

DEPARTMENT OF INDUSTRIAL RELATIONS

OFFICE OF THE DIRECTOR
455 Golden Gate Avenue, Tenth Floor
San Francisco, CA 94102
(415) 703-5050



August 23, 2002

Donald C. Carroll, Esq.
Law Offices of Carroll & Scully, Inc.
300 Montgomery Street, Suite 735
San Francisco, CA 94104-1909

Re: Public Works Case No. 2001-049
Undergraduate Housing Expansion - Mesa Court
University of California, Irvine

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 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 improvements to the Mesa Court housing complex at the University of California ("UC"), Irvine ("Project") is a public work under California prevailing wage laws. On account of its internal university affair exemption under the California Constitution, however, UC Irvine is not required to pay prevailing wages on the Project.

In June 1998, the Regents of UC approved a plan to expand undergraduate student housing at UC Irvine. On October 26, 1998, Senior Vice President V. Wayne Kennedy granted the Project an exception from UC's policy requiring the payment of prevailing wages. Based on the exception granted, UC did not require the payment of prevailing wages when it advertised this Project for bid in May of 2000.

The Project involves construction of 620 beds¹ and related support spaces, and expansion and renovation of an existing dining hall. 160 of the 620 beds are to replace beds lost due to demolition of several seismically deficient buildings.

¹ The original plan called for the construction of 428 beds. But given enrollment forecasts, in January 2000 the Regents expanded the scope and budget for this Project, increasing housing capacity by the additional 192 beds.

The contract for construction between UC Irvine and Harper/Nielsen Dillingham Builders, a joint venture, ("Contractor") was entered into on July 24, 2000. Anticipated completion date was supposed to be June 2002, although the Department has learned that the Project currently is behind schedule. The purpose of the Project is to alleviate the shortage of affordable housing for UC Irvine undergraduate students.

The Project cost is \$39,759,000. It initially was funded by a bridge loan from the UC's Commercial Paper Fund No. 01487, which consists of money obtained through the sale of commercial paper notes. \$21,370,000 of the loan was repaid with funds obtained through the sale of revenue bonds. The revenue bonds are to be retired using net revenues from student housing. The balance of the bridge loan will be repaid in the same fashion. No state-appropriated funds are involved.

Under what is now Labor Code section 1720(a)(1) (as amended by Statutes of 2001, Chapter 938, section 2 (Senate Bill 975)), a public work is defined as "[c]onstruction, alteration, demolition, installation or repair work done under contract and paid for in whole or in part out of public funds" The Project is construction, alteration and demolition. It is being done under contract between UC Irvine and Contractor. Student housing net revenues and proceeds from the sale of notes and bonds, which are being used to finance the Project, are public funds.² Therefore, the Project fits the definition of a public work under California prevailing wage laws.

The inquiry as to whether prevailing wages must be paid on the Project, however, does not end here. Article 9, section 9 of the California Constitution provides UC a limited exemption from prevailing wage requirements for matters involving internal university affairs. *Regents of UC v. Aubry* (1996) 42 Cal.App.4th 579, 49 Cal.Rptr.2d 703.

The facts of *UC v. Aubry* closely resemble the facts involved here. In that case, the Second District Court of Appeal held

² Contractor argues that the Project is not a public work because it is being paid for through "external financing." UC appears to use this term to describe nonstate-appropriated funding sources. While it is agreed that the Project was not paid for with state-appropriated funds, the funds that were used to finance the Project are nevertheless public funds. The University of California is a public entity and, therefore, its funds are public, not private, in nature.

that the construction of married student and faculty/staff housing at UC Los Angeles was an internal university affair. The court reasoned that the construction of subsidized housing, financed with nonstate-appropriated funds, was part of the university's core educational mission because the shortage of affordable housing impeded the university's ability to recruit and retain qualified faculty and staff, and to provide an affordable education to married students with children. Therefore, the Court concluded, UC was not required to comply with California prevailing wage laws.

