

FEB 26 2002

Div. of Labor Statistics & Research  
Claim's Office

## DECISION ON ADMINISTRATIVE APPEAL

RE: PUBLIC WORKS CASE NO. 99-079

HILTON GRAND COAST RESORT DEVELOPMENT<sup>1</sup>

HUNTINGTON BEACH REDEVELOPMENT AGENCY

I. INTRODUCTION AND PROCEDURAL HISTORY

On November 23, 1999, Southern California Labor/Management Operating Engineers Contract Compliance ("Requesting Party") requested a public works coverage determination for the above-referenced development, which is situated on a 44-acre parcel at the corner of Beach Blvd. and Pacific Coast Highway in Huntington Beach. On November 30, 2000, the Director determined that the development was covered under Labor Code section 1720(a). The development entails (1) a 517-room resort hotel and conference center ("Resort Hotel"); (2) approximately 120 residential units; and (3) an additional hotel, all to be constructed on land owned by the Huntington Beach Redevelopment Agency ("Agency") and leased or sold to Mayer Financial, L.P. ("Developer"). The development also entails certain off-site improvements. Public funds have been or will be spent on the public improvements and certain other items specified in a "Schedule of Feasibility Gap Payments."

<sup>1</sup> The development was originally known as the Hilton Grand Coast Resort Development. However, Hyatt has since replaced Hilton as the hotel operator.

Both Agency and Developer timely appealed the determination. Both challenged the legal reasoning of the determination and asserted that changed facts under their February 5, 2001 "Second Implementation Agreement" should cause a different result.

## II. ISSUES TO BE DECIDED

### Contentions on Appeal

Agency makes the following arguments:<sup>2</sup>

1. California Redevelopment Law governs all redevelopment activities of Agency, including payment of prevailing wages;

2. The phrase "under contract" in Labor Code section 1720(a) refers to a contract directly let to an individual contractor for performance of specific construction, alteration, demolition, or repair work.

Developer incorporates by reference Agency's arguments, and additionally contends that:

1. The purposes underlying California's prevailing wage laws would be violated by classifying the Resort Hotel and residential developments as public works;

2. The expenditure of a minimal amount of public funds to prepare publicly owned land for disposition to a private developer for private development purposes does not convert that subsequent private development into a public work;

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<sup>2</sup> Agency's arguments are paraphrased herein for purposes of brevity.

3. The criteria used by the Department in determining that the development is a single public works project are without legal authority;

4. The expenditure of public funds on off-site public improvements that are constructed in conjunction with an adjacent private development project does not convert the private project into a "public work" for purposes of the prevailing wage law.

The requesting party did not submit a response to the appeals.

#### Conclusions on Appeal

1. The Health and Safety Code's prevailing wage requirements do not render the provisions of the Labor Code inapplicable to redevelopment projects.

2. Under Labor Code section 1720(a), a construction project done under contract and paid for in whole or in part out of public funds is a public work, irrespective of whether a public entity is a party to a "construction contract."

3. Classification of this development as public works is consistent with the purposes of prevailing wage laws.

4. Payment of any amount of public funds to subsidize construction under contract is sufficient to satisfy the definition of public works under Labor Code section 1720(a).

5. The criteria used by the Department in determining that the development is a single public works project are appropriate and consistent with the prevailing wage law.

6. Where the facts justify treatment of private construction and adjacent publicly-funded off-site improvements as a single project, prevailing wages must be paid for the entire project.

### III. FACTS

The history of the project and the relevant facts are discussed at length in the initial determination, and that discussion is incorporated by reference here. The following new information was submitted on administrative appeal.

