

DEPARTMENT OF INDUSTRIAL RELATIONS  
OFFICE OF THE DIRECTOR  
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March 12, 2007

Ofer Elitzur, Esq.  
Cox, Castle & Nicholson, LLP  
555 Montgomery Street, Suite 1500  
San Francisco, CA 94111

Re: Public Works Case No. 2006-001  
Horizons at Indio Apartments  
City of Indio

Dear Mr. Elitzur:

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 California Code of Regulations, title 8, 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 construction of the Horizons at Indio Apartments ("Project") is not a public work, and is not subject to the prevailing wage requirements of the California Labor Code.

#### Facts

Project consists of 13 single-story apartment buildings. It will include 80 units, consisting of 33 two-bedroom units and 47 one-bedroom units. Pursuant to regulatory agreements, for a period of 55 years, 100 percent of the units (with the exception of the manager's unit) will be rented to residents whose income is equal to or less than 60 percent of the area median income.

Project is to be owned by UHC Indio, L.P., a California limited partnership ("Owner"). The partners in this entity include Heritage Community Housing, Inc., a California nonprofit public benefit corporation ("Managing General Partner") and AMTAX Holdings 553 LLC, an Ohio limited liability company ("Investor Limited Partner").

Financing for Project is from a combination of sources. These include (1) a construction and permanent loan ("Bond Loan") funded from the proceeds of low-income housing bonds allocated by the California Debt Limit Allocation Committee ("CDLAC") and issued by the California Statewide Communities Development Authority ("CSCDA") in the aggregate principal amount of \$8.5 million; (2) a loan from the Joe Serna, Jr. Farmworker Housing Grant Program of the Department of Housing and Community Development, in the amount of approximately \$2.65 million, with an interest rate of 3 percent ("Serna Loan"); (3) a loan in the amount of approximately \$2.8 million from the Indio Redevelopment Agency ("RDA"), funded by the RDA's Low and Moderate Income Housing Fund, with an interest rate of 1 percent ("RDA Loan"); (4) a loan in the amount of \$1 million from the Economic Development Agency of Riverside County, sourced from HOME Investment Partnership Program funds, with an interest rate of 1 percent ("County Loan"); and (5) equity investment from Investing Limited Partner, which will be eligible

to receive federal Low-Income Housing Tax Credits ("LIHTCs") of \$459,541 annually for each of ten years, pursuant to a reservation by the California Tax Credit Allocation Committee ("TCAC").<sup>1</sup>

### Discussion

Labor Code section 1771<sup>2</sup> generally requires the payment of prevailing wages to workers employed on public works. Section 1720(a)(1) defines public works to include: "Construction, alteration, demolition, installation, or repair work done under contract and paid for in whole or in part out of public funds ...." This Project clearly will entail construction work done under contract. At issue here is whether Project is "paid for in whole or in part out of public funds." Section 1720(b) provides in pertinent part:

(b) For purposes of this section, "paid for in whole or in part out of public funds" means all of the following:

(1) The payment of money or the equivalent of money by the state or political subdivision directly to or on behalf of the public works contractor, subcontractor, or developer.

(2) Performance of construction work by the state or political subdivision in execution of the project.

(3) Transfer by the state or political subdivision of an asset of value for less than fair market price.

(4) Fees, costs, rents, insurance or bond premiums, loans, interest rates, or other obligations that would normally be required in the execution of the contract, that are paid, reduced, charged at less than fair market value, waived, or forgiven by the state or political subdivision.

(5) Money loaned by the state or political subdivision that is to be repaid on a contingent basis.

(6) Credits that are applied by the state or political subdivision against repayment obligations to the state or political subdivision.

However, section 1720(c) provides that:

(c) Notwithstanding subdivision (b):

...

(6) Unless otherwise required by a public funding program, the construction or rehabilitation of privately owned residential projects is not subject to the requirements of this chapter if one or more of the following conditions are met:

...

(E) The public participation in the project that would otherwise meet the criteria of subdivision (b) is public funding in the form of below-market interest rate loans

<sup>1</sup>TCAC also reserved state LIHTCs for Project, but the Department was advised in December 2006 that Owner has declined such credits.

<sup>2</sup>Subsequent statutory references are to the Labor Code unless otherwise indicated.

for a project in which occupancy of at least 40 percent of the units is restricted for at least 20 years, by deed or regulatory agreement, to individuals or families earning no more than 80 percent of the area median income.

