

DEPARTMENT OF INDUSTRIAL RELATIONS

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



April 7, 2003

Victor M. Ortiz-de-Montellano, Esq.
Altshuler, Berzon, Nussbaum, Rubin & Demain
177 Post Street, Suite 300
San Francisco, CA 94108

Re: Public Works Case No. 2002-047
Legacy Partners Project
City of Concord Redevelopment Agency

Dear Mr. Ortiz-de-Montellano:

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 Legacy Partners Project ("Project") is a public work subject to the payment of prevailing wages.

Factual Background

On November 14, 2000, the City of Concord Redevelopment Agency ("Agency") and Legacy Partners 2273 LLC, entered into a Disposition and Development Agreement ("DDA") for the development and construction of the Project. On July 20, 2001, Legacy Partners 2273 LLC assigned its rights and obligations under the DDA to EQR-Legacy Partners (2000) Concord LLC ("Developer").

The Project is a 259 unit luxury rental residential project set on 4.59 acres in the City of Concord ("City"). It will include two four-story buildings, two parking structures and a swimming pool. Developer has retained Daniel Silverie III, Inc. ("Contractor") to construct the Project for an estimated cost of \$30 million.

The Project site originally consisted of 21 improved parcels, two owned by City and one owned by Agency. The remaining parcels were owned by private parties, most of whom were under contract to sell to Developer ("Developer Parcels").

Under the DDA, Agency agreed to acquire and assemble the 21-parcel site for construction of the Project. To accomplish this Agency, using Developer funds, completed the sale of the privately owned parcels. In addition, Agency purchased the City-

owned parcels and "sold" them along with the Agency parcel ("Agency Parcels") to Developer, subject to the relocation credit described below, for fair market value of \$490,000.

Financial Assistance

A. Relocation Credit

The DDA requires Developer to pay all relocation costs up to \$525,000. In consideration of this payment, Agency agreed to give Developer a relocation cost credit up to \$490,000 to be applied against the purchase of the Agency Parcels. In addition, Agency agreed to pay one half of the relocation costs that exceeded \$525,000 up to \$1.2 million. Developer has recently advised this Department that the relocation cost to date is \$642,000. According to Developer, it has paid the \$642,000. Agency has paid \$47,500 in relocation costs.

Because relocation costs exceeded the purchase price of the Agency-owned parcels, Developer paid no money for their transfer.

B. Net Property Tax Increment Rebate

Under the DDA, Agency is to provide to Developer a portion of the "net property tax increment revenues" Agency will receive as a result of the construction of this Project. For the first ten years following construction, Developer is to receive 100 percent of the net tax increment revenues in the form of a tax rebate. Should the value of the Project not exceed \$270,000 per unit, along with other contingencies, Developer is to receive 100 percent of the net tax increment revenues for an additional ten years. The Summary Report Pursuant to Section 33433 of the California Community Redevelopment Law ("Summary Report"), dated October 27, 2000, estimates the tax rebate paid to Developer over a 20-year time period will be approximately \$2,692,000. The Summary Report also states that this tax rebate, along with the Agency's assistance in assembling the Project site, is necessary to provide "the financial incentive to develop this project." (Summary Report, p. 10.)

Deferred Participation Payments

The DDA does provide that upon the occurrence of certain capital events, e.g. sale or refinancing of the Project, Developer will pay to Agency a percentage of profits received. The Summary Report, based on the assumption that there will be a refinance and two sales of the property during the first 20 years, expects

the Agency to receive deferred participation payments in the total sum of \$642,000. According to the DDA, these deferred participation payments are to offset costs incurred by Agency in assembling the Project site. However, Agency recognizes that the success of the Project allowing for these deferred participation payments is uncertain, and there is no guarantee Agency will receive the deferred payments (Summary Report, p. 11).

Legal Analysis

What is now Labor Code section 1720(a)(1)¹ (as amended by statutes of 2001, chapter 938, section 2 (Senate Bill 975)) defines "public works" in relevant part as: "Construction, alteration, demolition, installation or repair work done under contract and paid for in whole or in part out of public funds."

Here the Project is the demolition of existing structures and construction of a 259-unit complex pursuant to contractual agreements. The demolition and construction are also being paid for in part with public funds. Agency paid \$490,000 in relocation costs in the form of Agency Parcels, plus an additional \$47,500. The payment of site assembly costs, including relocation costs, constitutes payment of public funds. *Town Square Project/City of King*, PW 2000-011 (December 11, 2000). In addition, the payment to Developer of the net property tax increments constitutes payment of public funds for construction since it is being paid in consideration of the construction of the Project.