On February 5, 2001, Agency and Developer entered into a "Second Implementation Agreement to Amended and Restated Disposition and Development Agreement" ("SIA"). This agreement changed some of the details of the deal, in response partly to the initial determination, and partly to a controversy before the Coastal Commission with regard to a two-thirds acre "Degraded Wetland Area" within Parcel B. The SIA provides for this area to be deeded back to Agency, with a reduction to 120 of the minimum number of housing units to be built. This eliminated the need for the Shipley Nature Center wetlands mitigation, one of the items for which Developer was formerly entitled to Feasibility Gap payments.

An amended Schedule of Feasibility Gap Payments attached to the SIA as Attachment No. 8 contains a number of changes from the original schedule. The reference to the Shipley Nature Center wetlands mitigation was deleted in its entirety. The reference to the implementation of the Driftwood Agreement was amended to specify only "acquisition of Mobilehomes and payment to the former owners and occupants of the Driftwood Mobilehome Park pursuant to the

Driftwood Agreement." Several other provisions of the schedule were amended to limit to public rights-of-way reimbursed costs for construction, demolition and alteration work. Additionally, the amended schedule contains the following provision:

(3) In no event shall Developer be entitled to payment or reimbursement from Agency for any "construction, alteration, demolition, or repair work" (as said phrase is defined in Labor Code section 1720(a) other than for those certain public facilities and improvements identified in subparagraphs (1) and (2) above which are to be constructed and installed by Developer within dedicated public rights-of-way.

#### IV. DISCUSSION

1. The Health and Safety Code's Prevailing Wage Requirements Do Not Render the Provisions of the Labor Code Inapplicable to Redevelopment Projects.

Health and Safety Code section 33423 provides that:

Before awarding any contract for such [demolition, clearance, project improvement and site preparation] work to be done in a project, the agency shall ascertain the general prevailing rate of per diem wages in the locality in which the work is to be performed, for each craft or type of workman needed to execute the contract or work, and shall specify in the call for bids for the contract and in the contract such rate and the general prevailing rate for regular holiday and overtime work in the locality, for each craft or type of workman needed to execute the contract.

Agency previously contended that this language, which requires prevailing wages only when an agency itself awards a contract, governs redevelopment agencies to the exclusion of the prevailing wage requirements of the Labor Code. On appeal, Agency simply argues that the above provision is limited in scope, without

expressly arguing that the Labor Code is inapplicable.<sup>3</sup> The argument necessarily implies, however, that the only prevailing wage requirements applicable to redevelopment projects are those found in the Health and Safety Code.

For the reasons stated in the initial determination (incorporated by reference herein), the prevailing wage requirements of the Labor Code may apply to redevelopment projects irrespective of whether the redevelopment agency awards the construction contract. This result is consistent with Precedential Decision on Administrative Appeal, Public Works Case No. 2000-15, Downtown Redevelopment Plan Projects, City of Vacaville, March 22, 2001.<sup>4</sup>

2. Under Labor Code Section 1720(a), A Construction Project Done Under Contract and Paid for In Whole or In Part Out of Public Funds is a Public Work, Irrespective of Whether a Public Entity is a Party to a "Construction Contract."

Agency argues at length that under section 1720(a), the term "public works" is limited to work done under a contract awarded by a public agency to a contractor for construction, alteration, demolition or repair work. Agency argues, *inter alia*, that the plain language of the statute so limits the meaning of the term. Agency's asserted limitation is found nowhere in the text of the statute. The Department has long held that section 1720(a) is not

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<sup>3</sup> In a separate but related argument, Agency contends that even if the prevailing wage provisions of the Labor Code apply to some redevelopment activities, they do not apply to the construction of the Resort Hotel, because it cannot be constructed by the Agency under the Health and Safety Code. (Agency appeal, pp. 7-9.) This argument erroneously assumes that the Labor Code provisions are limited to those construction activities the Health and Safety Code permits redevelopment agencies to undertake directly. As discussed below, however, the Labor Code is not so limited, but rather applies to all construction done under contract that receives public funding.

