STATE OF CALIFORNIA

DEPARTMENT OF INDUSTRIAL RELATIONS

DECISION ON ADMINISTRATIVE APPEAL

RE: PUBLIC WORKS CASE NO. 2001-043

CAPITOL PARK HOMES

CITY OF SACRAMENTO REDEVELOPMENT AGENCY

I. INTRODUCTION AND PROCEDURAL HISTORY

On August 23, 2001, Charles M. Taylor of the Northern California Carpenters ("Carpenters") wrote to the Department of Industrial Relations ("Department") requesting a written opinion as to whether Capitol Park Homes, a single-family townhouse development in downtown Sacramento ("Project"), involving funds from the Redevelopment Agency of the City of Sacramento ("Agency") is a public work requiring the payment of prevailing wages pursuant to Labor Code section[1] 1720 *et seq*. Department Director Stephen J. Smith issued a coverage determination ("Determination") on July 19, 2002, finding that the Project is a public work subject to California's prevailing wage laws. On August 19, 2002, Agency filed an administrative appeal of the Determination. The appeal was joined in by Shasta/Downtown Sacramento Venture Single Family Development LLC ("Developer").

Agency submitted an 18-page letter brief in support of the appeal, as well as declarations from three witnesses

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[1] All section references are to the Labor Code unless otherwise indicated.

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with attachments. Agency also submitted a binder with several multi-page documents. Many of the documents filed with the appeal had already been compiled by the Department in the course of its initial investigation into the financing arrangements for the Project. Several of the documents, however, filed by Agency were submitted for the first time on appeal, despite the fact that these documents pre-dated construction of the Project and had previously been requested from Agency by Department staff.[2]

II. ISSUES AND CONCLUSIONS ON APPEAL

Agency and Developer make six principal arguments:

(1) Laches bars the Director from determining that the prevailing wage laws apply to the Project.

(2) The Agency's forgiveness of most of a $1.6 million construction loan to Developer should not be considered a payment of public funds because: (a) Agency is receiving an affordability covenant from Developer in exchange for the funds; and, (b) Agency will ultimately recover all its investment in the Project upon the eventual re-sale of the 18 units restricted to affordable to low- and moderate-income purchasers.

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[2] Agency submitted the following documents for the first time on appeal: (1) Agency Staff Report of July 5, 2000, accompanied by Agency Resolution 200-052 of the same date, and a memo of August 25, 2000 reflecting the correction of an error in the staff report; (2) First Amendment to the Owner Participation Agreement ("OPA"); (3) First Amendment to Regulatory Agreement; and (4) Individual Regulatory Agreement. Document (2), the Amended OPA, reflects a change in the number of restricted and non-restricted units for sale and in Agency's share in the proceeds of the initial sale of all units. The Determination was based upon the facts contained in the initial OPA. This Decision on Appeal includes consideration of the Amended OPA.

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(3) Labor Code section 1720 et seq. does not require the payment of prevailing wages on this Project because the construction was performed pursuant to contracts between private parties.

(4) The Project is not a public work under section 1720.2 because the statutory elements are not met.

(5) The Health and Safety Code provides an exemption from the prevailing wage law for redevelopment agencies.

(6) Application of the prevailing wage law to the Project violates public policy as embodied in the Community Redevelopment Law.

(7) To the extent the 2001 Amendments to section 1720 apply, the Project is exempt from the prevailing wage law under section 1720(c)(3).

(8) Developer requests a hearing.

For the reasons discussed below, the appeal is denied and the Determination is affirmed. The request for hearing is denied.

III. SUMMARY OF FACTS

The Project consists of 64 single-family townhouses initially conceived as a way to provide affordable, low-cost housing in the Central City area of Sacramento. To effectuate the Project, Agency and Developer entered into an original OPA dated October 23, 1998. Under the terms of this OPA, all 64 of the units were to be sold at prices affordable to low-and moderate-income purchasers. Agency agreed to provide partial financing to Developer for pre-

construction and construction costs through a forgivable loan of $2 million. The loan was advanced pursuant to a "First Amended and Restated Promissory Note secured by Deed of Trust," dated May 16, 2000, which superseded an earlier note executed October 23, 1998. The OPA and Note provided that 1/64 of the loan would be forgiven upon the sale of each individual unit. Under the formula used, Agency staff recommended approval of the OPA, estimating that Agency stood to be repaid $266,519 of the $2 million loan with the balance forgiven. (Minutes of City Council Meeting, September 15, 1998.)

