

DEPARTMENT OF INDUSTRIAL RELATIONS
OFFICE OF THE DIRECTOR
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August 1, 2008

Nathan D. Schmidt, Hearing Officer
Office of the Director, Legal Unit
455 Golden Gate Avenue, Suite 9516
San Francisco, CA 94102

Re: Public Works Case No. 2008-012
Geneva Village Apartments
City of Fresno

Dear Mr. Schmidt:

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 Geneva Village Apartments ("Project") is not subject to the prevailing wage requirements of the California Labor Code.

Facts

The Project consists of a 142-unit multi-family affordable housing community on a 10-acre site on Church Avenue in West Fresno. The development will also include parking facilities, a community center, recreational facilities, fencing, landscaping and other on-site and off-site improvements. The Project is owned by Geneva Village, L.P., a California limited partnership ("Owner"). The partners in this entity are Squire Development and Advanced Development and Investments ("ADI").

Financing for the Project is from a combination of sources. These include (1) equity investment of \$18,560,944 from investors who will be eligible to benefit from Federal Low Income Housing Tax Credits ("LIHTCs") of \$1.996 million annually for 10 years, pursuant to a reservation by the California Tax Credit Allocation Committee ("CTCAC"); (2) a bank loan of \$6.241 million; (3) deferred profit and overhead totaling \$536,056; (4) a loan from the City of Fresno ("City") in the amount of \$1 million; (5) a second loan from City in the amount of \$500,000; and (6) an Affordable Housing Program grant of \$852,000 from the Federal Home Loan Bank of San Francisco.¹

¹ This grant is from private funds. The Federal Home Loan Banks ("Banks") were established pursuant to the Federal Home Loan Bank Act of 1932 (12 U.S.C. § 1421 et seq.). They are federally chartered but privately owned. Their mission is to promote the availability of housing financing through more than 8,000 member institutions. They are cooperatives whose stock may be owned only by member institutions such as insured banks, thrifts, credit unions and insurance companies engaged in housing finance. The Banks fund themselves principally by issuing consolidated obligations, which are the primary obligation of a sponsoring Bank or Banks, backed by a guarantee of joint-and-several liability of all Banks. See PW 2004-049, *Silverado Creek Family Apartments* (May 27, 2005).

The source of funds for the two City loans was a HOME Investment Partnership Program grant from the United States Department of Housing and Urban Development ("HUD") to the City under the Cranston-Gonzalez National Affordable Housing Act of 1990. The City loan for \$500,000 is a 42-year deferred fully amortized loan bearing interest at 0.5 percent per annum for the first 19 years and 2 percent per annum for the remainder of the loan term. The City loan for \$1 million is a 60-year residual receipts loan bearing interest at the applicable federal rate, which in this case is 4.75 percent.

Pursuant to a Declaration of Restrictions executed by Owner in favor of City and recorded with the Fresno County Recorder, occupancy of 139 of the units will be restricted for a period of 55 years to tenants qualifying as low- and very low-income families. Not less than 28 of the restricted units are preserved for households with income at 50 percent of the area median income ("AMI"), and not less than 111 of the remaining units are preserved for households with income at 65 percent of AMI or below. These and other restrictions are also set forth in a Regulatory Agreement issued by CTCAC.

Discussion

Labor Code section 1771² 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 the Project is "paid for in whole or in part out of public funds" and, if so, whether the Project nonetheless enjoys a statutory exemption from prevailing wage requirements. 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.

² Subsequent statutory references are to the Labor Code unless otherwise indicated.

Section 1720(c), however, 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 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.

It is undisputed that the two loans from City of HOME funds have interest rates that are charged at less than fair market value within the meaning of section 1720(b)(4). The Project is therefore paid for in whole or in part out of public funds.³ Notwithstanding the public funding, the Project is exempt from prevailing wage requirements because the conditions under section 1720(c)(6)(E) have been met. The public participation in the Project is public funding in the form of below-market interest rate loans. Approximately 98 percent of the units are subject to occupancy restrictions, in excess of the 40 percent required by statute. The restrictions will apply for 55 years, above the 20 years required by statute. These occupancy restrictions are set out in a Declaration of Restrictions recorded with the County Recorder and in a Regulatory Agreement issued by CTCAC. The occupying households can earn no more than 50 percent and 65 percent of AMI, less than the 80 percent required by statute.