<sup>4</sup> Recent amendments to Labor Code section 1720, although not in effect when the initial determination was issued, expressly include redevelopment projects.

limited to situations in which the public entity is a party to a construction contract. (Precedential Public Works Decision on Administrative Appeal, Case No. 98-005, Goleta Amtrak Station (November 23, 1998).) "Section 1720(a) does not require a specific type of contract under which construction is paid for with public funds." (Precedential Public Works Coverage Determination, Case No. 99-054, Monterey Peninsula Water Management District, Improvements in Purchased Building, November 10, 1999.)

3. Classification of this Development as Public Works is Consistent with the Purposes of Prevailing Wage Laws.

Developer asserts that the hotels and residences at issue are not being constructed "for public use," and therefore are not public works.<sup>5</sup> (Developer Letter of Appeal, p. 4.) Developer relies on an Attorney General's opinion stating that the common definition of public works is "all fixed works constructed for public use." (*Ibid.*, citing 69 Ops. Atty. Gen. 300, 305.) Developer relies on the same opinion to characterize the legislative purpose: "The purpose of California's prevailing wage law 'is to obtain well-qualified, competent and efficient workers for the construction of public facilities by assuring that they are paid commensurate with those working in private industry.'" (*Ibid.*, citing 69 Ops. Atty. Gen. at 303.)

The Attorney General's "common definition" is inapplicable here because this determination turns on a specific *statutory* definition.

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<sup>5</sup> In fact, the parties have agreed to provide occasional use of the conference center for public meetings.

The elements of a public work in section 1720(a) do not include a requirement that the construction done under contract and paid for with public funds also be for public use. If the facts of this case fall within the statutory definition, it is irrelevant whether or not they fall within a common dictionary definition. Moreover, while the structures being built may not be used by a public entity, they are expressly being constructed to facilitate the public purposes set forth in the Health and Safety Code.

Moreover, the Attorney General's Opinion does not fully enunciate the legislative purpose of the prevailing wage law. That purpose is not simply to obtain well-qualified workers for the construction of public facilities. Rather, in *Lusardi Construction Company v. Aubry* (1992) 1 Cal.4<sup>th</sup> 976, 985, the California Supreme Court stated that: "The overall purpose of the prevailing wage law is to protect and benefit employees on public works projects." The same decision recognized the broad authority of the Director of Industrial Relations to determine what is or is not a public work. (*Id.* at 988-989.)

4. Payment of Any Amount of Public Funds to Subsidize Construction Under Contract is Sufficient to Satisfy the Definition of "Public Works" Under Labor Code Section 1720(a).

Developer asserts that a relatively small portion of the Agency's expenditure of public funds pursuant to the 1998 DDA was for "site preparation" activities, e.g., the demolition and removal

of the mobile homes that were formerly on the site.<sup>6</sup> It represents that the Agency's cost for these items was only a few hundred thousand dollars, and stresses that the activities took place while the land was still owned by the Agency. Developer notes that the expenditure of Agency funds for site preparation is authorized by Health & Safety Code sections 33420 and 33421, while the expenditure of such funds for the subsequent construction of private improvements is prohibited by Health & Safety Code section 33440.

The mere fact that an expenditure is authorized under the Health and Safety Code does not preclude a conclusion that the expenditure is a payment for construction, alteration, demolition or repair work within the meaning of Labor Code section 1720(a), nor does that section include a *de minimis* exception. Moreover, Agency did not simply engage in site preparation prior to the sale of land to a third party. Rather, Agency and Developer had an existing, longstanding landlord-tenant relationship, and Developer advanced costs for site preparation which Agency agreed to reimburse as a condition of a comprehensive agreement for construction of the development. The circumstances are therefore similar to those previously held by the Department to constitute a basis for coverage under Labor Code section 1720(a):

Agency draws an artificial distinction between costs it alleges are associated only with site acquisition and those associated with "construction of the Project." The payments here are for activities integrally connected to the construction of the Project and without which the

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<sup>6</sup> Developer also argued that the payments for site preparation were likely to be eliminated in the SIA. In fact, the SIA did reduce the scope of site preparation activities paid for by Agency, but did not entirely eliminate them.

