

DEPARTMENT OF INDUSTRIAL RELATIONS

OFFICE OF THE DIRECTOR

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December 21, 2009

Dennis B. Cook, Esq.
Lisa V. Ryan, Esq.
Cook Brown, LLP
555 Capitol Mall, Suite 425
Sacramento, CA 95814-4503Re: Public Works Case No. 2009-045
Lorena Apartments
City of Los Angeles

Dear Mr. Cook and Ms. Ryan:

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 construction of the Lorena Apartments (the "Project") is not a public work subject to prevailing wage requirements except as provided herein.

Facts

The Project entails the construction of a 112-unit multi-family affordable housing complex on a 2.62-acre site in the Boyle Heights neighborhood of the City of Los Angeles ("City"). The residential units are contained within two four-story buildings. Underlying the buildings is a two-story subterranean parking structure providing 234 parking spaces. An existing church building is to be relocated within the Project site to provide residents with recreational/community space. Two other existing structures are to be demolished. There will be a 30-year restriction on the residential units requiring that they be rented to low-income households earning at or below 60 percent of the area's median income.

The Project is a joint venture between Global Premier Development, Inc. and LINC Housing Corporation (collectively "Developer"). The estimated cost of the Project is \$40,478,047. Project financing is from several sources. Developer is obtaining two loans: \$7,119,935 from the Wilshire State Bank and \$1.12 million from the Federal Home Loan Bank. Developer has raised \$21,247,875 in investor equity. Developer is also contributing \$990,237 in the form of a deferred development fee. Additional funding is from two grants: a \$5 million Infill Infrastructure Grant awarded by the California Department of Housing and Community Development's Infill

Incentive Grant Program¹ and a \$5 million CalReUSE Grant awarded by the California Pollution Control Financing Authority.²

The Project involves the excavation and removal of approximately 90,000 tons of soil, much of it contaminated with toxic substances, chiefly lead. The contaminated soil is likely to be regarded as hazardous waste per the Mitigated Negative Declaration issued by City under the California Environmental Quality Act.³ Among the environmental mitigation measures imposed by City on Developer is the requirement that the contaminated soil be remediated by treatment on-site and then transported for disposal off-site. The cost of these mitigation measures is \$7.85 million, which is to be paid for with the \$5 million CalReUSE Grant and \$2.85 million of the \$5 million Infill Infrastructure Grant.

Construction of the subterranean parking structure involves consideration of both the State Density Bonus Law and City's parking regulations. The State Density Bonus Law allows developers to increase the density of residential units in a development as an incentive for the construction of affordable housing. In this instance, Developer qualifies for a 35 percent density bonus, which means that the Project will have 35 percent more units than would ordinarily be permitted by City's zoning laws. The capacity of the subterranean parking structure is dictated by City's parking regulations, which require at least two spaces of off-street parking per dwelling unit. Given the Project's density bonus and the number of off-street parking spaces needed, Developer determined that a subterranean parking structure is essential for the Project. City's Site Plan Review Compliance Findings⁴ includes City's approval of the configuration of the subterranean parking structure as compatible with existing and future development on neighboring property. The cost of constructing the parking structure is approximately \$4.68 million. Developer intends to allocate the remaining \$2.15 million of the \$5 million Infill Infrastructure Grant⁵ toward this cost.

¹The Infill Incentive Grant Program is funded by Proposition 1C, the Housing and Emergency Shelter Trust Fund Act of 2007. The Infill Incentive Grant Program exists to promote infill housing development by providing financial assistance for infrastructure improvements needed for new housing in previously developed areas.

²CalReUSE, an acronym for California Recycle Underutilized Sites Program, is also funded by Proposition 1C. CalReUSE exists to dispense grants and loans to finance brownfield cleanup in association with infill residential development projects.

³The Mitigated Negative Declaration and the required mitigation measures are incorporated by reference into the Terms and Conditions of Approval, which is contained within a document entitled Density Bonus and Site Plan Review Director of Planning Determination and Findings.

⁴See Density Bonus and Site Plan Review Director of Planning Determination and Findings.

⁵The Infill Incentive Grant Program includes parking structures among the types of infrastructure improvements necessary for the development of housing in urbanized infill areas.

Discussion

Labor Code section 1771⁶ generally requires the payment of prevailing wages to workers employed on public works. Section 1720, subdivision (a)(1)⁷ 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" Subdivision (b) provides:

(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.

...

Subdivision (c), however, provides:

(c) Notwithstanding subdivision (b):

...

