STATE OF CALIFORNIA
Arnold Schwarzenegger, *Governor*

DEPARTMENT OF INDUSTRIAL RELATIONS
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To All Interested Parties:

Re: Public Works Case No. 2002-053
Pleasant Hill Schoolyard Redevelopment Project

The Decision on Administrative Appeal, dated July 10, 2003, in PW 2002-053, *Pleasant Hill Schoolyard Redevelopment Project,* was reversed in a published First District Court of Appeal opinion dated November 22, 2005. See *Greystone Homes, Inc. v. Chuck Cake, Department of Industrial Relations* (2005) 135 Cal.App.4th 1.

STATE OF CALIFORNIA

DEPARTMENT OF INDUSTRIAL RELATIONS

DECISION ON ADMINISTRATIVE APPEAL

RE: PUBLIC WORKS CASE NO. 2002-053
PLEASANT HILL SCHOOLYARD REDEVELOPMENT PROJECT

INTRODUCTION

On January 16, 2003, the Director of Industrial Relations issued a public works coverage determination ("Determination") finding that the Pleasant Hill Schoolyard Redevelopment Project ("Project") is a public work subject to prevailing wage obligations. The basis of the Determination is that the Project is demolition and construction performed under contract and paid for in part with public funds in the form of a gift of public land, public payment of traffic impact mitigation fees and public payment of land acquisition costs with annual net tax increment and housing set-aside revenues.

On February 25, 2003, Greystone Homes ("Developer") timely filed an administrative appeal of the Determination. Both Developer and Carpenters Local Union No. 152, International Brotherhood of Electrical Workers Local Union No. 302, Plumbers and Steamfitters Local Union No. 159 and

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Sheet Metal Workers Local Union No. 104 (collectively "Unions") fully briefed the issues on appeal.[1]

Having fully considered the record and arguments on appeal, the undersigned hereby denies the appeal for the reasons set forth in the Determination, which is fully incorporated by reference herein, and for the additional reasons discussed in this Decision on Appeal.

DISCUSSION[2]

This Decision on Appeal discusses Developer's argument that prevailing wage obligations should not apply to the Project because Developer and the Pleasant Hill Redevelopment Agency ("Agency") relied on controlling Department administrative law when they entered into the Disposition and Development Agreement ("DDA") structuring the Project in November 1999. According to Developer, the Project would not have been deemed a public work under the administrative law it claims controlled at that time. To properly address Developer's arguments, a discussion of the history and procedures concerning the designation by Department of Industrial Relations ("Department") of

[1] Developer submitted letter briefs on February 25, 2003, March 26, 2003 and April 3, 2003; Unions submitted letter briefs on March 28, 2003 and April 23, 2003.

[2] This Decision does not discuss issues already addressed in the Determination, including those raised by Developer for the first time on appeal.

precedential administrative determinations under Government Code[3] section 11425.60 is in order.

Under Section 11425.60(a), "A decision (of the Department) may not be expressly relied upon as precedent unless it is designated as a precedent decision by the agency." Under Section 11425.60(c), the Department is to publish, once per year, a Notice in the California Regulatory Notice Register, advising the public that it has an index of precedential decisions available for public review. The index is to be updated at least once per year. The statute does not restrict the number of times the index may be updated.

In January 1999 the Department published its first Notice in the California Regulatory Notice Registry that it had an index of precedential public works coverage determinations that was available upon request. In May 1999 the index was updated, both designating new coverage determinations as precedential and "de-designating" a number of prior determinations. This index was again updated, with format changes only, in June 1999. No other updates were made between June 1999 and November 1999, the date of the DDA. The June 1999 index is the controlling index for this Project. Copies of the May 1999 and June 1999 indices are attached hereto.

[3] Unless otherwise indicated, all section references are to the California Government Code.

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Developer argues that in November 1999, eight precedential public works coverage determinations held that a conveyance of public land, payment of site acquisition costs and payment of traffic impact fees do not constitute payment of funds for construction. According to Developer, the Determination is therefore in conflict with the controlling law when the DDA was entered into. The eight determinations relied on by Developer are *Young Apartments*, PW 93-010 (February 1, 1994), *Brea Downtown Redevelopment Project*, PW 93-040 (March 28, 1994), *Robert Salem Company*, PW 93-055A (November 21, 1994), *El Dorado Irrigation District*, PW 92-006 (April 9, 1992), *City of Pismo Redevelopment Agency*, PW 94-034 (February 28, 1995), *2424 Arden Way*, PW 91-037 (April 20, 1992), *Jurupa Valley Spectrum LLC Project*, PW 98-003 (April 27, 1998) and *Springs Gateway Building Partnership*, PW 97-007 (January 15, 1998).

A review of the June 1999 index reveals that neither the *Young, Brea, Robert Salem, Jurupa Valley* nor *El Dorado* decision is listed. Developer argues, however, that the June 1999 index is not relevant because a new Notice must be published in the California Regulatory Notice Register before an updated index can be relied upon. In other words, it is Developer's position that if the Department updates its index within the one-year period between publications of Notice, said updates are ineffective unless the Department

publishes a new Notice. Under Developer's reasoning, every time a new precedential determination is added to the index, formal publication of the existence of the updated index would have to take place. In this case, the Developer's argument is that the precedential determinations applicable to the Project would be those listed in the January 1999 index, not the updated June 1999 index, because a new Notice was not published as to the existence of the June 1999 index.