Project could not have been developed. Accordingly, the Agency's payment of these costs constitutes payment for construction out of public funds within the meaning of section 1720(a). (Precedential Public Works Determination, Case No. 2000-011, Town Square Project, City of King, December 11, 2000.)

5. The Criteria Used by the Department in Determining that the Development is a Single Public Works Project are Appropriate and Consistent with the Prevailing Wage Law.

Developer argues that the initial determination "constructs out of whole cloth a dichotomy between 'a single project' and 'multiple projects,' with five criteria invented to distinguish between the two."<sup>7</sup> (Developer Appeal, p. 6.) However, the criteria applied in the initial determination are consistent with those applied in a previous determination now designated as precedential, Precedential Public Works Decision on Administrative Appeal, Case No. 2000-016, Vineyard Creek Hotel and Conference Center, Redevelopment Agency, City of Santa Rosa, October 16, 2000. The enunciation of such criteria is within the Director's broad discretion to make coverage determinations (*Lusardi, supra*, 1 Cal.4<sup>th</sup> at 988-989), and the criteria are appropriately applied to determine whether prevailing wages are required on the entire development.

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<sup>7</sup> Agency also argues that in holding that the development in question is a single public works project, the Department erroneously imported the word "project" into section 1720(a). Although the word "project" does not appear in section 1720(a), both that and the phrase "public works project" appear repeatedly in other provisions of the prevailing wage statutes, including sections 1771.5, 1775, 1776, 1777.1 and 1777.5. All of the sections must be read in harmony with each other, rather than in isolation [cite]. The word "project" also appears several places in the prevailing wage regulations, notably in 8 CCR section 16001(a)(1), which permits an interested party to request a coverage determination regarding "a specific project." The term "project" is the central focus of Precedential Public Works Coverage Determination, Case No. 2000-016, Vineyard Creek Hotel and Conference Center, October 16, 2000. Finally, the California Supreme Court has stated that: "The overall purpose of the prevailing wage law is to protect and benefit employees on public works projects." (*Lusardi Construction Co. v. Aubry* (1992) 1 Cal.4<sup>th</sup> 976, 985 (emphasis supplied).)

The first criterion is "the manner in which the construction was organized in view of, for example, bids, construction contracts, agreements and work force." Developer notes that rather than looking to the construction contracts between it and the contractor performing the work, or the composition of the work force, the determination only pointed out that there was one DDA. Developer questions whether it should make any difference whether there was one DDA or multiple ones. The difference is this: by entering into a single DDA, the Agency and the Developer treated the site preparation and construction of the hotels, the residential housing and the public improvements as a single, multi-phase project.<sup>8</sup> The facts are therefore analogous to those in the Santa Rosa case, where a hotel and conference center and related off-site improvements were determined to constitute a single project.

The second criterion was the "physical layout of the project." Developer questions the relevancy of this criterion and labels "conclusory" the determination's finding that the three phases of the development "will be physically integrated with each other and with the accompanying public improvements." Developer asks what it means for a hotel to be "physically integrated" with a single-family residential development on the opposite side of the street, and when are public improvements not "integrated" with adjacent private improvements? Developer acknowledges that in a "general planning

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<sup>8</sup> Moreover, the City of Huntington Beach's own web site characterizes the development as a single project: "Construction is underway for a new 530-room resort hotel and conference center . . . . The project also includes 177 single-family homes . . . and a 300-room third hotel is planned as a future phase." (<http://www.hbbiz.com/home/current.htm>, emphasis supplied.)

sense . . . the City of Huntington Beach and Mayer have made an effort to see that the various private improvements will be compatible with one another and that the public will be adequately served by the adjacent off-site improvements." (Developer appeal, p. 7.) What is significant is that a single DDA with a single developer provided for the two hotels, the residential housing and the public improvements all to be constructed on what had been a single parcel which had for many years been leased to Developer.<sup>9</sup>

The third criterion was "the oversight, direction and supervision of the work." The determination noted that the Agency has the right of access to the site for purposes including inspection and to require progress reports from the Developer. Developer asserts that this is an extremely narrow scope of public involvement in a private development project, and far less than the "pervasive inspection and supervision authority" that the City already has over private projects for which building permits are issued.