(2) If the state or a political subdivision requires a private developer to perform construction, alteration, demolition, installation, or repair work on a public work of improvement as a condition of regulatory approval of an otherwise private development project, and the state or political subdivision contributes no more money, or the equivalent of money, to the overall project than is required to perform this public improvement work, and the state or political subdivision maintains no proprietary interest in the overall project, then only the public improvement work shall thereby become subject to this chapter.

(3) If the state or a political subdivision reimburses a private developer for costs that would normally be borne by the public, or provides directly or indirectly a public subsidy to a private development project that is de minimis in the context of the project, an otherwise private development project shall not thereby become subject to the requirements of this chapter.

⁶Subsequent statutory references are to the Labor Code unless otherwise indicated.

⁷Subsequent subdivision references are to section 1720.

- (4) The construction or rehabilitation of affordable housing units for low- or moderate-income persons pursuant to paragraph (5) or (7) of subdivision (e) of Section 33334.2 of the Health and Safety Code that are paid for solely with moneys from a Low and Moderate Income Housing Fund established pursuant to Section 33334.3 of the Health and Safety Code or that are paid for by a combination of private funds and funds available pursuant to Section 33334.2 or 33334.3 of the Health and Safety Code do not constitute a project that is paid for in whole or in part out of public funds.

The Project entails construction work done under contract and paid for in part out of public funds within the meaning of subdivision (b)(1), in the form of the CalReUSE Grant and the Infill Infrastructure Grant. As such, the Project meets the elements of a public work under subdivision (a)(1). The question presented is whether the Project is nonetheless exempt from prevailing wage requirements under subdivision (c).

Under the exemption set forth in subdivision (c)(2), the Mitigated Negative Declaration states that City is requiring Developer to remediate and remove the contaminated soil and City's Site Plan Review states that City is requiring Developer to provide off-street parking. As such, these documents establish that both the environmental mitigation measures and the subterranean parking structure are required by City as conditions of regulatory approval of the Project. The California Department of Housing and Community Development and the California Pollution Control Financing Authority contributed a total of \$10 million in grants. The cost to excavate and treat the contaminated soil and construct the parking structure is \$12.53 million. Therefore, public entities have contributed no more money to the overall Project than is required to perform this work. The Project is an otherwise private development project. Neither the state nor a political subdivision of the state will maintain a proprietary interest in the overall project.

The key inquiry under subdivision (c)(2) is whether the environmental mitigation measures and the construction of the subterranean parking garage are "public work[s] of improvement." Consistent with PW 2007-004, *Carson Marketplace, Carson Redevelopment Agency/City of Carson* (January 9, 2008), remediation and disposal of the contaminated soil constitutes a public work of improvement in that it protects the public from exposure to hazardous waste. The Legislature has recognized the public nature of this type of work by authorizing the California Pollution Control Financing Authority to award grants to remediate contaminated housing sites. CalReUSE specifically exists to finance brownfield cleanup in association with infill residential development projects, such as the Project at issue here. Construction of the parking structure also constitutes a public work of improvement in that it serves the public policy of providing necessary infrastructure required for this type of urban housing development. This public policy objective was expressed by the Legislature when it authorized the California Department of Housing and Community Development to award grants under its Infill Incentive Grant Program for the building of parking structures as a component of infill housing projects.

Letter to Dennis B. Cook, Esq. and Lisa V. Ryan, Esq.

Re: Public Works Case No. 2009-045

Page 5

Accordingly, the Project falls within the subdivision (c)(2) exemption and prevailing wage requirements apply only for the environmental mitigation measures and construction of the subterranean parking structure.⁸

I hope this determination satisfactorily answers your inquiry.

Sincerely,



John C. Duncan
Director

⁸Given the conclusions reached herein, Developer's arguments concerning subdivisions (c)(3), which provides an exemption for projects receiving a de minimis public subsidy, and (c)(4), which provides an exemption for projects funded with monies from a redevelopment agency's Low and Moderate Income Housing Fund established under provisions of the Health and Safety Code, need not be addressed. Nor is it necessary to address Developer's argument that the environmental mitigation measures and the parking construction are separate projects from construction of the residential buildings. The following, however, should briefly be noted: the highest percentage of total project costs found by the Director to be de minimis under the subdivision (c)(3) exemption was 1.64 percent in PW 2004-024, *New Mitsubishi Auto Dealership, Victorville Redevelopment Agency* (March 18, 2005); none of the Project funding is from a Low and Moderate Income Housing Fund, a threshold element of the subdivision (c)(4) exemption; and Developer's Infill Infrastructure Grant Program Application describes the scope of work for the Project as including the residential buildings, the remediation work, and the subterranean parking structure.