

DEPARTMENT OF INDUSTRIAL RELATIONS

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February 15, 2002

Madison M. Christian
General Counsel
QMG America
500 East Esplanade Drive, Suite 102
Oxnard, CA 93030

Greg C. Brown
Community Development Director
Port Hueneme Redevelopment Agency
City of Port Hueneme
250 North Ventura Road
Port Hueneme, CA 93041

Re: Public Works Case No. 2001-064
Portside Homes
Redevelopment Agency
City of Port Hueneme

Dear Messrs. Christian and Brown:

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 Portside Homes development in the City of Port Hueneme ("Project") is a "public works" subject to the payment of prevailing wages.

The Port Hueneme Redevelopment Agency ("Agency") and QMG, a private residential developer ("Developer"), entered into a Disposition and Development Agreement ("DDA") on November 7, 2001. The DDA involves six adjoining parcels of land in the City of Port Hueneme.¹ Parcels five and six are the properties to be redeveloped under the DDA. Parcel six is vacant land recently purchased by Developer through a private sale. Parcel five is improved land owned by Anacapa Meats, Inc. The improvements on

¹ Parcels one through four are improved lands owned by private parties. Under the DDA, Developer is to submit design plans and costs estimates for renovation work but redevelopment of these parcels is not contemplated at this time.

Letter to Madison M. Christian & Greg C. Brown
Re: Public Works Case No. 2001-064
February 15, 2002
Page 2

parcel five include offices and a warehouse used by a business tenant for a vegetable packing operation. Under the DDA, Agency will acquire parcel five and convey it to Developer for merger with parcel six, using the powers of eminent domain if no voluntary sale can be arranged. On the merged, then subdivided land, Developer will build 23 small lot, detached three to four bedroom, single-family homes.

Developer is to pay all costs of constructing the homes and required off-site improvements, which include underground utilities, water and sewer work, tree wells, street lights, curbs, gutters, sidewalks and a reconstructed alley.

Agency is to pay all costs of demolishing and clearing parcel five of its surface elevation improvements in preparation for construction. The cost of this work is estimated to be \$25,000. The mechanism for Agency's payment will take the form of a credit given by Agency to Developer against the purchase price of parcel five. Said purchase price is \$270,000.²

Upon completion of the Project, Developer is required to sell 25 percent of the houses at a price no greater than the maximum sum affordable to a moderate-income household under the affordable housing provisions of the Community Redevelopment Law (Health and Safety Code sections 33000* et seq.). Once the houses are sold, Developer is to pay Agency 50 percent of the total sale proceeds after deduction of Developer's costs and profit. Counsel for Developer estimates Agency will receive \$45,000 from the Project.

Although the DDA does not require the payment of prevailing wages, the parties agreed to seek an opinion from the Department of Industrial Relations as to the applicability of California's prevailing wage law to this Project. Section 814 of the DDA recites the following:

² The purchase price is for less than Agency's acquisition price. In light of the decision here, however, we need not reach the question whether this transaction would make the Project a public works. It should be noted that under some circumstances the Department of Industrial Relations would find that a below market sale of public property would constitute payment for construction with public funds. See Precedential Public Works Case No. 2000-011, Town Square Project, City of King, December 11, 2000, fn. 6.

Letter to Madison M. Christian & Greg C. Brown
Re: Public Works Case No. 2001-064
February 15, 2002
Page 3

On October 15, 2001 Governor Davis signed into law Senate Bill 975 (Alarcon) that may require the payment by the Developer of the State's prevailing wage requirements for construction of the Project.

As this coverage request was prompted by passage of Senate Bill 975, a threshold question in this determination is the applicability of the Bill to the Project. Senate Bill 975, which became effective on January 1, 2002, amended Labor Code section 1720. In so doing, it expanded the definition of a public works. In this case, the date of the DDA controls whether the Project is governed under Senate Bill 975. As the DDA in this matter was entered into on November 7, 2001, the old law, prior to amendment by Senate Bill 975, applies.

Prior to amendment, Labor Code section 1720(a) defined a public works for prevailing wage purposes as "[c]onstruction, alteration, demolition or repair work done under contract and paid for in whole or in part out of public funds For purposes of this subdivision 'construction' includes work performed during the design and pre-construction phases of construction including, but not limited to, inspection and land surveying work."

