

STATE OF CALIFORNIA

DEPARTMENT OF INDUSTRIAL RELATIONS

DECISION ON ADMINISTRATIVE APPEAL

IN RE: PUBLIC WORKS CASE NO. 2004-016

RANCHO SANTA FE VILLAGE SENIOR AFFORDABLE HOUSING PROJECT

PUBLIC WORKS CASE NO. 2004-030

CASA LOMA FAMILY APARTMENTS

The undersigned, having reviewed the administrative appeal filed by the State Building and Construction Trades Council of California, AFL-CIO ("SBCTC"), said appeal is hereby denied for the reasons set forth in the initial coverage determinations dated February 25, 2005, which are incorporated by reference herein, and for the additional reasons stated below.

SBCTC complains that in August 2004, representatives of the California Coalition for Affordable Housing ("CCAH") discussed the instant cases in an allegedly "ex parte meeting" with the Secretary and Deputy Secretary of the Labor and Workforce Development Agency ("Agency"), and the Acting Director and Acting Chief Counsel of the Department of Industrial Relations ("Department"). SBCTC "requests the same opportunity for worker representatives and their attorneys to meet *ex parte* with the same officials to hear

in person from advocates for the opposite view"
(SBCTC Appeal at 2.)

The coverage determination process is quasi-legislative, not adjudicative. *McIntosh v. Aubry* (1993) 14 Cal.App.4th 1576, 1583; 8 California Code of Regulations section 16002.5. An evidentiary hearing is not required for the issuance of a coverage determination. *Lusardi Construction Co. v. Aubry* (1992) 1 Cal.4th 976, 990-992. A coverage determination does not "adjudicate" anything. *Id.* at 991. "The Director's determination cannot be characterized as 'judicial,' because it does not encompass the conduct of a hearing or a binding order for any type of relief." *Id.* at 993. Since the determination process is not "judicial" or "adjudicative," it is not subject to the provisions of the Administrative Procedure Act regulating *ex parte* communications, Government Code sections 11430.10 through 11430.80.

Moreover, the parties requesting the determinations at issue did not participate in that meeting. The determinations followed full consideration of the written submissions of all interested parties, including SBCTC. SBCTC has had a full opportunity to submit additional information and arguments in support of its appeal. Accordingly, and as SBCTC well knows from its own

participation in meetings on matters of interests to it with representatives of the Agency and the Department, the meeting with CCAH representatives was entirely proper.

SBCTC also argues that the initial determinations are contrary to a prior determination that had been designated as precedential: "At the time that work on at least one of the projects began ... PW 2002-070, *1010 Pacific Apartments/City of Santa Cruz* (June 30, 2003), provided that federal tax credits constituted public funds for purposes of triggering the prevailing wage law." (SBCTC Appeal at 3.)

SBCTC's argument is mistaken. It relies entirely on a single sentence in *1010 Pacific Apartments*: "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." That sentence was based upon the version of Labor Code section 1720(b)¹ in effect in June 2002. In 2002, however, the Legislature enacted SB 972, which substantially amended section 1720(b).² Consequently, effective January 2003, "payment out of public funds" is now defined as including "obligations that would normally

¹All subsequent statutory references are to the Labor Code.

²It is this version of section 1720(b) that controls the two projects herein.

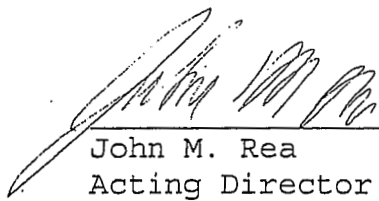
be required in the execution of the contract, that are ... forgiven by the state or political subdivision." Because the federal government is neither the state nor a political subdivision thereof, federal tax credits clearly do not fall within the current statutory language.

Additionally, the sentence relied upon by SBCTC was not necessary to the outcome in *1010 Pacific Apartments*. Construction financing included tax-exempt bonds, a federal tax credit, and assistance from the Redevelopment Agency in the form of tax increment rebates and waiver of planning, building and park fees. The tax increment contribution and fee waivers clearly constituted payments out of public funds within the meaning of section 1720(b), but the project was determined to be exempt from prevailing wage requirements under the exemptions set forth in section 1720(d)(1) and (d)(3). Thus, the outcome did not turn on whether the federal tax credit was a payment out of public funds. Given this fact and the statutory amendment discussed above, it was appropriate to de-designate *1010 Pacific Apartments* as precedential, and not to rely on it in making the initial determinations here.

For the foregoing reasons, the initial determinations are affirmed and the administrative appeal is denied. This

decision constitutes final administrative action in this matter.

DATED: 26 May 09



John M. Rea
Acting Director