Here, the Project was conceived to address a shortage of affordable housing for UC Irvine undergraduate students. Under *UC v. Aubry*, providing affordable student housing is part of the university's core educational mission. The Project is being financed with revenues from student housing and proceeds from the sale of notes and bonds, which are nonstate-appropriated funds. For these reasons, under *UC v. Aubry*, the Project is an internal university affair exempt from prevailing wage requirements.

Consistent with this precedent, UC invoked its constitutional exemption by granting this Project an exception, as stated above. The requesting party, Southern California Labor/Management Operating Engineers Contract Compliance Committee ("SCL/MOEGCC"), claims, however, that the California State Budget Act ("Act") for the year 2000-2001 affirmatively requires UC to pay prevailing wages on this Project notwithstanding the exception previously granted.

The Act, which became effective on June 30, 2000, placed a moratorium on the granting of further prevailing wage exceptions by UC until June 30, 2001. Because this determination turns on the correct interpretation of the Act, the specific provisions in the Act concerning the moratorium are quoted in full:

The funds provided under this item shall be available for expenditure only if the University of California requires the payment of prevailing wage rates by the contractors and subcontractors on all projects in this item and on all other capital outlay projects undertaken by the University of California that are funded using nonstate funds or are otherwise not financed with the funds appropriated in this item.

This requirement shall represent a moratorium on granting further exceptions to paying prevailing wage until June 30, 2001. The University of California

shall submit a report to the Legislature by February 15, 2001, on its policy of granting exceptions to pay less than prevailing wage for construction of capital projects.

SCL/MOECCC argues that UC is required to pay prevailing wages because the Project was not "irretrievably launched" and could have been restructured as of the effective date of the Act. In response, UC argues³ that the Act does not preclude the undertaking of nonprevailing wage projects that were granted an exception prior to the effective date of the Act. According to UC, as the Project was granted an exception on October 26, 1998, the prevailing wage requirements under the Act do not apply.

The words of a statute must be given their ordinary meaning and construed in context. "[S]tatutes or statutory sections relating to the same subject must be harmonized, both internally and with each other, to the extent possible." *Dyna-Med, Inc. v. Fair Employment and Housing Com.* (1987) 43 Cal.3d 1379, 1386-1387.

Under these principles of statutory construction, the first, second and third sentences of the provision in question should be read together and harmonized. The first sentence states that the funds appropriated by the Legislature for 24 specific projects named in a preceding provision shall be available only if UC requires the payment of prevailing wages on those projects and on all other capital outlay projects funded using nonstate-appropriated funds. The second sentence states that "[t]his requirement," referring to the first sentence, is a moratorium on the granting of further exceptions until June 30, 2001. The third sentence and the word "further" in the second sentence make clear that the Legislature was aware that UC had a policy of granting exceptions and that there were exceptions already in place.

The proper interpretation of the provision is as follows: In order to receive the appropriated funds, UC must require the payment of prevailing wages on the 24 specific projects funded by

³ Also UC raises questions concerning the constitutionality of the moratorium provision in the Act, which it contends it may disregard. Article 3, sections 3.5(a) and (b) of the California Constitution prevent an administrative agency from declaring a statute unconstitutional or refusing to enforce a statute based on its unconstitutionality where there is no appellate court decision to that effect. Because there is no appellate court decision to that effect, and because I ultimately find the Act inapplicable to this Project, I decline to reach the issue of the constitutionality of the moratorium provision.

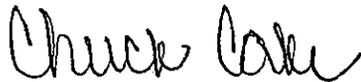
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the Act and on all other capital outlay projects funded with nonstate-appropriated funds that had not received an exception prior to the effective date of the Act. Under the Act, no further exceptions are allowed.

As this Project was granted an exception prior to the effective date of the Act, the prevailing wage requirements under the Act do not apply.⁴ Based on the foregoing, I find that UC Irvine is exempt from prevailing wage obligations for this public works project.

I hope this determination satisfactorily answers your inquiry.

Sincerely,



Chuck Cake
Acting Director

⁴If the Legislature had intended to nullify the exceptions granted by UC prior to the effective date of the Act, it could have done so affirmatively.