

DEPARTMENT OF INDUSTRIAL RELATIONS

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January 30, 2004

Daniel M. Fuchs, Esq.
Livingston & Mattesich
1201 K Street, Suite 1100
Sacramento, CA 95814-3938

Re: Public Works Case No. 2003-003
Victoria By The Bay
City of Hercules

Dear Mr. Fuchs:

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 three residential developments, collectively referred to as "Victoria By The Bay" ("VBTB") are not public work requiring the payment of prevailing wages. The site preparation work on the property on which VBTB was built, however, is public work subject to the payment of prevailing wages.

VBTB is a residential development in the City of Hercules ("City") consisting of three separate construction projects totaling 880 residential units on 206 acres. The site on which VBTB exists was the former Pacific Refinery. Because of the significant pollution problems resulting from the site's use as a refinery, City was required to arrange for site clean-up before the property could be put to use for residential or commercial development. On January 11, 2001, City, its Redevelopment Agency and Hercules Victoria LLC ("Developer"), a California Limited Liability Company, entered into a "Developer and Owner Participation Agreement" ("Agreement") under which Developer would arrange for the demolition, soil remediation work and infrastructure improvements construction, including water and sewage systems and design and construction of parks ("site preparation"). Agency would pay Developer approximately \$75 million for this work out of future increment tax revenues paid by the new homeowners at VBTB.

Developer entered into Purchase Agreements with three builders who purchased improved parcels from Developer. These Purchase

Agreements were entered into November 22, 2000, with the Santa Clara Valley Housing Group, July 25, 2001, with Warmington Homes California and December 23, 2002, with William Lyons Homes.¹ The builders constructed the individual residential units on the remediated and improved parcels each had bought from Developer.

This public works coverage request is to determine the following:

1. Whether the site preparation work specified in the Agreement is public work; and,
2. If so, whether that makes the construction of VBTB a public work.

No one disputes Developer paid prevailing wages with respect to all the site preparation work provided in its Agreement with City and Agency. Also, it is apparently not disputed that the work encompassed in the Agreement will ultimately be paid for with public funds in the form of tax increment revenues. Consequently, the work encompassed in the Agreement is a public work because it meets the definitional requirements of the version of Labor Code section 1720(a) in effect in January, 2001, when Developer, City and Agency entered into their site preparation agreement:

As used in this chapter "public works" means:

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

The remaining determination to be made is whether the site preparation work and the VBTB residential development constitute a single, interdependent and integrated project such that the payment of prevailing wages is also required in the construction of the residential development.

¹ These agreements all contain the following paragraph:

Upon acquisition of the Property, Buyer acknowledges that it will be subject and obligated to abide by that certain Project Labor Agreement, dated as of March 9, 2000, by and among Hercules LLC, and U.A. Plumbers and Steamfitters Local No. 159, International Brotherhood of Electrical Workers Local No. 302, and Sheet Metal Workers Union Local No. 104 (collectively, the "Unions"), and that certain Side Letter Regarding the Craft Jurisdiction of U.A. Plumbers and Steamfitters Local No. 159, dated February 23, 2000, by and between Hercules LLC and U.A. Plumbers and Steamfitters Local No. 159 (collectively, the "PLA"). Buyer further acknowledges that, upon acquisition of the Property, it will be subject to the Prevailing Wage Policy of the Hercules Redevelopment Agency (the "Wage Policy").

In *Vineyard Creek Hotel and Conference Center*, Redevelopment Agency of Santa Rosa, PW 2000-016 (October 16, 2000), the Director found that the determination whether there are several projects or one project must be made 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.

With respect to the first factor, there is no single agreement unifying or defining the relationship between the site preparation work and the residential development. They are different types of construction being undertaken independent of each other and do not share a common design or function. The site preparation work is being contracted for by Developer pursuant to the Agreement with City and Agency. The residential work is being contracted for by the three builders under separate agreements from the original transaction between Developer, City and Agency. The builders purchased subdivided improved lots from Developer at fair market value in arms-length transactions and will construct residential units under separate contracts and with different workforces than those involved in the site preparation work.

As to the second factor - the physical layout of the project - an analysis of *Vineyard Creek* as well as subsequent determinations reveals that projects determined to be integrated are those where there is in reality a single development. In *Vineyard Creek*, for example, the conference center and hotel complex constituted one integrated design and, in fact, represented a single facility. Here, by necessity the site preparation and the residential development are physically proximate to each other. The site preparation work in this situation represents a stand-alone

construction project, not dependent on the construction of any single residential unit to be completed and viable. That the site preparation work and the residential development are to some degree physically connected does not create the level of integration necessary to find a single project. In some cases, physical integration between the site preparation work, including the infrastructure improvements, and the actual building construction may be, and often is, sufficient to find a single project. Here, however, the relationship between the two is far too attenuated, especially when viewed in light of the other factors.

As to the third factor, City and Agency exercise no apparent control, oversight, supervision, or approval - apart from the typical zoning, permitting and inspection requirements - with respect to the residential development.

With respect to the fourth factor, there is no apparent interconnected financial relationship between the public works project and the residential developments. The site preparation is paid for with public funds. No part of those funds is used to subsidize the privately-funded residential developments. Without a showing that the public funds are somehow redirected or linked to the private developments, the necessary financial relationship does not exist. The payment of public funds for the site preparation does not in and of itself transform the residential developments (which do not receive public funds) into a public work.

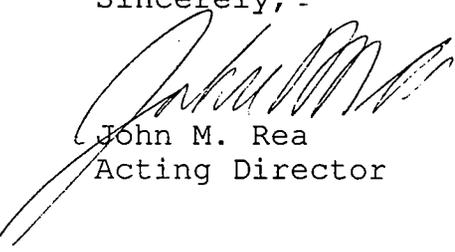
Finally, as to the general interrelationship of the various aspects of construction, the site preparation work is intended to mitigate environmental and regional infrastructure problems that extend well beyond the scope of the residential developments. While the residential developments obviously derive a benefit from the infrastructure work, it is no different from the benefit any private home derives from the existence of necessary public infrastructure supporting that home, for example streets and sewers. These types of infrastructure improvements are common to almost all residential development in California and are frequently paid for with funds ultimately reimbursed by new homeowners in the form of property tax assessments.

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Accordingly, in weighing and analyzing the above five factors, I find that there is insufficient basis to find the site preparation work and the home construction in the residential developments to be a single integrated and interdependent project. For the reasons stated above, even though the site preparation work is public work subject to the payment of prevailing wages, the relationship between the site preparation work and the residential developments is not of such a nature so as to transform the residential developments into a public work project as well.²

I hope this determination satisfactorily answers your inquiry.

Sincerely, -



John M. Rea
Acting Director

² This statutory finding as to whether the two undertakings are public work is without regard to any contractual obligations to pay prevailing wages that may exist as a function of the previously noted Project Labor Agreements.