The Division of Labor Standards Enforcement ("DLSE") argues that the Project does not qualify for the section 1720(c)(6)(E) exemption because it "is shutting the doors on individuals and families with incomes between 65.1% and 80%" of the AMI. (DLSE Reply Memorandum at p.2.) DLSE's argument is without merit. It is axiomatic that anyone earning 50 or 65 percent of AMI is "earning no more than 80 percent" within the plain meaning of the statute. Section 1720(c)(6)(E) does not require that occupancy be open to the entire range of incomes up to the 80 percent ceiling in order for an affordable housing project to qualify for the exemption. Indeed, this Department has applied the exemption consistently in several previous determinations that also involve more stringent occupancy and earnings restrictions than those required by the statute. Thus, in PW 2005-034, *Woodhaven Manor Apartments* (November 16, 2005), the exemption was deemed applicable to a project in which occupancy of 100 percent of the units was restricted to tenants earning no more than 60 percent of the AMI. The *Woodhaven* determination was challenged on other grounds, and was ultimately affirmed in *State Building*

³ The only other financial assistance for the Project that arguably is public in nature is the LIHTCs. The Court of Appeal, however, recently held that such tax credits do not constitute a payment in whole or in part out of public funds under California's statutory scheme (*State Building & Construction Trades Council of California v. Duncan, et al.* (2008) 162 Cal.App.4th 289, 294.)

and Construction Trades Council of California v. Duncan, et al., supra, 162 Cal.App.4th 289.⁴

DLSE contends, however, that federal regulations imply that the use of HOME funds triggers state prevailing wage obligations. DLSE bases this argument on Code of Federal Regulations, title 24, section 965.101, which preempts state prevailing wage requirements on projects assisted with funds for low-income public housing under the United States Housing Act of 1937. It states:

(a) A prevailing wage rate (including basic hourly rate and any fringe benefits) determined under State law shall be inapplicable to a contract or PHA-performed work item for the development, maintenance, and modernization of a project whenever:

(1) The contract or work item: (i) Is otherwise subject to State law requiring the payment of wage rates determined by a State or local government or agency to be prevailing and (ii) is assisted with funds for low-income public housing under the U.S. Housing Act of 1937, as amended; and

(2) The wage rate determined under State law to be prevailing with respect to an employee in any trade or position employed in the development, maintenance, and modernization of a project exceeds whichever of the following Federal wage rates is applicable

DLSE reasons that the promulgation of the above regulation implies the applicability of state prevailing wage requirements to projects funded or assisted by other types of federal funds. The fundamental problem with DLSE's argument is that the mere absence of an express federal preemption does not mean that the state prevailing wage law applies *by its own terms*. This is suggested by the phrase in the regulation itself specifying that the preemption applies when the work item is "otherwise subject to State law" requiring prevailing wages. As discussed above, the Project is exempt under the express language of section 1720(c)(6)(E), and this express statutory exemption cannot be overcome by inferring that the federal government intends that it not apply.

Moreover, projects receiving HOME funds are governed by Code of Federal Regulations, title 24, section 92.254(a)(2), which provides in part:

(a) General. (1) Every contract for the construction (rehabilitation or new construction) of housing that includes 12 or more units assisted with HOME funds

⁴ Other determinations applying the exemption to projects with more stringent occupancy and earnings restrictions include PW 2006-018, *Crossings at Madera Apartments* (September 14, 2007), PW 2006-001, *Horizons at Indio Apartments* (March 12, 2007), PW 2004-016, *Rancho Santa Fe Village Senior Affordable Housing Project* (February 25, 2005), and PW 2004-030, *Casa Loma Family Apartments* (February 25, 2005) (100 percent of units for those earning no more than 60 percent of AMI); PW 2006-015, *Sierra Garden Apartments* (September 1, 2006) (90 percent of units for those earning no more than 60 percent of AMI); PW 2006-006, *Tracy Place Senior Apartments* (July 11, 2006) (70 percent of units for those earning no more than 60 percent of AMI and the remaining 30 percent of units for those earning no more than 50 percent of AMI); and PW 2004-049, *Silverado Creek Family Apartments* (May 27, 2005) (80 percent of units for those earning no more than 60 percent of AMI).

