹ from the Redevelopment Agency of the City of Montebello ("Agency"). The Amended and Restated Owner

¹ In PW 2000-043, 13th and F Street Townhouse Development, City of Sacramento (January 23, 2001), this Department recognized that: "Here, public funds are expended on a construction project in the form of an ostensible loan agreement that does not contemplate repayment. Such a transaction is no different in substance than an outright grant of public funds." As discussed below, the "loan" in this case is of a similar character.

Participation Agreement ("OPA") between MDP and the Agency provides for the Agency to loan to MDP \$6,250,000 of housing set-aside funds made available to the Agency pursuant to California Health & Safety Code sections 33334.2 and 33334.3. Paragraph 4 of the OPA provides in pertinent part that:

[T]he entire Agency Loan shall be allocated solely and exclusively to Eligible Project Costs directly attributable to the affordable housing units within the Project and not to the commercial portion of the overall Project. Agency and Participant agree that the Eligible Project Costs allocable to the affordable housing units exceed the amount of the Agency Loan, and upon Agency's written request delivered to Participant at any time no later than one (1) year after Agency's Release of Construction Covenants for the Project, Participant shall provide to Agency written proof that such in the case.

When the Project is completed, 54 housing units will be reserved for lower income senior citizens who will be required to pay no more than the applicable "affordable" rent for not less than 99 years. These affordability restrictions exceed the requirements set forth in Health & Safety Code sections 33334.2(e)(2) and 33334.3(c) and (f)(1)(A).

So long as MDP complies with its obligations to develop and maintain the affordable senior citizen rental units within the Project, no interest accrues on the Agency Loan and MDP is given a full credit against the annual principal payments otherwise due (in the sum of \$61,111.11). Thus, assuming MDP timely develops and thereafter maintains Project in accordance with the OPA, the Regulatory Agreement, and the Agency Deed of Trust for the full 99-year term, MDP would not be required to make any repayment of principal or interest. If MDP defaults, however, interest commences to accrue on the unpaid principal balance of the Agency loan, at the rate of 8% per annum or the maximum legal rate, whichever is less, and principal and interest payments become due and payable.

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, alternation, 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 Agency Loan makes the

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

Project "paid for in whole or in part out of public funds."
Section 1720(b) provides in pertinent part:

(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.

(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.

However, section 1720(c) 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 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.

Health & 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 and moderate income housing, available at affordable housing cost ..." 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:

...
(2) Improve real property or building sites with onsite or offsite improvements, but only if both (A) 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 (B) 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.

If the newly constructed or rehabilitated housing units are part of a larger project and the agency improves or pays for onsite or offsite improvements pursuant to the authority in this subdivision, the agency shall pay only a portion of the total cost of the onsite or offsite improvement. The maximum percentage of the total cost of the improvement paid for by the agency shall be determined by dividing the number of housing units that are affordable to low- or moderate-income persons by the total number of housing units, if the project is a housing project, or by dividing the cost of the affordable housing units by the total cost of the project, if the project is not a housing project.

...
(5) Construct buildings or structures.

...
(7) Rehabilitate buildings or structures.
...

Health & Safety Code section 33334.3 provides in part that:

(a) The funds that are required by Section 33334.2 or 33334.6 to be used for the purposes of increasing and improving the community's supply of low- 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- 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 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 cost to, and occupied by, persons and families of low or moderate income and very low income and extremely low income households for the longest feasible time, but for not less than the following periods of time:

(A) Fifty-five years for rental units. ...

This Department has previously determined that under section 1720(c)(4), where the only sources of funding for the construction of affordable housing units for low- or moderate-income persons are from a combination of private funds and funds from a Low- and Moderate-Income Housing Fund established under the requisite section of the Health and Safety Code, the project is not paid for with public funds. *PW 2004-003, Cottage Homes Project, Bakersfield Redevelopment Agency (October 12, 2004).*

This Project is being financed in the manner described in *PW 2004-003*. The question presented in this case is whether a different outcome is required because the Project includes a privately-financed commercial building. Paragraph 4 of the OPA requires that the Agency Loan "be allocated solely and exclusively to Eligible Project Costs directly attributable to the affordable housing units within the Project and not to the retail commercial portion of the overall project." This is consistent with the provisions of the Health & Safety Code quoted above, which restrict the use of low and moderate income housing funds to the purposes specified therein. See *Craig v. City of Poway* (1994) 28 Cal.App.4th 319; *Lancaster Redevelopment Agency v. Dibley* (1993) 20 Cal.App.4th 1656.

It is significant that Health & Safety Code section 33334.2(e)(2) contemplates the use of Low and Moderate Income Housing Fund moneys for the construction or rehabilitation of affordable housing units within mixed-use projects. That provision requires

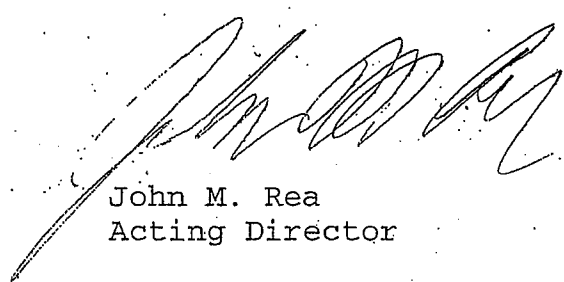
Letter to Jeffrey M. Oderman, Esq.
Re: Public Works Case No. 2006-002
Page 6

that for such projects: "The maximum percentage of the total cost of the improvement paid for by the agency shall be determined by ... dividing the cost of the affordable housing units by the total cost of the project ..."

Under section 1720(c)(4), monies from a Low and Moderate Income Housing Fund established pursuant to the Health & Safety Code do not constitute public funds when they are used for the construction or rehabilitation of affordable housing units as authorized therein. Here such monies are being used solely for the construction of affordable housing units; there is no other source of public funds involved and construction of the commercial building is being financed with purely private funds. Accordingly, under the specific facts of this case, the Project falls within the exemption set forth in section 1720(c)(4).³

For the foregoing reasons, the Project is not a public work subject to prevailing wage requirements. I hope this letter satisfactorily responds to your inquiry.

Sincerely,



John M. Rea
Acting Director

³ It is therefore unnecessary to address MDP's alternative contention that the Project is exempt under section 1720(c)(6)(E). It should be noted that MDP contends that the applicability of section 1720(c)(4) is strongly supported by *Greystone Homes, Inc. v. Cake* (2005) 104 Cal.App.4th _____. Notwithstanding the conclusion herein that section 1720(c)(4) applies, the holding in *Greystone* is not applicable to the facts of this case. *Greystone* involved the use of public funds for reimbursement of land acquisition costs, an issue not present in this case, prior to the substantial revision of section 1720 beginning with enactment of SB 975 in 2001. *Greystone* thus construed and applied a version of section 1720 that is no longer in effect. As that version did not include the present language of section 1720(c)(4), *Greystone* cannot be relied upon in construing that language.