

STATE OF CALIFORNIA

DEPARTMENT OF INDUSTRIAL RELATIONS

DECISION ON ADMINISTRATIVE APPEAL

RE: PUBLIC WORKS CASE NO. 2002-021

City Place Project

City of Long Beach

I. INTRODUCTION AND PROCEDURAL HISTORY

On March 26, 2002, the Southern California Labor/Management Operating Engineers Contract Compliance Committee ("Operating Engineers") requested of the Department of Industrial Relations ("Department") a public works coverage determination whether the City Place Project ("Project") in downtown Long Beach ("City") is a public work. On November 5, 2002, Acting Department Director Chuck Cake issued a determination ("Determination") that the Project is a public work requiring the payment of prevailing wages pursuant to Labor Code § 1720 *et seq.*

On December 4, 2002, both the developer of the Project, Coventry Long Beach Plaza, L.L.C. ("Coventry") and Pine Avenue Associates ("Pine Avenue"), participating for the

first time, filed timely administrative appeals of the Determination.

Coventry submitted a brief in support of its appeal along with additional documents. Pine Avenue submitted additional documents. On December 30, 2002, Operating Engineers submitted further argument. On February 7, 2003, a conference call occurred to clarify the issues, with Operating Engineers, Coventry, Pine Avenue, and representatives of the Department participating. Thereafter, on March 7, 2003, Coventry provided more documentation and legal authority for its position. On March 19, 2003, Operating Engineers submitted rebuttal argument.

II. SUMMARY OF FACTS

The Project is best described by City's description to members of the Long Beach Redevelopment Agency ("Agency"):

The proposed project involves the redevelopment of the Long Beach Plaza mall and its multi-level parking structure and the development of the former International School site

The proposed project contemplates the demolition of the existing mall . . . , portions of the existing parking structure and the construction of the following components:

- Destination retail (mall site)
- Neighborhood retail (school site)
- Hotel use (3rd Street site)
- Residential uses (various sites)

(Memo to Agency members, August 28, 2000, pgs. 1-2)

Coventry owns the mall. Agency owns the mall parking structure and the former International School site.

On September 12, 2000, Coventry, City and Agency entered into an Owner Participation Agreement ("OPA") for the Project. The OPA provides that City will renovate and seismically improve the parking structure. City will issue bonds to pay off the existing indebtedness for the original construction of the parking structure and to pay for the seismic upgrades required under the OPA. City contracted with a construction contractor to perform the parking structure upgrades, requiring the payment of prevailing wages.

In addition, City has agreed to reimburse Coventry approximately \$2.9 million for extensive off-site improvements of the public streets surrounding the mall. City has agreed to pay the first \$2 million in traffic impact fees through a ledger transfer from one City fund to another. When the appeal was filed, City had not yet paid this fee. Coventry provided its "understanding" that City "will undertake a journal vouchers accounting transfer from an excess business license account to the fee account."

(Letter, Lee Rosenthal, March 7, 2003)

In addition, Agency was to pay up to \$500,000 in plan check and building permit fees on Coventry's behalf. This fee was paid by journal voucher from City's "community

development/redevelopment account [controlled by Agency] to the building department..." (Memo to Agency members, August 28, 2000, Chart of Financial Participation).

Finally, with regard to the construction on the pre-existing mall and International School property, Agency was to transfer the International School locations, valued at approximately \$6.2 million, to Coventry for \$2 million. Coventry's \$2 million payment was deposited into an escrow account from which Coventry could draw, once it provided a specified level of funding with private sources. Once this funding condition was met, the escrow agent transferred this \$2 million back to Coventry.

Thus, two public entities have agreed to make at least five distinct contributions to the Project as follows: By City, seismic reconstruction of the parking lots, reimbursement for off-site improvements, and payment of a portion of the traffic impact fees. By Agency, sale of land at reduced price, and payment of plan check and building permit fees. The total participation by the public agencies is \$17,392,000, with Agency providing at least \$6,700,000, and City providing at least \$10,692,000. (*Id.*)

Pine Avenue purchased air rights for portions of the mall from Coventry to construct residential units. The funds for the purchase of the air rights and the construction were private.