Pursuant to the original OPA, Agency and Developer entered into a Regulatory Agreement whereby Developer agreed to sell the units only to low-and moderate-income families. Developer also agreed the affordability restriction would be imposed on those purchasing any of the units from Developer and subsequent purchasers. If a subsequent owner were to re-sell a unit at the market price, Agency would have the right to recapture a portion of the seller's equity as a penalty for not re-selling to another qualified low- or moderate-income purchaser. The original OPA states: "Developer represents and agrees that its promise to develop the Site under the OPA is not intended for speculation or land holding."

By 2000, however, market prices for residential housing in the downtown Sacramento area had appreciated to the extent that Agency staff estimated that sales could generate

an additional $3 million if all units in the Project were sold at the market price. Consequently, it was decided to modify the Project so that only 12 of the 64 units would be sold to low-income households and 6 units would be sold to moderate-income households. With the remaining 46 units sold at unrestricted market prices, Agency staff estimated that Agency would be repaid $611,000 of its $2 million loan to Developer. This amount would be generated upon the initial sale of the unrestricted units. The OPA and the Regulatory Agreement were amended to reflect this change in the scope of the Project. The Regulatory Agreement between Agency and Developer was amended to require Developer to sell a restricted low-cost unit only to a purchaser who first entered into an Individual Regulatory Agreement between the purchaser and Agency. Each Individual Regulatory Agreement contains a covenant of affordability limiting the purchaser's ability to profit from the re-sale of a restricted unit. Unless the unit is re-sold at an affordable price to another qualified low- or moderate-income purchaser, Agency is entitled to recover the excess revenue in excess of the affordable price. By means of this recapture provision, Agency anticipates it will collect at least $2 million over the next three to seven years as the restricted units are purchased and eventually re-sold on the open market.

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IV. DISCUSSION

1. <u>Agency has failed to meet its burden of proving the elements of the defense of laches.</u>

Agency asserts that laches precludes the Department from issuing a coverage determination in this case because Carpenters requested the coverage determination in August, 2001 and Department issued the coverage determination in July, 2002, both well after various events and agreements concerning the Project were made public between 1997 and 2001.

The two main elements of the affirmative defense of laches are unreasonable delay and prejudice. Prejudice is never presumed. The party asserting laches as a defense bears both the burden of producing evidence and the burden of proving that the delay was unreasonable and that it resulted in prejudice. *Conti v. Board of Civil Service Commissioners of the City of Los Angeles* (1969) 1 Cal.3d 351, 82 Cal.Rptr. 337.

While Agency lists the dates of various events concerning the Project in relation to the dates of the coverage request and Determination, Agency does not address the element of unreasonable delay. Furthermore, Agency also presents no evidence, other than mere passage of time, to prove that the alleged delay resulted in any prejudice. As such, Agency has not carried its burden of proof and its claim of laches is rejected.

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Agency also cites the Department's own regulations in support of its laches argument. Both references are inapplicable to this case. Title 8, California Code of Regulations ("CCR"), section 16302(a) concerns the administrative process for making rate determinations, not coverage determinations. Similarly, 8 CCR, section 16202(a) requires an *awarding body* to request a determination for a particular craft, classification or type of worker at least 45 days prior to the bid advertisement date, and does not pertain to whether a project is a public work.

Most important in response to Agency's laches argument is former section 1775, which gave the Labor Commissioner 90 days from the filing of a notice of completion to file an enforcement action for the payment of prevailing wages. In setting this statute of limitations at a point in time subsequent to the filing of a notice of completion, the Legislature envisioned that enforcement actions could be commenced even after construction has ceased. Given the Labor Commissioner's indisputable authority to take enforcement action upon completion of a public works project, the Director has no less authority to issue coverage determinations within that time frame as well.

