

DEPARTMENT OF INDUSTRIAL RELATIONS

OFFICE OF THE DIRECTOR

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January 31, 2008

Donald C. Carroll, Esq.
Carroll & Scully, Inc.
300 Montgomery Street, Suite 735
San Francisco, CA 94104-1909

Re: Public Works Case No. 2004-037
Bella Terra Entertainment Lifestyle Center
Redevelopment Agency of the City of Huntington Beach

Dear Mr. Carroll:

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 only those facilities designated in the Funding and Construction Agreement between the City of Huntington Beach ("City") and Huntington Center Associates, LLC ("Developer") are public work subject to the payment of prevailing wages.

Facts

On October 2, 2000, the Redevelopment Agency of the City of Huntington Beach ("Agency") entered into an Owner Participation Agreement ("OPA") with Developer¹ to provide for the redevelopment of what was formerly known as the Huntington Beach Mall into the Bella Terra Entertainment Lifestyle Center ("Bella Terra"). The projected redevelopment included the renovation and replacement of existing buildings as well as new construction that would increase the gross leasable space by more than 50 percent and include feature restaurants and a 20-screen multiplex theater. The mall property was and would remain privately owned, except for a public parking facility to be constructed in the center of the redevelopment site.

In the OPA, Agency agreed to reimburse Developer up to \$16.75 million, equaling about 10 percent of the projected overall cost of the redevelopment, for designated costs that included demolition, clearance, site preparation, public improvements, utilities and facilities, and land acquisition and easements. The parties agreed that the redevelopment would not be feasible without this reimbursement. (OPA, section 201.)

¹Huntington Center Associates, LLC is designated variously in the record documents as "Participant," "Landowner," and "Developer." The Mello-Roos Bond Offering Official Statement identifies the Developer as Snyder Huntington Development, LLC, which includes project manager J.H. Snyder Company LLC. Unless otherwise indicated, the term "Developer" will be used herein to refer to Huntington Center Associates, LLC in any of its capacities, including as part of Snyder Huntington Development, LLC.

In 2003, City established a Community Facilities District that essentially was co-extensive with the redevelopment site, and the following year, City issued \$25 million in Mello-Roos bonds to fund Agency's required reimbursement to Developer under the OPA. A little over \$20 million of the bond proceeds were earmarked for specified public facilities within the redevelopment, including \$4 million for street improvements, \$1.2 million for on-site wet utilities, \$165,000 for police substation improvements and over \$14 million for a six-level, City-owned public parking structure.² On March 1, 2004, City and Developer entered into a separate Funding and Construction Agreement, which specified that prevailing wage requirements would apply to construction of those earmarked facilities.

Developer entered into separate contracts with several different construction companies to complete various aspects of the redevelopment. The contracts with Bayley Construction and Bomel Construction, respectively, for phase I site development and to design and build the public parking structure contemplated the payment of prevailing wages, while the contracts covering other buildings and aspects of the redevelopment did not. Each contract included an acknowledgment that the work was a portion of the master project known as Bella Terra.

Discussion

At all pertinent times, Labor Code section 1720(a)³ has defined public works as including "construction, alteration, demolition ... or repair work done under contract and paid for in whole or in part out of public funds ..."⁴

As a preliminary matter, the Southern California Operating Engineers Contract Compliance Committee, who requested this determination, and City's former Housing and Redevelopment Manager are correct in asserting that this determination should be based on the law as it existed on October 2, 2000, when the parties entered into the OPA. This has been the Department's consistent approach in redevelopment cases,⁵ and is the most logical point of reference for determining legal obligations. The OPA set the terms of the redevelopment known as Bella Terra; it provides a date certain from which all parties interested in the public works consequences of the redevelopment can ascertain their rights and responsibilities; and it is also a date over which the parties to the agreement had complete control. Using October 2, 2000 as the benchmark date, the version of the Labor Code that applies to the facts of this case is the one in effect prior to the amendments of Senate Bills 975 and 972. Developer's contention that the applicable law is determined by some later date when the Developer satisfied certain conditions under the OPA or entered into construction contracts is rejected.

²The balance of the bond proceeds was to be used for costs associated with the issuance of the bonds, a reserve fund and early interest payments.

³All statutory references hereinafter are to the California Labor Code unless otherwise specifically indicated.

⁴The quoted language is now found in subsection (a)(1). (Stats. 2001, ch. 938 (SB 975).)

⁵See, e.g., PW 2004-019, *Strand Redevelopment Project, City of Huntington Beach* (Decision on Appeal, November 18, 2005).

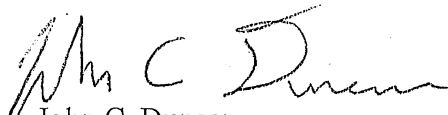
The merits of the parties' dispute centers on two issues: (1) whether the Mello-Roos bond proceeds used to fund Agency's contribution to the redevelopment constitute "public funds" within the meaning of section 1720(a); and (2) whether Bella Terra is a single integrated public works project, paid for in part with public funds, or whether it consists of multiple projects, both public and private in nature. In light of the ultimate conclusion reached in this determination and Developer's concession, albeit under a different rationale, that the designated facilities paid for with Mello-Roos bond proceeds are public work subject to prevailing wages, it is not necessary to address Developer's contention that Mello-Roos bond proceeds are not public funds. The critical question is whether public works coverage is limited to those designated facilities or extends to the entire redevelopment under the theory that Bella Terra is a single, integrated project.

There are facts weighing in either direction. On the one hand, the OPA expressed Agency's intent to make a substantial contribution to Bella Terra, with its reimbursement of certain costs regarded as necessary to the redevelopment's overall feasibility. Individual construction contracts and the Official Statement issued with the Mello-Roos bond offering also refer to a "Master" redevelopment project known as Bella Terra.

On the other hand, Agency's contribution in the form of Mello-Roos bond proceeds was plainly designated for specified public improvements rather than the redevelopment as a whole. Bella Terra was also constructed through a series of separate construction contracts with different contractors. The construction contracts for the designated facilities paid for with Mello-Roos bond proceeds covered only those facilities; and construction of those facilities did not appear to be integrated with the construction of other improvements to the shopping mall.⁶ These facts outweigh the others and lead to the conclusion that the Bella Terra redevelopment is comprised of multiple projects both public and private in nature.

For the foregoing reasons, under the facts of this case, only those facilities paid for with Mello-Roos bond proceeds as designated in the Funding and Construction Agreement between City and Developer are public work subject to the payment of prevailing wages.

Sincerely,



John C. Duncan

Director

⁶A significant distinction between Bella Terra and the Strand Redevelopment Project, which the Department determined to be a single integrated project, is that in *Strand* Agency contributed land and paid for an underground parking structure that served as the foundation for the entire construction project. PW 2004-019, *supra*.