Developer's interpretation of the requirements of the Government Code is rejected. Section 11425.60 only requires that the Notice be published once per year. There is no limit to the number of times the index can be updated during that one-year period, and there is nothing in the statute stating an index updated within a year of its last publication is ineffective unless a new Notice is published. The Department's interpretation of the requirements of section 11425.60 is consistent with the practical reality of an agency's issuance of administrative decisions and this Department's issuance of precedential public works coverage determinations. This Department issues many such determinations each year; each time a determination issues, the index is updated to include the new determination. A requirement that the Department republish a Notice each time a public works coverage determination is designated precedential would be unwieldy and therefore untenable. The

publication of an annual Notice of the existence of an index (as opposed to the publication of the index itself) puts the public on notice to request from the Department a current index of precedential determinations to guide an interested party in making plans for a project such as the one in this case. Here, Developer should have requested a copy of the current index when it entered into the DDA for the Project in November 1999.

Because the June 1999 index is controlling, Developer's *reliance on the Young, Brea, Robert Salem, Jurupa Valley and El Dorado* decisions is misplaced.

Under the June 1999 index three of the precedential determinations cited by Developer - *2424 Arden Way, City of Pismo Redevelopment Agency* and *Springs Gateway* - were precedential at the time the DDA was signed. These determinations, however, are legally and factually distinguishable from the Project and, therefore, do not support Developer's argument.

Developer argues that *2424 Arden Way* and *Springs Gateway* define "construction" under Labor Code section 1720(a)(1) "in a manner that excludes the acquisition of real property," including the gifting of public land and reimbursement for site assembly. These determinations do not hold that land acquisition is excluded from the definition of construction; in fact, they do not address the

question whether land acquisition is part of construction. Accordingly, *2424 Arden Way* and *Springs Gateway* are not relevant to the analysis here.

Developer also cites *City of Pismo Redevelopment Agency*[4] in support of its argument that the payment of traffic impact fees and housing set-aside funds does not render the Project a public work. Specifically, Developer argues that because the Pismo determination allowed a portion of the project in that case to be severed for purposes of prevailing wage obligations, the 12 affordable housing units in the Project should be severed and prevailing wages be required on their construction only.

The *Pismo* case does not support severance of either the construction of the affordable housing units or the traffic impact work because *Pismo* focused strictly on the public funding of public improvements, including street, sewer, water and storm drains. Further, the City of Pismo did not, as here, contribute money toward land acquisition and traffic impact fees, nor did it gift public land.[5] There is also no indication the traffic impact fees here were

[4] This determination is not currently precedential.

[5] Developer also argues that if the transfer of the parcel here is interpreted as a gift, it is a forbearance of Agency's right to be compensated and not a payment of public funds under *McIntosh v. Aubry* (1993) 14 Cal.App.4th 1576. Developer's reliance on *McIntosh* is misplaced. In that case, the public entity's forbearance of its right to collect rent was found not to be a payment of public funds. The Court, however, stated that the giving of "property of value which may be converted into cash" is the payment of public funds. *Id.*, at 1588. Agency's gift of property here is therefore not a forbearance, but a payment of public funds.

earmarked for specific traffic improvements related to the Project.

Developer further asserts that the affordable housing units are a *de minimis* portion of the Project and the traffic impact fees and housing set-aside funding are a *de minimis* portion of the Project's cost. For these reasons, Developer argues that the Project should not be viewed as a public work. The Developer's argument is without legal support.

The cases cited by Developer in support of its *de minimis* arguments were not precedential at the time the DDA was entered into. Further, Labor Code section 1720 contains the language "in whole or in part out of public funds ..." The statute does not set an amount of public funds under which a project is not considered a public work. Labor Code section 1771.5, which exempts construction projects of $25,000 or less and maintenance projects of $15,000 or less from prevailing wage requirements, was the only limiting provision in effect in November 1999. Clearly, the Project exceeds those thresholds. Labor Code section 1720(c)(2)(B) (now subsection (c)(3)), which provides a *de minimis* exemption from prevailing wage requirements, was not effective until January 1, 2002.

Developer has requested a hearing on this matter pursuant to Title 8, California Code of Regulations, section

16002.5(b). That section provides that the decision to hold a hearing is within the Director's sole discretion. Because here the material facts are undisputed and the issues raised are legal ones, there are no factual issues to be decided and no hearing is necessary. Developer's request is therefore denied.

CONCLUSION

In summary, Developer has cited determinations in support of its arguments that were either not precedential at the time of the signing of the DDA or do not contradict the conclusions reached in the Determination. As such, the appeal is denied and the Determination upheld. The request for hearing is also denied. This decision constitutes the final administrative action in this matter.

Dated: 7-10-03

Chuck Cake

Chuck Cake, Acting Director

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