must contain a provision requiring the payment of not less than the wages prevailing in the locality, as predetermined by the Secretary of Labor pursuant to the Davis-Bacon Act (40 U.S.C. 276a-276a-5), to all laborers and mechanics employed in the development of any part of the housing. Such contracts must also be subject to the overtime provisions, as applicable, of the Contract Work Hours and Safety Standards Act (40 U.S.C. 327-332).

(2) The contract for construction must contain these wage provisions if HOME funds are used for any project costs in sec. 92.206, including construction or nonconstruction costs, of housing with 12 or more HOME-assisted units. When HOME funds are only used to assist homebuyers to acquire single-family housing, and not for any other project costs, the wage provisions apply to the construction of the housing if there is a written agreement with the owner or developer of the housing that HOME funds will be used to assist homebuyers to buy the housing and the construction contract covers 12 or more housing units to be purchased with HOME assistance. The wage provisions apply to any construction contract that includes a total of 12 or more HOME-assisted units, whether one or more than one project is covered by the construction contract. Once they are determined to be applicable, the wage provisions must be contained in the construction contract so as to cover all laborers and mechanics employed in the development of the entire project, including portions other than the assisted units. Arranging multiple construction contracts within a single project for the purpose of avoiding the wage provisions is not permitted.

(3) Participating jurisdictions, contractors, subcontractors, and other participants must comply with regulations issued under these acts and with other Federal laws and regulations pertaining to labor standards and HUD Handbook 1344.1 (Federal Labor Standards Compliance in Housing and Community Development Programs), as applicable. Participating jurisdictions must require certification as to compliance with the provisions of this section before making any payment under such contract.

Thus, the federal regulation applicable to this Project expressly mandates compliance with the Davis-Bacon Act and other federal labor standards, but is silent as to state prevailing wage requirements. If it were HUD's intent to similarly require compliance with state prevailing wage laws, the regulation would contain similar express language.

DLSE also cites a November 2004 letter in which City requested a special determination⁵ from the Division of Labor Statistics and Research on the assumption that the Project would be subject to prevailing wage requirements under Health & Safety Code section 50675.4(c)(2). That section requires payment of prevailing wages for construction assisted through the state Multifamily Housing Program. While it may be inferred from City's letter that such funding for the Project

⁵ Special determinations are authorized by California Code of Regulations, title 8, section 16202, subdivision (a), which states: "The awarding body shall request the Director to make a determination for a particular craft, classification or type of worker not covered by a general determination. Any such request shall be submitted at least 45 days prior to the bid advertisement date." In this instance, City requested a special determination for residential rates for the classifications "Drywall Finisher" and "Plaster Cleanup Laborer."

was anticipated at the time, there is no evidence that funding from that program was actually received. Absent funding from the Multifamily Housing Program, the Project is not subject to the requirements of Health & Safety Code section 50675.4(c)(2).⁶

For the foregoing reasons, the two City loans fall within the safe harbor of the exemption set forth in section 1720(c)(6)(E). Accordingly, the Project is exempt from prevailing wage requirements of the California Labor Code.

I hope this letter satisfactorily answers your inquiry.

Sincerely,



John C. Duncan
Director

⁶ DLSE also argues that the Home Investment Partnerships Agreement between City and Owner sets forth an obligation to pay California prevailing wages. While the purpose of coverage determinations such as this is to interpret the provisions of the Labor Code, not contracts between interested parties, suffice it to say that a fair reading of the Agreement is that it requires payment only of federal Davis-Bacon rates. DLSE further argues that by entering into the above Agreement with the intent not to pay state prevailing wages, Owner engaged in "actual fraud" as defined by Civil Code section 1572. This argument must be rejected as lacking in any factual basis, and in any event is not germane to the interpretation of the Labor Code.