STATE OF CALIFORNIA EDMUND G. BROWN JR., *Governor*

DEPARTMENT OF INDUSTRIAL RELATIONS
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To All Interested Parties:

Re: Public Works Case No. 2009-010
Vista del Sol Senior Housing Complex – City of Redlands

The Decision on Administrative Appeal, dated April 23, 2010, in PW 2009-010, *Vista del Sol Senior Housing Complex – City of Redlands*, was affirmed in a published Fourth District Court of Appeal opinion dated June 15, 2012. See *Housing Partners I, Inc. v. John C. Duncan, in his official capacity as the Director of Industrial Relations for the State of California* (2012) 206 Cal.App.4th 1335.

STATE OF CALIFORNIA

DEPARTMENT OF INDUSTRIAL RELATIONS

DECISION ON ADMINISTRATIVE APPEAL

RE: PUBLIC WORKS CASE NO. 2009-010

VISTA DEL SOL SENIOR HOUSING COMPLEX

CITY OF REDLANDS

I. INTRODUCTION

On November 2, 2009, the Director of the Department of Industrial Relations ("Department") issued a public works coverage determination (the "Determination") finding that the construction of the Vista Del Sol Senior Housing Complex (the "Project") in the City of Redlands ("City") is a public work subject to prevailing wage requirements. The Determination found that the Project entails construction done under contract and wholly paid for out of public funds. The public funds payments include a grant in the form of a forgiven "loan" as well as two below-market interest rate loans. The Determination further found that none of the affordable housing exemptions apply.

Pursuant to California Code of Regulations, title 8, section 16002.5, an administrative appeal of the Determination was filed by Housing Partners I, Inc. ("HPI"), an interested party, on December 3, 2009. Along with a letter brief in support of the appeal and attachments thereto, HPI submitted two loose-leaf binders with what are purported to be excerpts from the legislative history of Senate Bill 975 ("SB 975") and Senate Bill 972 ("SB 972"). None of the other interested parties has filed a response.

The argument and documents submitted by HPI have been considered carefully. For the reasons set forth in the Determination, which is incorporated herein, and for the additional reasons stated below, the appeal is denied and the Determination affirmed.

II. CONTENTIONS ON APPEAL

The two affordable housing exemptions at issue in this case are found in Labor Code section[1] 1720, subdivision (c)(4) and subdivision (c)(6)(E). On administrative appeal, HPI restates the arguments made below that the exemptions apply, and makes the following three new arguments, which will be addressed herein.

First, HPI argues that the language of the statute is confusing and worded badly. Therefore, according to HPI, the Department must resort to legislative history to interpret the exemptions. HPI contends that the legislative history of SB 975, which led to the adoption of the subdivision (c)(4) exemption, and SB 972, which led to the adoption of the subdivision (c)(6) exemption, justifies a broad interpretation of the exemptions. Broadly interpreted, it is urged that both of these exemptions apply to the Project.

Second, HPI argues that the Department's approach to statutory interpretation revived what HPI refers to as the "cumulative effects doctrine" in that the cumulative effect of separately analyzing each of the two exemptions has led to the erroneous conclusion that the Project is a public work. HPI asserts that the Department thus relied on a doctrine that was judicially discredited in *McIntosh v. Aubry* (1993) 14 Cal.App.4th 1576.

Third, HPI argues that the Legislature has an "overarching" and "pervasive" policy of encouraging the development of affordable housing. HPI views the Department's narrow interpretation of these exemptions as inconsistent with this public policy, putting "no less than the financial feasibility of affordable housing projects in California" at stake.

III. DISCUSSION

In response to HPI's argument that the legislative history of SB 975 and SB 972 should be considered because the statute is worded badly, the exemptions at issue are clear in meaning. Longstanding rules of statutory construction do not require the consideration of legislative history to determine whether the Project qualifies for one of the subdivision (c) exemptions. In ascertaining what the Legislature intended by enacting a statute, the words of a statute themselves provide the most reliable indicator. *People v. Gardeley* (1996) 14 Cal.4th 605, 621. The plain words of a statute are to be given their ordinary meaning. If the language is clear and unambiguous, it is unnecessary to resort to other indicia of the intent of the

[1]All further section references are to the California Labor Code unless otherwise specified.