III. ISSUES ON APPEAL¹

- (1) Whether the Project is paid for in whole or in part with public funds;
- (2) Whether the Project is exempt from prevailing wages because City is a chartered city that properly invoked its chartered city exemption from the payment of prevailing wages; and,
- (3) Whether the construction of the residential units by Pine Avenue is part of the Project.

IV. DISCUSSION

Except for the status of the work performed by Pine Avenue, there does not appear to be a dispute among the parties to this appeal that the Project is construction done under various contracts. The disputed issues generally concern whether public funds have been paid for the Project and whether the charter city exemption from prevailing wage obligations is available.

¹ Coventry has asked whether tenants who perform improvements of their leased property within the Project would be covered by the Determination. The current record is inadequate to provide a response to its question.

A. Various Contributions by the City and Agency Constitute Payment of Public Funds for Construction of the Project.

1. City's Payment Of Traffic Mitigation Fees and Agency's Payment of Plan Check and Building Permit Fees.

Both City and Agency have or will pay fees on Coventry's behalf. City will make its payment by a journal voucher transfer between accounts within City coffers. Agency has paid its fees to City using the same accounting mechanism.

Under what is now Labor Code section 1720(a)(1), "public work" was defined as:

Construction, alteration, demolition, or repair work done under contract and paid for in whole or in part out of public funds....

Coventry has argued that these transfers are not "payments" within what is now Labor Code section 1720(a)(1)² as the definition of payment existed at the time of the OPA September 12, 2000, relying on *McIntosh v. Aubry* (1993) 14 Cal.App.4th 1576.³

In *McIntosh*, the Court held that where a private party constructed a building on County land and then operated a residential care facility in exchange for rent forbearance, no "payment" occurred. However, the Court's discussion of

² Unless otherwise indicated, all statutory references are to the Labor Code.

³ Because the OPA was entered into in September 2000, the Senate Bill 975 amendments to the definition of "payment of public funds," which became effective on January 1, 2002, do not control.

the meaning of "payment" does not support Coventry's position in this case:

[T]he "payment" here must be "out of public funds" (§ 1720, subd. (a)). The word "funds" is not specially defined in the statute but "has a well-established meaning in common parlance The dictionary defines it as 'available pecuniary resources ordinarily including cash and negotiable paper' [citation], and in a legal context the courts have also taken it to include property of value which may be converted into cash [citations]." The county's right to charge rent is not an available pecuniary resource like cash or some readily cash-convertible asset. To take rent collected from one source and use it to pay obligations would plainly be a payment of public funds, but the County here will not collect the rent.

Id., 14 Cal.App.4th at 1588 (citations omitted)

In reaching this decision, the *McIntosh* Court distinguished between "an available pecuniary resource" and forbearance of money that would otherwise come to the public entity. However, "nothing in that (*McIntosh*) opinion suggests that the actual payment of public funds as an incentive to private development would not trigger prevailing wage

requirements." *Downtown Redevelopment Plan Projects, City of Vacaville*, PW 2000-015 (3/21/01) ("Vacaville").

As to City's payment of fees, Coventry has supplied no authority that the journal voucher transfer by City is not a transfer of "cash or some readily cash-convertible asset." *McIntosh, supra*, 14 Cal.App.4th at 1588. While in *McIntosh*, the public agency "waived" inspection fees and later charged them to a specific account in the County's budget, here the fees have not been "waived" but rather have been paid out of a specific account. Accordingly, the transfer of funds between City's accounts constitutes "payment" within the meaning of 1720.⁴

As to Agency's payment of fees, Agency is a separate legal entity from City (*infra*) and its payment of plan check and building permit fees constitutes payment of public funds. Nothing in *McIntosh* provides that payment from a separate public entity to a City is anything other than "payment" under section 1720. The fact that the two payments are accomplished in the same manner merely highlights that City's payment of traffic impact fees was a payment under section 1720. Even independent of City's payment, Agency's payment for plan check and building permit fees constitutes payment of public funds.