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2. <u>Forgiveness of Agency's purported loan to Developer constitutes the payment of public funds for construction of project, notwithstanding Agency's plan to recoup the funds expended from prospective purchasers of the restricted units.</u>

Agency advances essentially two arguments in its effort to demonstrate that the loan forgiveness does not convert the Project into a public work. Its first argument is that a partially forgivable "loan" to Developer used for construction is not a payment of public funds because Agency received in return the covenant of affordability expressed in the Regulatory Agreement between Agency and Developer. Agency asserts that the covenant of affordability, which assures that Developer will offer some of the units in the Project to low- and moderate-income buyers, is an interest in real property with monetary value. Although Agency stops just short of claiming that the affordability restriction has a monetary value of nearly $1.4 million (to assure that 18 units of affordable housing are put on the market), that position is implicit in the contention that the loan forgiveness was exchanged for the conveyance of the property interest.

Agency's argument here glosses over the fact that Developer used the loan for construction of the Project. Without that construction, the Regulatory Agreement is meaningless, as are all of the restrictive covenants involved, of which the affordability restriction is only one. The existence of the affordability covenant does not

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change the fact that Agency funds were used for construction of the Project under contract. The affordability restriction pertains not to the actual work of construction, but rather to the marketing of the housing units after the construction is completed.

Agency also urges the Director to look past the fact that Developer will be re-paying only $611,000 of the $2 million "loan" advanced by Agency. Instead, Agency argues the Director should acknowledge Agency's expert testimony predicting that Agency will ultimately recover the remaining $1,389,000 and more once the restricted units are re-sold at market prices by their owners. Since Agency's loan was made to Developer with the expectation that Agency would eventually recover all the funds that were loaned, it is argued, the loan should be seen as a good "investment". Under these circumstances, Agency argues that the forgiven loan should not be characterized as a payment of public funds.

Even if one accepts Agency's economic projections and assumes it will realize a return on its "investment" in this Project at least equal to the amount of the "loan," the money recovered by Agency from the subsequent re-sale of the restricted units is divorced, both temporally and qualitatively, from the Agency's financial transaction with Developer. Agency concedes that Developer has been partially loaned $2 million, that Developer is using the $2 million for construction of the Project, and that only

$611,000 of that amount (or approximately 39 percent) will be repaid *by Developer*. The Agency's recovery of the rest of its monetary outlay, regardless of the certainty or the extent of that recovery, will not be from Developer, but rather will be derived from a series of transactions involving Agency and prospective purchasers of the restricted units unrelated to Developer, who holds the loan repayment obligation.

In making a coverage determination, the Director reviews the facts to determine whether "construction," as that term has been defined in the law, is "paid for in whole or in part out of public funds". *See* what is now Labor Code section 1720(a) and (b) (as amended by Statutes 2001, chapter 398, section 2). Once those questions are answered affirmatively, it is irrelevant whether as a result of a real estate transaction a public entity investor stands to make a profit.

Contrary to Agency's argument, this approach does not exalt form over substance. The construction of the Project is being subsidized with nearly $1.4 million in public funds from Agency to Developer with no obligation to repay. This summarizes both the form *and* the substance of the loan. The loaned funds cannot be both forgiven and repaid; the concepts are mutually exclusive. Under these facts, that portion of Developer's loan being forgiven by Agency must be characterized as the payment of public funds.

3. <u>Contracts between private parties fall within the prevailing wage law if public funds are used for construction.</u>

Agency argues that, since Agency was not a party to any construction contract, its contract with Developer is not subject to the prevailing wage law. Agency's second argument fails because there is nothing in section 1720 requiring that a public agency be a party to the construction contract. The requirements of section 1720(a) are unambiguous: public funds must be used "in whole or in part" for construction done under contract. Prevailing wages can be required when the contracting parties are private entities but the money involved is public. *See, for example, Department of Corrections, Community Correctional Facilities*, PW 96-006 (June 11, 1996); *Lewis Center for Earth Sciences Construction*, PW 99-052 (November 12, 1999).