Legislature. *Lungren v. Deukmajian* (1988) 45 Cal.3d 727, 735. Statutory exemptions are to be narrowly construed. *County of Amador v. El Dorado County Water Agency* (1999) 76 Cal.App.4th 931, 966. The exemptions at issue here are set forth in words whose ordinary meaning is clear and unambiguous. Consequently, it is not necessary to look to the legislative history of these exemptions to understand their scope and application. For the reasons set forth in the Determination, the Project does not qualify for either of the statutory exemptions.[2]

HPI's argument regarding *McIntosh* is misplaced for a variety of reasons not the least of which is that neither *McIntosh* nor the cumulative effects doctrine played any role in the Department's analysis. *McIntosh* involved construction of a residential care facility for minors on land owned by the County of Riverside. The County agreed to sublease the land to the developer for free. In addition to the rent forbearance, the County waived inspection costs and advanced money to pay the developer's surety bond premiums. The Court upheld the Department's determination that the project was not a public work, finding that none of these subsidies constituted the payment of public funds for construction. In so finding, the Court

[2]Even if HPI's argument is credited, HPI's version of the relevant legislative history is unpersuasive. There is no dispute that SB 975 expanded the reach of the prevailing wage law by broadening the scope of coverage. There is also no dispute that one of the purposes of SB 972 was to clarify the application of SB 975 with respect to self-help housing, certain non-profit rehabilitation projects, and affordable housing projects. The legislative history of SB 972, however, does not clearly support HPI's claim that the Legislature intended to adopt "an expansive set of exemptions" for such projects. For instance, an analysis prepared for the Assembly Committee on Labor and Employment dated May 1, 2002, states that SB 972 will create an exemption "for privately owned residential projects with some public funding in certain narrow circumstances." The enrolled bill report ("EOB") on SB 972 prepared by the California Housing Finance Agency acknowledged that affordable housing projects require multiple layers of financing and that SB 972, while exempting below-market rate loans from triggering prevailing wage coverage, would not prevent other types of financing from triggering coverage. The EOB concluded that SB 972 "is intended to exempt a limited number of affordable housing projects from the requirement to pay prevailing wage." HPI's version of legislative history also relies heavily on letters by SB 972's opponents and supporters addressed to the Governor, specific legislators, and members of the Assembly Labor and Employment Committee. Because these letters were not communicated to the Legislature as a whole, they do not reflect legislative intent and are not cognizable as part of the legislative history of SB 972. See *Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc.* (2005) 133 Cal.App.4th 26. The First District Court of Appeal observed that when the Legislature amended section 1720, it was capable of creating a categorical exemption if it wanted to do so. *State Building and Construction Trades Council of California v. Duncan* (2008) 162 Cal.App.4th 289, 324. Far from creating a categorical exemption for all affordable housing projects, the Legislature created limited exemptions in subdivisions (c)(4) and (c)(6)(E) for specified types of projects that are financed using particular funding sources. In sum, the material relied on by HPI provides ambiguous support, at best, for HPI's position that these exemptions were intended to be read broadly so as to create a categorical exemption for affordable housing projects. Were it necessary to resort to legislative history, which it is not given the unambiguous language of the exemptions, the cognizable legislative history cited above supports a different conclusion.

rejected an argument made by the party challenging the determination that the cumulative effect of the multiple subsidies should invoke public works status, even if none of the subsidies would do so individually.

HPI argues that the Department employed the cumulative effects doctrine rejected by *McIntosh* by ignoring the fact that the Project would have qualified for the subdivision (c)(4) exemption if project funding were limited to housing set-aside funds of a redevelopment agency; and it would have qualified for the subdivision (c)(6)(E) exemption if project funding were limited to below-market interest rate loans. HPI asserts that by analyzing these exemptions *separately*, the Department treated them *cumulatively*. HPI contends that the proper way to analyze these exemptions is in combination with one another, and in conjunction with the introductory language of subdivision (c)(6). By failing to engage in a "conjunctive reading," as the argument goes, the Department did not harmonize subdivision (c)(4) and subdivision (c)(6)(E).

HPI overlooks the fact that in passing SB 975 the Legislature overturned the specific holding in *McIntosh* regarding the definition of payment in adopting what is now subdivision (b) of section 1720, which defines the phrase "paid for in whole or in part out of public funds." *State Building and Construction Trades Council of California v. Duncan* (2008) 162 Cal.App.4th 289, 307-08 ("*Trades Council*"). In fact, the public subsidies at issue in *McIntosh*, rent forbearance, premium payments and cost waivers, are now explicitly included in subdivision (b)(4) of section 1720.