However, the issue is not simply the extent of Agency's oversight of Developer's construction; it is the reciprocal nature of their respective roles, wherein Developer is responsible for the oversight, direction and supervision of the construction of public improvements. Moreover, Agency's oversight is not limited to construction activities, but extends to approval of the franchisor

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<sup>9</sup> Attachment No. 2 to the DDA, titled "Legal Description of the Site," sets forth a single legal description for the entire site of the development. The description references Attachment No. 1, which is a map of the site as subdivided into parcels for the various phases of the development, and showing the new streets connecting them.

and hotel management company selected by Developer (DDA, section 203.1(a)(5) and (6), and to approval of alterations to the hotel buildings, for which Developer must submit "detailed plans and specifications of the proposed work and an explanation of the need and reasons thereof." (DDA Attachment 5, Form of Ground Lease, section 705.)<sup>10</sup>

The fourth criterion is the financing and administration of the construction funds. The initial determination focused on the "feasibility gap payments," which it found to be public subsidy without which the project would not be economically feasible. Developer faults this analysis for ignoring the fact that all of the hotel and residential construction will be paid for and administered by itself, and not the Agency. (Developer Appeal, p. 8.)

Developer's attack on the fourth criterion is not persuasive. The facts here are essentially similar to those in the Santa Rosa case, where the Agency contributed funds for the construction of the conference center and off-site improvements, and also spent money on toxic remediation. There, as here, public funding was deemed to be necessary to bridge a financing gap.

The fifth criterion is "the general integration of the various aspects of construction." Developer attacks this criterion as "exceedingly vague" and the determination's discussion of it "conclusory." (Developer Appeal, p. 8.)

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<sup>10</sup> Additionally, the Grant Deed for parcel B imposes certain maintenance obligations on Developer, and gives Agency the right to notify Developer to cure deficiencies, and to maintain the property itself should Developer fail to do so. (DDA, Attachment No. 6.)

The Santa Rosa determination stressed the following facts in its analysis of the fifth criterion: (1) The Developer and Agency shared a financial stake in the success of the entire project in that the "Agency's participation rent is based on a percentage of the total gross revenue of the Hotel and Conference Center"; (2) upon sale or refinancing, the Developer was required to pay the Agency a percentage of the sale price over \$27.5 million; and (3) but for the Agency's contribution of \$6.5 million, the Hotel apparently could not be built due to a financing gap. (PW Case No. 2000-016, *supra*, at 5.)

The facts here are similar. Here the Agency has a stake in the success of the hotels because the land lease provides for the sharing of revenues above a specified threshold. With respect to the residential housing, Agency has the option of participating in sales revenues above a stated threshold.<sup>11</sup> Here, as in Santa Rosa, the project would not be economically feasible without a public subsidy to cover the financing gap. A final consideration is that the parties have agreed on a construction sequence that requires completion of certain activities on one part of the development before activities on another part begin.<sup>12</sup> This is yet another way that the various aspects of construction are integrated.

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<sup>11</sup> Additionally, the Grant Deed for the residential parcel reserves Agency's oil and mineral rights to the property. (DDA, Attachment No. 8, Exhibit A.) The leases for the hotel parcels contain similar reservations.

<sup>12</sup> The Grant Deed for Parcel B requires the Developer to: "Refrain from commencing the construction of the residential improvements required by this Grant Deed until substantial commencement has occurred of the improvements required by the DDA for Parcel A . . . ." Attachment No. 6 to DDA, p. 2.