The Director has issued and continues to issue precedential prevailing wage coverage determinations that interpret the phrase "public funds" under the old law. Therefore, when evaluating whether a project is a public works, it is critical to consider both the relevant statutory law as well as the Director's precedential coverage determinations.

Turning to the facts here, the Project involves construction and demolition performed under contract. Determining its public works status, therefore, depends on whether the Project was paid for in whole or in part out of public funds. Although Developer is to pay with private funds all costs of constructing the houses and required off-site improvements, the costs of demolishing and clearing parcel five for the housing construction is being paid for with public funds.

As indicated earlier, the mechanism for Agency's payment of the costs of demolition and clearing is in the form of an approximately \$25,000 credit, deducted from the purchase price of parcel five. In Precedential Public Works Case No. 2000-011,

Letter to Madison M. Christian & Greg C. Brown
Re: Public Works Case No. 2001-064
February 15, 2002
Page 4

Town Square Project, *infra*, a developer was granted credits against the purchase price of property owned by the redevelopment agency and sold to the developer under the city's "Performance Incentive Program." It was found that the credits constituted a payment of public funds for construction. Similarly, the credit involved here, which was earmarked for the construction undertaking and deducted from a legal obligation to the Agency, constitutes a payment of public funds. Therefore, under Labor Code section 1720(a), the Project is a public work requiring the payment of prevailing wages.

Citing *International Brotherhood of Electrical Workers v. Board of Harbor Commissioners* (1977) 68 Cal.App.3d 556 and *McIntosh v. Aubry* (1993) 14 Cal.App.4th 1576, Developer argues that prevailing wage laws "were not intended to apply to redevelopment projects such as this which are essentially nothing more than purchase and sale transactions." (Letter dated December 5, 2001 of Madison M. Christian to California Department of Industrial Relations.)

First, the two cases cited by Developer are factually distinguishable. *International Brotherhood of Electrical Workers* involved a lease under which the public entity received royalties in exchange for granting an oil and development company the right to drill for oil and gas. There is no such arrangement involved here. In *McIntosh*, a county had an agreement with a non-profit corporation to build a residential facility for the care of minors under the county's charge. The county agreed to waive inspection costs, forego rent on land, lend funds for bond premiums and pay a per-head amount for the later care of the minors. The court held that rent forbearance, cost waivers and loans are not payment of public funds, and that the agreement was essentially one for public services. Here, the Agency is not waiving costs and rent or loaning funds; it is affirmatively paying for construction costs.

Second, in arguing that this Project is essentially a purchase and sales transaction rather than a "traditional public works" in which "a government agency contracts with a private third party to perform construction, repair or maintenance work for that agency," Developer misreads Labor Code section 1720(a). As discussed above, Agency paid public funds toward the construction undertaking. Additionally, there is no requirement that the public entity be a party to a construction contract. Redevelopment projects, such as the one here, often proceed under disposition and development agreements or owner participation

Letter to Madison M. Christian & Greg C. Brown
Re: Public Works Case No. 2001-064
February 15, 2002
Page 5

agreements in which the parties to the construction contract are private but the project is being subsidized with public funds. In numerous precedential coverage determinations, such redevelopment projects were found to be public works.³ It makes no difference, as Developer asserts, that Agency may receive a cut from the sale proceeds of the homes and \$270,000 from the sale of parcel five. These payments will not compensate Agency for its total acquisition costs. More importantly, the relevant inquiry is whether there has been a payment of public funds for construction or pre-construction. As explained, there has.

For the above reasons, the Project is a public works for which prevailing wages must be paid.

I hope this determination satisfactorily answers your inquiry.

Sincerely,



Stephen J. Smith
Director

³ Precedential Public Works Case No. 2000-016, Vineyard Creek Hotel and Conference Center, Redevelopment Agency, City of Santa Rosa, October 16, 2000; Precedential Public Works Case No. 2000-015, Decision on Administrative Appeal, Downtown Redevelopment Plan Projects, City of Vacaville, March 22, 2001; Precedential Public Works Case No. 2000-043, 13th and F Street Townhouse Development, City of Sacramento, January 23, 2001 (appeal denied in non-precedential Decision on Administrative Appeal, December 4, 2001); Precedential Public Works Case No. 2000-011, Town Square Project, City of King, December 11, 2000.