4. <u>Section 1720.2 is not the exclusive statutory authority under which construction performed under private contracts will be considered public works.</u>

Agency argues that section 1720.2 overrides and modifies the wording of section 1720 and makes the prevailing wage law applicable only to private contracts when the criteria set forth in section 1720.2 are satisfied. This argument ignores the fact that section 1720.2 provides that certain construction projects will be considered public works in addition to the projects that fall within the definition of "public works" set forth in section 1720. Note that section 1720.2 specifically states that "'public works' *also* means any construction work done under private

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contract when all of the following conditions exist . . ." (emphasis added). Contrary to Agency's interpretation of the legislative history, section 1720.2 was not enacted to narrow the reach of the prevailing wage law, but rather to extend the law to include privately owned projects that are leased to public agencies.

5. <u>The existence of a prevailing wage requirement in the Health and Safety Code does not render the provisions of the Labor Code inapplicable to redevelopment projects.</u>

Agency further argues that it is not subject to the prevailing wage law because the Community Redevelopment Law has a different prevailing wage provision, and that this more specific prevailing wage law controls over the more general provisions found in the Labor Code. The identical issue has been already addressed by the Department in *Downtown Redevelopment Plan Projects, City of Vacaville*, PW 2000-015 (March 22, 2001). The full discussion in that case will not be recapitulated here. It suffices to say that when the Labor Code and the Health and Safety Code are read together, they do not conflict with one another. Rather, they present complementary parts of a statutory scheme requiring the payment of prevailing wages on construction done under contracts awarded directly by redevelopment agencies, in addition to construction that is financed by redevelopment agencies.

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6. <u>Enforcement of the prevailing wage laws implements an important public policy</u>.

Agency's appeal is also based on an argument of public policy. Agency notes that the payment of prevailing wage rates increases the cost of construction. These increased costs, it argues, frustrate the Legislature's desire to encourage the development of low-cost housing in California.

Public policy considerations are generally beyond the scope of the coverage determinations issued by the Director. It must be noted, however, that the California Supreme Court has explicitly acknowledged "the public policy of California 'to vigorously enforce minimum labor standards in order to ensure employees are not required or permitted to work under substandard unlawful conditions, and to protect employers who comply with the law from those who attempt to gain competitive advantage at the expense of their workers by failing to comply with minimum labor standards.' [Citation omitted.] The conditions of employment on construction projects financed in whole or in part by public funds are governed by the prevailing wage law. [Citation omitted.]" *Lusardi Construction Company v. Aubry* (1992) 1 Cal.4th 976, 985, 4 Cal.Rptr.2d 837, 842.

Agency's argument that the public policy expressed by the community redevelopment law should be given more weight than the public policy contained in the prevailing wage law is more properly directed to the Legislature.

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7. The Project is not exempt from the prevailing wage law by the amendments of Senate Bill 975.

Section 1720 was amended with the passage of Senate Bill ("SB") 975 by the addition of a subdivision (c)(3), among other changes. In essence, the new statutory language provides that the financing of construction of affordable housing units financed with moneys from a low and moderate income housing fund under Health and Safety Code will not constitute a public works project paid for out of public funds. Agency contends that this exemption applies to the Project under consideration here because all of the Agency financing was from such a fund.

SB 975 became effective January 1, 2002. In cases of redevelopment agency agreements with Developers, the date of the agreement determines the applicable law. As the original OPA in this case is dated October 23, 1998, the SB 975 amendments to the public works laws are not applicable to this Project. Therefore, the exemption contained in what is now section 1720(c)(4) is inapplicable.[3]

8. A hearing is not required or necessary.

Developer requests a hearing in its appeal. 8 CCR section 16002.5(b) provides that the decision to hold a hearing is within the Director's sole discretion. Because the material facts are undisputed and the issues raised are legal ones, there are no factual issues to be decided and no

[3] For the same reasons, any exemptions contained in the 2004 amendments to the public works laws contained in SB 972 are also unavailable.

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hearing is necessary. Developer's request is therefore denied.

V. CONCLUSION

For the foregoing reasons, Agency's and Developer's appeals are denied and the Determination that the Project is a public work subject to the payment of prevailing wages is sustained.

Dated: 1-15-03

Chuck Cake

Chuck Cake, Acting Director

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