6. Where the Facts Justify Treatment of Private Construction and Adjacent Publicly-Funded Off-Site Improvements as a Single Project, Prevailing Wages Must be Paid for the Entire Project.

Developer acknowledges that the payments provided by the Agency for the construction of public streets, pedestrian walkways (including the pedestrian bridge over the Pacific Coast Highway), utilities and similar public improvements makes that construction "public works" within the meaning of section 1720(a). Developer contends, however, that there is no legal authority for extending the coverage to the adjacent private development. Developer argues that such extension is contrary to prior precedential determinations, which severed the public improvements from the private. (Developer Appeal, p. 10, citing Public Works Decision on Administrative Appeal, Case No. 94-034, City of Pismo Beach Redevelopment Agency (February 28, 1995) and Public Works Decision on Administrative Appeal, Case No. 93-012, Wal-Mart Shopping Center, City of Lake Elsinore (July 1, 1994).)

The cases cited by Developer are factually distinguishable from the case at hand.<sup>13</sup> In the Lake Elsinore case, the developer of a shopping center agreed to construct offsite improvements, and the redevelopment agency agreed to reimburse the developer, contingent on the shopping center generating sufficient tax revenues. Only the off-site improvements were at issue, and the Department held that they were public works. In the Pismo Beach case, the developer

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<sup>13</sup> These determinations are no longer designated as precedential.

of a factory outlet center had agreed to construct both the center and adjacent off-site improvements with private funds. As the project was nearing completion, the developer requested financial assistance from the city or the redevelopment agency, and the agency agreed to reimburse the developer for the cost of the offsite improvements. The Department held that the reimbursement constituted a payment out of public funds for construction of the public improvements. A significant difference between Pismo Beach and this case is that in Pismo Beach the project was begun without any contemplation of a public subsidy, so the subsequent reimbursement for offsite improvements was not an inducement for construction of the privately financed outlet center.

Developer cites three other determinations regarding what it calls "mixed public-private projects" as support for its argument, but all are factually distinguishable. In Precedential Public Works Determination, Case No. 94-027, Groundwater Remediation Facilities, Burbank Operable Unit, California Superfund Project (November 18, 1994), Lockheed and the City of Burbank agreed to each construct certain remediation facilities as part of a consent decree in a federal lawsuit filed by the Environmental Protection Agency. Lockheed and Burbank each paid for that construction for which they were responsible. There was no evidence that Burbank paid for its portion of the construction as an inducement for Lockheed to pay for its portion; rather the inducement for both was to settle the lawsuit. In Precedential Public Works Decision on Administrative Appeal, Case No. 93-054, Tustin Fire Station (Tustin

Ranch), June 28, 1994, The Irvine Company agreed to construct a fire station for the City of Tustin as part of an agreement for commercial and residential development on 2,000 acres of company-owned land. The Director held that the fire station was a public work because its construction costs were reimbursed by the City. The sole issue in dispute was the public works status of the fire station, and no one requested a determination as to coverage of the commercial and residential development, so that issue was not decided. The same is true of the final decision cited by Developer, Public Works Decision on Administrative Appeal, Case No. 93-039, Valley Rose Estates Project-City of Wasco, August 26, 1995.<sup>14</sup>

The precedential determination most factually similar to this case is Santa Rosa, *supra*, and this decision is consistent with that one. There, as here, the expenditure of public funds for construction of public improvements served as a subsidy to induce private construction. There, as here, the public and private improvements were so intertwined as to make them one development project.

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<sup>14</sup> This determination is no longer designated as precedential.

V. CONCLUSION

The undersigned, having reviewed the administrative appeals filed by the Agency and the Developer, said appeals are hereby denied. This decision constitutes final administrative action in this matter.

Dated: 2/8/02

Stephen J. Smith  
Stephen J. Smith  
Director