Developer makes several arguments that the Project is not a public work. First, it argues that no public funds are being used to construct the apartment complex. It states:

The only assistance that the Agency is providing is to condemn and acquire the land by imminent (sic) domain and transfer title to Legacy. For its work in site assembly, the Agency receives \$490,000 for the land, plus about \$642,000 in Deferred Participation Payments.

Developer's argument ignores several facts. As noted above, Agency is not receiving \$490,000 for the Agency Parcels. Because of the relocation credit, Agency is in fact paying \$490,000 in relocation costs in exchange for the transfer of the Agency Parcels to Developer. Furthermore, the fact that these site

¹ All statutory section references are to the Labor Code.

Letter to Victor M. Ortiz-de-Montellano, Esq.

Re: Public Works Case No. 2002-047

Page 4

assembly costs may yet be reimbursed does not obviate the fact that Agency is now paying public funds to subsidize the Project. The Deferred Participation Payments are contingent upon the refinance or sale of the property, which events at this time are speculative. In its Summary Report, Agency itself recognizes it may never regain its financial assistance to the assembly of the Project site.

Developer also ignores that Agency is to pay Developer tax rebates that total \$2.7 million. This alone constitutes payment of public funds for construction.

Finally, the fact that these public funds are ostensibly tied to assembly versus construction costs, or are paid post-construction, does not remove the Project from the purview of Section 1720(a)(1). Section 1720(a)(1) provides that "'construction' includes work performed during the design and preconstruction phases of construction... ." Site assembly and relocation are part of the preconstruction phase, which under this section, constitutes construction. Payments for site assembly are payments "for activities integrally connected to the construction of the project...without which the project could not have been developed." *Town Square Project/City of King, supra*, at p. 5. Here, according to the DDA, the tax rebates are being paid in consideration of Developer's obligation to build the Project (DDA, p. 47, para. 601.) The rebates are only made possible as a result of the construction of the Project. Thus, the tax rebates are public funds paid for the construction of the Project.

Developer next argues the Agency assistance for site assembly "is in essence a loan being paid for the Developer." Developer is legally incorrect in this assertion. For a loan to exist there must be an obligation to repay. Under the DDA there is no such obligation by Developer to repay the site assembly costs. *13th and F Street Townhouse Development/City of Sacramento*, PW 2000-043 (January 23, 2001). Here, reimbursement to Agency will only occur based on uncertain events. And, as previously discussed, Agency's tax rebate payments alone constitute public funds for construction.

Finally, Developer argues that the tax rebate "is in essence a forbearance of a certain portion of increase in taxes due after completion of the project." In support of this argument, Developer points out that the Project is expected to generate over \$4.2 million in increased tax revenues, which "the Agency will rebate or forbear collecting roughly \$2,700,000." According

Letter to Victor M. Ortiz-de-Montellano, Esq.

Re: Public Works Case No. 2002-047

Page 5

to Developer, this financial arrangement amounts to a forbearance of certain tax increases and "is akin to the rent forbearance" in *McIntosh v. Aubry* (1993) 14 Cal.App.4th 1576.

Developer's argument is flawed for several reasons. First, Agency has agreed to pay to Developer, out of public coffers, 100 percent of the increased tax revenues it receives from the County of Contra Costa as a result of the construction of the Project. This is a direct payment of public funds, not a forbearance in collecting taxes owed.

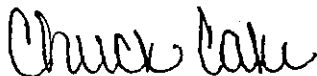
Second, the *McIntosh* decision is factually distinguishable from this case. In *McIntosh*, the Court stated that the refusal or forbearance to charge rent does not constitute a payment of public funds. The Court noted that there is a distinction between the collection of rent and later payment of obligations therefrom versus the forbearance or refusal to collect rent that may be charged. In this case, there is a collection of increased tax revenues by the County, which are then paid to Agency, who in turn pays Developer. Under *McIntosh*, this is not a forbearance or a refusal to collect, but rather a collection of money paid by Agency under an obligation set forth in the DDA.

To summarize, Agency paid public funds for the construction of the Project when it paid a portion of the site assembly costs and has committed to pay \$2.7 million in tax rebates in consideration for building the Project.

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

I hope this determination satisfactorily answers your inquiry.

Sincerely,



Chuck Cake
Acting Director