⁴ This conclusion is supported by the language of the OPA, in which the City's transfer of funds was called a "payment."

2. City's Payment For Seismic Upgrade For The Parking Structure.

City's payment for the seismic upgrade for the parking structure under the OPA is clearly the payment of public funds and makes the Project a public work.

3. City's \$ 2.9 Million Reimbursement For Off-Site Improvements.

The OPA provides that City will reimburse Coventry \$2.9 million for Coventry's construction of the streets surrounding the Project. City's payment for construction work under the OPA is clearly payment of public funds and makes the Project a public work.

4. The Agency's Transfer of the International School Site.

Coventry now reports that it paid \$2 million into escrow for the International School site and received these funds back without the funds ever coming under Agency's control. The release of funds itself may not constitute payment of public funds because it constituted a return to Coventry of funds it previously deposited in the escrow account. Left undecided, however, is whether Agency's transfer of the International School property under this arrangement is a transfer for below market value that constitutes payment of public funds. That is, the result of this payment scheme resulted in Agency's transfer of the International School site for no money. As the Determination states, Agency estimated that the fair market

value of the International School site was \$6.2 million. It was transferred to Coventry for \$ 0.00.

While under the Senate Bill 975 amendments to the prevailing wage laws we would find such a property transfer to constitute payment for construction with public funds, we need not address whether the same rule applies to this pre-975 project in light of the findings that there are other sources of public funds to the Project.

B. The Project is Not Exempt From Prevailing Wage Requirements under City's Chartered City Status.

Based on the foregoing discussion, the Project is construction performed under contract and paid for in part with public funds. It is therefore a public work. The inquiry does not end here, as Coventry seems to argue that the whole Project is subject to City's chartered city exemption under Cal. Const., Art. XI, section 5.

A chartered city is exempt from general state laws where its local law conflicts with the general law over a purely municipal affair unless the state law is a matter of statewide concern. *California Fed. Savings & Loan Assn. v. City of Los Angeles* (1991) 54 Cal.3d 1. Here, a conflict exists between City's Municipal Code and the California Prevailing Wage Law. However, no purely municipal affair is involved because Agency is a separate legal entity from City and is not covered by City's exempt status.

Coventry provides no authority for the proposition that the existence of some charter city money exempts a public work also funded with non-charter city money. The Project is simply not a municipal affair under a project analysis.

Coventry argues that City's chartered city exemption applies equally to Agency's money and activities, as it is simply a part of City's governing structure. To the contrary, Agency owes its existence to state law, without which it could not exist. Health & Safety Code section 33100. Agency's function is to carry out the state's policy to eliminate blight by economic development, controlled at the local level. *Redevelopment Agency of City of Berkeley v. City of Berkeley* (1978) 80 Cal.App.3d 158, 169, 143 Cal.Rptr. 633 ["The redevelopment of blighted areas was declared to be a governmental function of state concern, in the interest of health, safety and welfare of the people of the state and of the communities in which the areas exist."]. Agency is authorized by state law to collect special taxes and charge special fees to accomplish its goal. Agency's activities, throughout the state, carry out the state's policy. *In Re Redevelopment Plan for Bunker Hill* (1964) 61 Cal.2nd 21, 37 Cal.Rptr. 74, *Duskin v. San Francisco Redevelopment Agency* (1973) 31 Cal.App.3rd 769, 107 Cal.Rptr. 667, *Walker v. City of Salinas* (1976) 56 Cal.App.3rd 711.

