

DEPARTMENT OF INDUSTRIAL RELATIONS  
OFFICE OF THE DIRECTOR  
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May 25, 2011

Jeffrey M. Oderman, Esq.  
Rutan & Tucker, LLP  
611 Anton Blvd., Suite 1400  
Costa Mesa, CA 92626

Re: Public Works Case No. 2011-011  
Construction of Residential Project  
UH Downtown Fremont, LLC/City of Fremont

Dear Mr. Oderman:

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 section 16001(a) of title 8 of the California Code of Regulations. Based on my review of the facts presented in this case and an analysis of the applicable law, it is my determination that the construction of a residential project and associated infrastructure improvements ("Project") is a public work. In this case, however, the requirement to pay prevailing wages is restricted to the public improvement work required as a condition of regulatory approval of the Project.

#### Facts

The Project is a residential development on a 4.1 acre parcel in the City of Fremont ("City"). The Project entails the construction of 301 dwelling units within two structures, a parking garage and a pool and fitness facility (collectively, "Private Residential Construction"). In addition, the Project includes a 17,000 square foot civic park, public street improvements, and public sanitary, sewer and waterline ("public utility") improvements including trenching (collectively, "Public Improvement Work"), as required by the Findings and Conditions of Approval, approved by the City Council on March 24, 2009.

On March 30, 2011, City and UH Downtown Fremont, LLC ("Developer") entered into the Memorandum of Understanding ("MOU") regarding the development of the Project. Developer owns the property to be developed with the exception of a portion of California Street that is to be vacated by City. City is to convey this property to Developer for fair market price as determined by an MAI<sup>1</sup> appraiser. With the exception noted below, the Project will be paid for with private funds.

After City approved the Project, City applied for a \$1.6 million grant from the Federal Transportation for Livable Communities Fund, which is administered by the Alameda County Congestion Management Agency ("TLC Grant"). City will contribute the TLC Grant funds toward the cost of constructing the public street improvements. The TLC Grant requires a local matching

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<sup>1</sup>Member of the Appraisal Institute.

share,<sup>2</sup> which is to be paid by Developer in two installments in a total amount not to exceed \$400,000.<sup>3</sup>

As a condition of the TLC Grant, City is to undertake the public street improvement work itself. City intends to bid out the work to a private contractor. The remainder of the Public Improvement Work, the civic park estimated to cost \$1.5 million and the public utility improvements and trenching estimated to cost \$1,002,519, is to be undertaken by Developer.

#### Discussion

Labor Code section 1720, subdivision (a)(1)<sup>4</sup> generally defines “public works” to mean: “Construction, alteration, demolition, installation, or repair work done under contract and paid for in whole or in part out of public funds ... .” Section 1720, subdivision (b) defines “paid for in whole or in part out of public funds” to include “[t]he 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” (subd. (b)(1)) and the “[t]ransfer by the state or political subdivision of an asset of value for less than fair market price” (subd. (b)(3)).

Section 1720, subdivision (c)(2) 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.

The Project entails construction done under contract. The Project is paid for in part out of public funds within the meaning of section 1720, subdivision (b)(1) in the form of a \$1.6 million payment by City of TLC Grant funds.<sup>5</sup> The Project therefore meets the elements of a public work under

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<sup>2</sup>Developer’s local matching share payments will be credited against Developer’s payment obligations under Developer’s agreement with City to purchase the vacated portion of California Street. If the fair market price under that agreement exceeds the local matching share, Developer is to make an additional payment to City for the difference.

<sup>3</sup>The MOU does not specify the total cost of the public street improvements. The TLC Grant is for \$1.6 million. Developer’s matching share is not to exceed \$400,000. Cost overruns above \$2 million for the public street improvement work that is attributable to the Project are the responsibility of Developer. Accordingly, it would appear that the parties project the cost of the public street improvement work to be \$2 million.

<sup>4</sup>All section references are to the California Labor Code unless otherwise indicated.

<sup>5</sup>The only other potential source of public funds payment is the transfer by City to Developer of the vacated portion of California Street. Developer has agreed to purchase the property for fair market price as determined by a bona fide

section 1720, subdivision (a)(1). Accordingly, the entire Project is subject to the requirements of California's prevailing wage laws. *Azusa Land Partners v. Department of Industrial Relations* (2011) 191 Cal.App.4th 1, 29 ("*Azusa*").

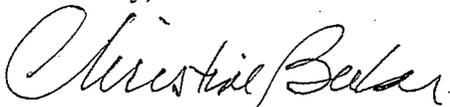
The issue in this case is whether the partial exemption for private development projects paid for in part with public funds set forth in section 1720, subdivision (c)(2) applies. The exemption applies if four requirements are met: (1) the public improvement work is a condition of regulatory approval of the project; (2) the project is an otherwise private development; (3) the public entity contributes no more money, or the equivalent of money, to the overall project than is required to construct the public improvement work; and (4) the public entity maintains no propriety interest in the overall project. *Azusa, supra*, 191 Cal.App.4th at p. 29.

Here, the Public Improvement Work includes a civic park, public street improvements, and public utility improvements including trenching. Each of the components of the Public Improvement Work is required as a condition of City's regulatory approval of the Project, as memorialized in the Findings and Conditions of Approval approved by the City Council on March 24, 2009. The Project is an otherwise private residential development. The \$1.6 million in public funds contributed to the Project by City does not exceed the collective cost of the Public Improvement Work, which amounts to \$4,502,519.<sup>6</sup> City maintains no proprietary interest in the Project.

Accordingly, the elements of the exemption under section 1720, subdivision (c)(2) are satisfied. Only the Public Improvement Work is subject to prevailing wage requirements. The Private Residential Construction is exempt.

I hope this determination satisfactorily answers your inquiry.

Sincerely,



Christine Baker  
Acting Director

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appraisal performed by an MAI appraiser. Therefore the transfer does not entail a payment of public funds within the meaning of section 1720, subdivision (b)(3).

<sup>6</sup>It should also be noted that Developer's payment to City for the vacated portion of California Street will also be counted toward City's local matching share for the TLC Grant. Even if the local matching share is disregarded and City were paying the entirety of the \$2 million cost of the public street improvement work itself, City would still be contributing no more money to the overall Project than would be required to pay for all of the Public Improvement Work, and therefore this issue has no bearing on the above analysis.