Regarding the Bond Loan, tax-exempt bond financing is widely used for multifamily affordable housing projects. There are two basic structures for multifamily housing revenue bonds: Publicly-offered and privately-placed.<sup>3</sup> PW 2004-016, *Rancho Santa Fe Village Senior Affordable Housing Project* (February 25, 2005) ("*Rancho Santa Fe*") involved publicly-offered bonds such as those involved here:

A "conduit issuer" (in this case, CSCDA) issues and sells bonds and, simultaneously with their issuance, assigns all of its rights to the bond proceeds to a private trustee for the bondholders. The bond trustee advances the proceeds to a developer or other private party (the "Borrower") to assist in financing the project. The borrower is contractually bound to make payments to the bond trustee from revenues generated by the project on payment terms that exactly match the terms of repayment of the bonds.

Because it assigns all of its rights to a bond trustee, the Issuer never has possession of either the bond proceeds or the loan repayments that are made by the borrower directly to the bond trustee.

...

This Department has previously determined that money collected for, or in the coffers of, a public entity is "public funds" within the meaning of section 1720. PW 93-054, *Tustin Fire Station* (June 28, 1994). Here neither the conduit bond revenues nor the loan repayments ever enter the coffers of a public entity, nor are they collected for the public entity. Since none of the money flows into or out of public coffers, the conduit bond financing is not "the payment of money or the equivalent of money by the state or political subdivision" within the meaning of section 1720(b)(1).

For the reasons explained above, the Bond Loan does not constitute payment in whole or in part out of public funds. Additionally, the fact that the bond proceeds fund the loan does not mean that a public entity is making a loan at a below-market interest rate for purposes of section 1720(b)(4). Even if the bonds were deemed to be a below-market interest rate loan by a public entity, they would not trigger prevailing wage requirements, where, as here, regulatory agreements meet the requirements for the section 1720(c)(6)(E) exemption. *Rancho Santa Fe, supra*.

In contrast, the Serna, RDA and County Loans are all being made by the state or political subdivisions thereof, and interest rates are clearly below-market within the meaning of section

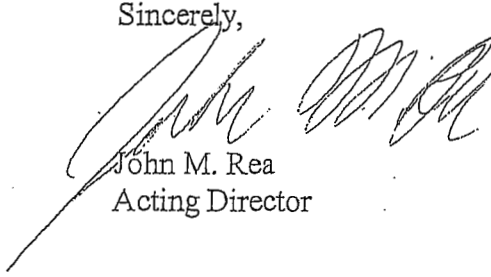
<sup>3</sup>J. Cooper, *Multifamily Rental Housing: Financing with Tax-Exempt Bonds* (Orrick, Herrington & Sutcliffe LLP, 2003) at n. 13.

1720(b)(4). However, due to the restrictions set forth in the regulatory agreements, these loans are all exempt under section 1720(c)(6)(E).<sup>4</sup>

Finally, as to the federal LIHTCs, as discussed above, section 1720(b)(1) provides that "payment of money or the equivalent of money by the state or political subdivision" constitutes payment out of public funds. Here the federal LIHTCs do not entail any payment to the Developer by either the state or a political subdivision. Moreover, a tax credit "involves no expenditure of public moneys received or held ... but merely reduces the taxpayer's liability for total tax due." *Center for Public Interest Law v. Fair Political Practices Commission* (1989) 210 Cal.App.3d 1476. Accordingly, the allocation of federal LIHTCs is not a payment of money or the equivalent of money within the meaning of section 1720(b)(1). Nor do the federal LIHTCs entail any action by the state or a political subdivision under section 1720(b)(4) as they are not "obligations that would normally be required in the execution of the contract." The execution of the contract entails expenditures by, not income to, the Developer. In contrast, the federal LIHTCs would only reduce tax obligations, if any, on income derived from activities other than construction of the housing.<sup>5</sup> As no other provision of section 1720(b) is germane, the federal LIHTCs do not constitute payment in whole or in part out of public funds.<sup>6</sup>

For the foregoing reasons, Project is not a public work subject to the prevailing wage requirements of the Labor Code. I hope this letter satisfactorily responds to your inquiry.

Sincerely,



John M. Rea  
Acting Director

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<sup>4</sup>Owner points out that with each of these loans, the loan principal and accrued interest will be paid out of residual receipts and come due at the end of the stated term; and, repayment in full is expected. As such, the money is not to be repaid on a contingent basis within the meaning of section 1720(b)(5). Therefore, the loans do not constitute payment in whole or in part out of public funds under this section either.

<sup>5</sup>*Rancho Santa Fe, supra.*

<sup>6</sup>*Ibid.*