Almost without exception, every court that has examined the relationship between cities and their redevelopment agencies have found that the two are separate entities. See, for example, *Pacific States Enterprises v. City of Coachella* (1993) 13 Cal.App.4th 1414, *Stockton Newspapers, Inc. v. Members of Redevelopment Agency of City of Stockton* (1985) 171 Cal.App.3rd 95, *Walker v. City of Salinas, supra*, *Long Beach Community Redevelopment Agency v. Morgan* (1993) 14 Cal.App.4th 1047, 18 Cal.Rptr.2nd 100. This is true even where, as here, the Agency's governing board is identical to City's City Council. *Long Beach Community Redevelopment Agency v. Morgan, supra*. For this reason, Agency is not the same entity as City, even though City and Agency work in concert to fulfill the state mandate to eliminate blight. Since the Agency's contribution of fees to City's coffers was a "payment," prevailing wages must be paid.

There are three principal factors governing whether a project is purely a municipal affair: (1) the extent of non-municipal control over the project; (2) the source and control of the funds used to finance the project; and, (3) the nature and purpose, including the geographic scope, of the project. *Southern California Roads Co. v. McGuire* (1934) 2 Cal.2d 115, *Primary Plant Headworks and Cannery Segregation Project, City of Modesto*, PW 97-018, 97-019

(3/17/00), *SPCA-LA Companion Village and Education Center*,
supra.

In this case, the public funds for the project come from both a chartered city and non-chartered public entity. The OPA and the documents that underlie it show that the public entity most involved in the Project was Agency, which is not a chartered city. There is no evidence that the Project's nature, purpose, or effect is limited to the residents of City. Therefore, the project is not purely a municipal affair, and City's charter city exemption does not apply to the Project.

C. Pine Avenue's Construction Of Residential Units Is Part Of the Project.

Pine Avenue purchased air rights from Coventry to construct condominiums and apartments through an Assignment and Assumption Agreement among Coventry, Agency, and Pine Avenue ("Assumption Agreement"). This Assumption Agreement provides that Pine Avenue would develop specified portions of the planned residential units provided for in the OPA under an assignment from Coventry of this responsibility. In addition, Coventry and Pine Avenue entered into a Purchase and Sale Agreement ("Sale Agreement") in which Pine Avenue purchased for \$6.3 million the air rights to construct the residential units above "podium decks" that Coventry was responsible under the OPA to construct. The parties to the Purchase and Sale Agreement provided that the

podium deck and the residential units would be constructed using a subsidiary of Pine Avenue, rather than Coventry's general contractor for the rest of the Project.

The issue is whether Pine Avenue's construction of the residential units is part of the Project. In *Vineyard Creek Hotel and Conference Center*, PW 2000-016 (October 16, 2000) the Director found that the determination of whether there are single or multiple projects must be on a case-by-case basis. The Director found that five factors have to be considered:

(1) the manner in which the construction is organized in view of, for example, bids, construction contracts, and workforce; (2) the physical layout of the project; (3) the oversight, direction and supervision of the work; (4) the financing and administration of the construction funds; and (5) the general interrelationship of the various aspects of construction. ...In making this finding, it is the analysis of the above factors, not the labels assigned to the various parts by the parties, which controls. Under Labor Code section 1720(a), if there is a single project involving the payment of public funds, prevailing wages will apply to the entire project; if there are multiple projects, prevailing wages may apply to one project but not another, depending on the circumstances.

The construction of the residential units is part of the Project under *Vineyard Creek*. The work by Pine Avenue was contemplated in the OPA, and Pine Avenue performed other portions of Coventry's construction obligation under the OPA. In fact, all of what Pine Avenue built was originally Coventry's responsibility. There is geographic proximity in

that the two portions of the Project touch at the podium decks. There has been no showing why the same interrelationship of the various parts of the Project under the OPA did not continue after the Assumption Agreement. Based on the information provided, the Project, including the assumption undertaken by Pine Avenue, is a single interdependent and integrated Project.

V. CONCLUSION

For the reasons discussed above, Coventry's appeal is denied, and the Determination is affirmed.

Dated: 11-14-03

Chuck Cake

Chuck Cake, Acting Director