

DEPARTMENT OF INDUSTRIAL RELATIONS

OFFICE OF THE DIRECTOR

455 Golden Gate Avenue, Tenth Floor

San Francisco, CA 94102

(415) 703-5050



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.

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January 16, 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. 2002-053
Pleasant Hill Schoolyard Redevelopment Project

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 upon my review of the facts of this case and an analysis of the applicable law, it is my determination that the Pleasant Hill Schoolyard Redevelopment Project ("Project") is a public work subject to the payment of prevailing wages.

In November 1999 the Pleasant Hill Redevelopment Agency ("Agency") and The DeSilva Group, LLC ("DeSilva") entered into a Disposition and Development Agreement ("DDA") for the development and construction of the Project. The scope of the Project includes the demolition of the existing structures on the Project site, the building of 134 residential townhomes, 12 of which are designated as affordable housing units, and the construction of parking spaces, a swimming pool and on- and off-site improvements. In December 1999 DeSilva assigned its rights under the DDA to Greystone Homes, Inc. ("Developer"). The cost of the Project is estimated at \$31.3 million.

At the time of the signing of the DDA, the Project site consisted of 29 parcels of land. Agency owned two of the parcels ("Agency parcels"), DeSilva owned or was under contract to buy 20 parcels ("Developer parcels") and the remaining seven parcels were owned by third parties ("Acquisition parcels"). Pursuant to the DDA, Agency agreed to convey to Developer its two parcels and to assist Developer in acquiring the Acquisition parcels. Developer agreed to advance all costs of acquisition for the Developer parcels and Acquisition parcels.

Because Agency understood the Project could not be built without its assistance, Agency agreed to convey the Agency parcels cost-free, assume the Traffic Impact Mitigation Fee and reimburse Developer for its costs in acquiring the Developer and Acquisition parcels.

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The DDA reveals that one of the Agency parcels, the Clara Court Parcel, was purchased previously by Agency at fair market value for \$161,111.11. The other Agency parcel was purchased by Agency using monies advanced by Developer but to be reimbursed by Agency through payment of the annual net tax increments as more fully described below.

The Summary Report Pursuant to Section 33433 of the California Community Redevelopment Law ("Summary Report") states the assumption of the traffic mitigation fees will cost Agency \$209,000.

Concerning Agency's agreement to reimburse Developer the costs of acquiring the one Agency parcel and the Developer and Acquisition parcels, including the purchase price and relocation costs, in the DDA and the promissory note signed by Agency, Agency agrees to pay to Developer "...from the Annual Net Tax Increments...an amount equal to the lesser of: (a) the amount the Agency receives until October 2, 2028 or (b) TWO MILLION TWO HUNDRED SIXTY SEVEN THOUSAND DOLLARS...in present value..." Agency also agrees to "...reimburse the Developer from the Annual Housing Set-aside Revenues TWO HUNDRED FORTY THOUSAND DOLLARS...in net present value..."

The Affordability Agreement signed and recorded as part of the DDA states that this Agency assistance was provided as consideration for the Developer constructing the Project. The Summary Report also states that "...the Project would not generate a satisfactory return to the Developer without assistance from the Agency." This same report states the Project would not be economically viable without agency assistance.

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 part out of public funds."

Here the Project is demolition and construction done under contract. The demolition and construction are being paid in part with public funds from Agency. The gift of public land (Clara Court Parcel) is the equivalent of the payment of public funds. *Town Square Project/City of King*, PW 2000-011 (December 11, 2000.) Agency's payment of traffic impact fees is payment for construction since the impact fees are a mandatory cost of constructing the Project. *Downtown Redevelopment Plan Projects/City of Vacaville*, PW 2000-015 (March 22, 2001.)

¹ All statutory code section references are to the Labor Code.

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Agency's payment of the annual net tax increments and housing set-aside funds constitutes payment of public funds for construction since they are being paid to reimburse the Developer's costs. Since all of these payments are for activities integrally connected to the construction of the Project, the Project is a public work. *Town Square Project/City of King, supra.*

Agency makes several arguments that the Project is not a public work. First, it states that since the DDA was signed in 1999, the recent amendments to section 1720 by Senate Bill 975 ("SB 975") do not apply. According to Agency, at the time the agreement was signed there were no Department precedential determinations finding that "the transfer of property for less than fair market value at its highest and best use triggers prevailing wages."

Agency is correct that the SB 975 amendments to section 1720 do not apply here as the DDA was entered into prior to the effective date of the new law. Its argument concerning Department precedential decisions, however, is flawed for at least two reasons. Here, Agency is not transferring land for a purchase price that is less than fair market value; rather, it is giving the land to Developer at no cost. Since at least November 17, 1999, this Department has promulgated the position that gifts of public land constitute payment of public funds. *El Monte Riverview Business Center Office Building D, PW 99-039* (November 17, 1999.) More importantly, even without the gift of land, the Project is a public work because public funds are also being expended on it in the form of payments of annual net tax increment revenues, housing set-aside funds and traffic mitigation fees.²

Agency next suggests that the fact the rights and obligations under the DDA to develop and construct the Project were assigned to another developer/contractor should somehow remove this Project from the prevailing wage laws. Agency does not explain how this assignment makes a difference in determining whether the Project is a public work. Section 1720(a)(1) requires this Department to only look to see if the construction is being done under contract and paid for in whole or in part out of public

² It should also be noted that Agency's argument, which is essentially a due process notice argument, would go not to the correctness of the Department's public works coverage analysis, but to the enforceability of prevailing wages where the Department may have specifically altered an on-point public works coverage position after the parties relied on a contrary earlier determination in structuring a project.

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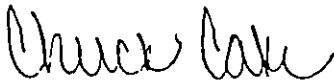
funds. Whether a developer/contractor is being substituted in has no bearing on the determination whether the Project is a public work. As discussed above, since public funds are funding construction performed under contract, the Project is a public work for which prevailing wages must be paid by the responsible parties.

Finally, Agency argues that prior to the advent of SB 975 this Department never required payment of prevailing wages for low- and moderate-income housing projects. Agency is incorrect in this statement. In *13th and F Street Townhouse Development*, PW 2000-043 (January 23, 2001), this Department found that the payment of low-income housing funds used to help build the project made the project a public work under section 1720. See also, *Silvercreek Apartment/Napa Community Redevelopment Agency*, PW 99-074 (September 27, 2000) and *King City Migrant Center Project/County Monterey Housing Authority*, PW 2000-025 (September 15, 2000).³

To summarize, the Project meets all the elements of a public work for which prevailing wages must be paid.

I hope this determination satisfactorily answers your inquiry.

Sincerely,



Chuck Cake
Acting Director

³ Note that the public works coverage status of a project is a statutory matter not dependent upon the Department's issuance of a precedential public works coverage determination for prevailing wage obligations to attach. *Lusardi Construction Company v. Aubry* (1992) 1 Cal.4th 976, 985, 4 Cal.Rptr.2d 837, 842.