Moreover, to the extent *McIntosh* has any relevance here, the cumulative effects doctrine militates against HPI's position. HPI, not the Department, seeks to aggregate all of the separate exemptions of subdivision (c) into one cumulative exemption. HPI, not the Department, posits that the cumulative effect of two exemptions can be understood to offset the application of each of those exemptions separately. It is HPI that argues for a result that cannot be reached by analyzing and applying the subdivision (c)(4) and (c)(6)(E) exemptions separately and on the merits of each, standing alone.

Regarding HPI's contention that the Department should defer to the public policy of encouraging the development of affordable housing, it must be noted that the Department is charged with enforcing the prevailing wage law. This body of law is to be liberally construed

to protect and benefit workers employed on public works projects. *Williams v. SnSands Corporation* (2007) 156 Cal.App.4th 742, 749. Although HPI perceives a clash between prevailing wage and affordable housing policies, such considerations are more properly addressed to the Legislature. When a similar argument was presented to the First District Court of Appeal, it responded by stating: "These are issues of high public policy. To choose between them, is the essential function of the Legislature, not a court. 'Our role is confined to ascertaining what the Legislature has actually done, not assaying whether sound public policy might support a different rule.' [Citation omitted.]" *Trades Council, supra*, 162 Cal.App.4th at p. 324.

HPI's public policy argument is premised on the notion that affordable housing projects are not financially feasible if prevailing wages are required. According to HPI, the Determination will aid in the demise of California's stock of affordable housing. Based on the Department's experience with other affordable housing projects since the statutory amendments of SB 975 and SB 972 became law, HPI's concern appears to be overstated. Notably, the Department has issued public works coverage determinations concerning affordable housing projects on at least 15 occasions during the period 2004 through 2008. All 15 of the projects were determined to come within one of the exemptions specific to affordable housing projects enacted by SB 975 and SB 972, and 13 of the 15 projects were determined to be exempt under subdivision (c).[3] Based on the Department's history with the affordable housing exemptions, it appears that developers and public entities throughout

[3]See PW 2004-009, *The Village at Hesperia, City of Hesperia* (August 16, 2004); PW 2004-003, *Cottage Homes Project, Bakersfield Redevelopment Agency* (October 12, 2004); PW 2004-016, *Rancho Santa Fe Village Senior Affordable Housing Project* (February 25, 2005); PW 2004-030, *Casa Loma Family Apartments/CL Investors* (February 25, 2005); PW 2004-049, *Silverado Creek Family Apartments, Sacramento, California* (May 27, 2005); PW 2005-034, *Woodhaven Manor Apartments, City of Rancho Cucamonga* (November 16, 2005); PW 2006-002, *Affordable Senior Housing Project, City of Montebello* (March 22, 2006); PW 2006-006, *Tracy Place Senior Apartments, City of Tracy* (July 11, 2006); PW 2006-005, *Central Village Apartments, City of Los Angeles* (July 12, 2006); PW 2006-015, *Sierra Garden Apartments, City of South Lake Tahoe* (September 1, 2006); PW 2006-020, *Heber Family Apartments, County of Imperial*, Decision on Administrative Appeal (April 5, 2007); PW 2006-001, *Horizons at Indio Apartments, City of Indio* (March 12, 2007); PW 2006-018, *Crossings at Madera Apartments, City of Madera* (September 14, 2007); PW 2008-012, *Geneva Village Apartments, City of Fresno* (August 1, 2008); PW 2008-029, *Atlantic Avenue Moderate Income Housing Development, Redevelopment Agency of the City of Long Beach* (November 25, 2008). Before it was reversed on administrative appeal, the project in *Heber Family Apartments* was determined to be covered by the prevailing wage law because the number of units set aside for low-income tenants was insufficient to meet the statutory criteria in subdivision (c)(6)(E), not because the method of financing was disallowed under the exemption.

California have been consistently successful in devising ways to finance affordable housing projects in a manner that satisfies the criteria found in the subdivision (c) exemptions.

IV. CONCLUSION

In summary, for the reasons set forth in the Determination, as augmented by this Decision on Administrative Appeal, the appeal is denied and the Determination affirmed. This Decision constitutes the final administrative action in this matter.

Dated: 4/23/10

John C. Duncan, Director