

DEPARTMENT OF INDUSTRIAL RELATIONS

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June 30, 2003

Patricia M. Gates, Esq.
Van Bourg, Weinberg, Roger & Rosenfeld
180 Grand Avenue, Suite 1400
Oakland, CA 94612

Re: Public Works Case No. 2002-070
1010 Pacific Apartments
City of Santa Cruz

Dear Ms. Gates:

This letter constitutes the determination of the Director of the Department 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 documents submitted and an analysis of the relevant facts, it is my determination that the construction of the 1010 Pacific Street Apartments ("Project") is a public work, but it is exempt from prevailing wage obligations under the exemptions provided in Labor Code¹ section 1720, subsections (d)(1) and (d)(3).

Pacific Union Apartments, Inc. ("Developer") is the developer of the Project, which is a five-story residential building containing 112 rental units in the City of Santa Cruz ("City"). Twenty-three of these units will be rented to households earning less than 50 percent of the median area income. Pursuant to a regulatory agreement, these units will remain low-income for a period of 55 years. Seventy-nine units will be rented at market rates. The building will include a basement parking structure containing 66 spaces, an exercise room, a landscaped courtyard, 111 bicycle parking spaces and approximately 6,550 square feet of ground floor retail space.

The total Project cost is projected at \$26.8 million, including the cost of the commercial space. Construction will be financed in part by tax-exempt bonds in the amount of \$21.65 million allocated by the California Debt Allocation Commission in April 2002, and a 3.6 percent federal tax credit of \$149,472 annually for 10 years allocated by the California Tax Credit Allocation Commission in July 2002. In addition, Redevelopment Agency ("Agency") of City is contributing 31 years of the tax increment

¹ All further statutory references, unless otherwise noted, are to the Labor Code.

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generated from the Project and waiving approximately \$510,000 in planning, building and park fees. Agency may also issue mortgage revenue bonds to assist Developer. Developer will utilize its private funds for some of the cost of the Project.

The Owner Participation Agreement ("OPA") between the Agency and Developer, which memorializes the Project, was entered into in January 2002.

Labor Code section 1720(a)(1) defines public works as "[c]onstruction, alteration, demolition, installation, or repair work, done under contract and paid for in whole or in part out of public funds." In June 2002, Section 1720(b) stated:

(b) For purposes of this section, "paid for in whole or in part out of public funds" means the payment of money or the equivalent of money by a state or political subdivision directly to or on behalf of the public works contractor, subcontractor, or developer, performance of construction work by the state or political subdivision in execution of the project, transfer of an asset of value for less than fair market price; fees, costs, rents, insurance or bond premiums, loans, interest rates, or other obligations that would normally be required in the execution of the contract, which are paid, reduced, charged at less than fair market value, waived or forgiven; money to be repaid on a contingent basis; or credits applied against repayment obligations. (Statutes of 2002, Chapter 938, S.B. 975.)

The Project involves construction to be performed under contract. The bond funds are public funds because they are funds issued by the State of California Treasurer's Office. The federal low-income housing tax credits are public funds because they constitute the forgiveness of an obligation that would normally be required in the execution of the contract and are waived or forgiven. The Agency's tax increment contribution constitutes the payment of money by a state or political subdivision directly to a public works developer and is therefore public funds. Agency's waiver of the fees constitutes public funds because the fees are obligations that would normally be required under the contract. Finally, the mortgage revenue bonds that Agency may issue would also constitute public funds because they are funds

issued by a public agency. Therefore, as this Project is construction performed under contract and paid for in part out of public funds, it is a public work.

Section 1720, subsections (d)(1) and (d)(3), however, provide exemptions from prevailing wage requirements for housing projects allocated the above-referenced state bond funds and federal low-income housing tax credits, respectively, on or before December 31, 2003.² As this Project was allocated on or before December 31, 2003, both the state bond funds and federal low-income housing tax credits enumerated in the exemptions, it qualifies for these exemptions.³

Counsel for the Carpenters Union argues that an exception to these exemptions contained in Section 1720(e) negates the exemptions in this case.

Section 1720(e) states:

If a statute, other than this section, or a
regulation, other than a regulation adopted

² These subsections provide:

Notwithstanding any provision of this section to the contrary, the following projects shall not, solely by reason of this section, be subject to the requirements of this chapter:

(1) Qualified residential rental projects, as defined by section 142(d) of the Internal Revenue Code, financed in whole or in part through the issuance of bonds that receive allocation of a portion of the state ceiling pursuant to Chapter 11.8 of Division 1 (commencing with section 8369.80) of the Government Code on or before December 31, 2003 ...

(3) Low-income housing projects that are allocated federal or state low-income housing tax credits pursuant to section 42 of the Internal Revenue Code, Chapter 3.6 of Division 31 (commencing with section 50199.4) of the Health and Safety Code, or sections 12206, 17058 or 23510.5 of the Revenue and Taxation Code, on or before December 31, 2003.

³ Projects are eligible for the exemptions contained in Section (d)(1) and (d)(3) when the bond or tax credit allocations fund the projects in whole or in part. Accordingly, the exemptions are available here despite the Agency funding sources. For the same reason, the Project would be exempt under either subsection (d)(1) or subsection (d)(3), alone.

pursuant to this section, or an ordinance or a contract applies this chapter to a project, the exclusions set forth in Subdivision (d) do not apply to that project.

Specifically, the Union cites the OPA's prevailing wage provisions (OPA § 309), the Agency's Prevailing Wage Policy (Resolution No. 685), the City's Municipal Code section 3.09 and Health and Safety Code sections 33423-33424 in support of its argument. None of these prevailing wage provisions, however, supports the application of the Section 1720(e) exception. Section 309 of the OPA adopts residential prevailing wage rates for the Project, not the commercial prevailing wage rates that would be required under Chapter 1 (Lab. Code § 1720, et seq.). Agency Resolution No. 685 is not a statute, regulation, ordinance or contract. City's Municipal Code section 3.09, which is an ordinance pertaining to responsible contractors for City contracts, is applicable only to contracts with the City that contain a prevailing wage provision. Here City is not a party to any agreement concerning the Project. Health and Safety Code sections 33423-33424 concern payment of prevailing wages in connection with contracts awarded by a redevelopment agency. Here, a redevelopment agency did not award a contract for the Project. The Health and Safety Code provisions cited do not, therefore, apply to this Project.

In conclusion, the Project is a public work, but it is exempt from prevailing wage requirements under both Section 1720, subsections (d)(1) and (d)(3), which exemptions are not nullified by Section 1720(e).

I hope this determination satisfactorily answers your inquiry.

Sincerely,



Chuck Cake
Acting Director