

DEPARTMENT OF INDUSTRIAL RELATIONS

OFFICE OF THE DIRECTOR
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March 6, 2002

John Carter, Director
Center for Contract Compliance
4399 North Santa Ana Avenue, Suite 205
El Monte, CA 91731

Re: Public Works Case No. 2001-008
Esplanade Shopping Center Redevelopment Project

Dear Mr. Carter:

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 Esplanade Shopping Center Redevelopment Project ("Project") is a public work subject to the payment of prevailing wages.

Factual Background

The Oxnard Community Development Commission ("Commission") entered into an Owner Participation Agreement ("OPA") with M&H Realty Partners IV, LP ("M&H") for the Project on property described as the Sears Parcel, Mall Parcels and Robinson's May Parcel.¹ Under the OPA, M&H is to construct and maintain a retail shopping center consisting of a new 136,000 square foot Home Depot with a 28,000 square foot garden center and a minimum of 200,000 square feet of commercial retail and restaurant space on the Sears and Mall Parcels, and 100,000 square feet of commercial retail space on the Robinson's May Parcel.

The OPA recites that, due to the substantial costs for demolition, clearance, site preparation, land acquisition and relocation costs, the Project is not feasible in the absence of financial assistance from the Commission. Therefore, under the OPA, to induce M&H's development of the Project, the Commission agreed to rebate to M&H 75 percent of the new redevelopment

¹ M&H holds title in the Sears and Mall Parcels and a sublease interest in the Robinson's May Parcel.

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property tax increment generated from the Project on an annual basis for a period of 20 years or until the rebate totaled a net present value of \$1.7 million, whichever occurred first. Payment is to begin when construction is complete and the facilities are operational.²

The Commission estimates that the Project will generate \$1.5 million in annual sales tax beginning in 2002. It estimates that the newly-constructed shopping center will add approximately \$34.8 million in increased property valuation, generating a new redevelopment tax increment of approximately \$200,000 beginning in 2002.

Discussion

Labor Code section 1720(a) generally defines public works to mean: "Construction, alteration, demolition or repair work performed under contract and paid for in whole or in part out of public funds...." Here, the Project is demolition and construction done under contract and, by use of tax increment rebates, paid for in part out of public funds. Consequently, the Project is a public work under section 1720(a) for which prevailing wages would be required.

M&H claims that the Project is not a public work for several reasons. First, M&H argues that the Project cannot be a public work because it is a commercial shopping center built by private parties on private land. These facts are not dispositive. Section 1720(a) only requires that the construction be done under contract. It does not require that a public entity either own the subject property or be a party to the construction agreement.³

Second, citing *McIntosh v. Aubry* (1993) 14 Cal.App.4th 1576, 18 Cal.Rptr.2d 680, M&H argues that since the actual construction is to receive Commission disbursements only after construction has

² As to the Sears and Mail Parcels part of the Project, the Commission agreed to pay to the Highway 101 Interchange Assessment District on behalf of M&H any assessments then due and payable to which the Parcels were subject with any remaining funds to be paid to M&H. For the Robinson's May Parcel, the Commission agreed to rebate the tax increment amounts directly to M&H.

³ Precedential Public Works Case No. 2000-006, SPCA-LA Companion Animal Village and Education Center, Decision on Administrative Appeal, August 24, 2001; Precedential Public Works Case No. 99-039, Riverview Business Center Office Building D, November 17, 1999.

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been completed, section 1720(a) does not apply. M&H is incorrect. The OPA states that Project costs for demolition as well as for certain aspects of construction including site preparation and land acquisition are not feasible without Commission financial assistance. Consequently, monies paid by the Commission to "assist" M&H in these aspects of demolition and construction on the Project constitutes the use of public funds as contemplated under section 1720(a). Reimbursement of private funds with public funds is deemed the payment of public funds under this section.⁴

Finally, M&H argues that the Project is not a public work because of the numerous contingencies contained in the OPA for Commission payment to M&H. Neither M&H nor the Commission has stated that M&H is expected to or has failed to meet any contingency. Neither has even suggested that M&H may not receive the \$1.7 million in tax rebates promised under the OPA. Where public funds are committed to construction under contract, remote contingencies of non-payment do not preclude the application of section 1720(a).⁵

I hope this determination satisfactorily answers your inquiry.

Sincerely,


Stephen J. Smith
Director

⁴ Precedential Public Works Case No. 93-054, Tustin Fire Station, Decision on Administrative Appeal, April 15, 1994.

⁵ Precedential Public Works Case No. 91-041A, Decision on Administrative Appeal, Morro Bay Desalination Plant, November 29, 1991.