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

DEPARTMENT OF INDUSTRIAL RELATIONS
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December 29, 2017

Deborah E.G. Wilder
635 Mariners Island Blvd., Ste. 200
San Mateo, CA 94404

Re: Public Works Case No. 2016-042
Historic Chapel at Fort Ord
County of Monterey

Dear Ms. Wilder:

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 Labor Code section 1773.5 and California Code of Regulations, title 8, section 16001, subdivision (a). Based on my review of the facts of this case and an analysis of the applicable law, it is my determination that the proposed renovation and rehabilitation of the historic chapel at Fort Ord is a public work subject to prevailing wage requirements.

Facts

This case involves the proposed renovation and rehabilitation of a pre-World War II single-story wood frame chapel that was listed on the Monterey County register of historic buildings in 2012. (Project). The Project will consist of both exterior and interior maintenance and improvements. The chapel is located within the East Garrison Project, a real estate development on approximately 244 acres of land carved out of what was formerly Fort Ord, a US Army base in Monterey County (Site). After Fort Ord was decommissioned and closed in 1986, the land was conveyed to the Fort Ord Reuse Authority (FORA), a regional public entity created pursuant to state and federal law to facilitate the conversion of Fort Ord from military purposes to civilian uses. The foundational document for the development of the Site is the FORA Master Resolution, adopted in 1997.

In 2005, the County of Monterey (County) approved the East Garrison Specific Plan (EGSP) for the Site. In addition to a new fire station, a six-acre regional park, and a public library, the EGSP contemplated the construction of 1,400 residential units, 34,000 square feet of retail commercial space, and 66,000 square feet of rehabilitated historic buildings, with the work to be done in three phases.[1] The chapel is mentioned in the EGSP as an element of the Arts District to be constructed as part of phase 3, as an existing structure to be "retained and enhanced." Appendix "A" to the EGSP includes rehabilitation guidelines for the chapel.

[1] In the interest of brevity, several intermediate steps in the development timeline are omitted from this fact summary.

Also in 2005, FORA transferred the Site to the Redevelopment Agency of the County of Monterey (Agency) at no cost. To facilitate the development of the Site per the EGSP, the Agency immediately entered into a Disposition and Development Agreement (DDA) with a developer, East Garrison Partners I (EGPI). EGPI also entered into a Development Agreement with the County. Before the DDA and the Development Agreement were signed, Agency had obtained a reuse evaluation of the site from an appraiser. It was concluded that the fair reuse value of the Site upon its conveyance to EGPI was $19 million. EGPI took title to the Site in exchange for the payment of $1.5 million. This figure represents a rediscounted price to account for, among other factors, the payment of prevailing wage rates to workers employed by the developer to perform construction on the subsequent development at the Site.

EGPI obtained a secured loan of $75 million in 2007, but during the subsequent recession EGPI defaulted on the loan and the lender commenced foreclosure.[2] UCP East Garrison, LLC (UCP) purchased EGPI's loan and purchased the Site at an auction. UCP then entered into the First Implementation and Agreement to the DDA, thereby assuming the role of the Site's developer and agreeing to be bound by all of the terms, covenants, conditions, and obligations of the DDA and the EGSP.

The DDA in § 321 provides that prevailing wages may apply to certain improvements when those improvements "are considered to be a Public Work for purposes of prevailing wages under State law when constructed by the Developer or any successor or assign . . . ." Following this rather equivocal language, the DDA goes on to state that the improvements to which § 321 may apply include "all work for which prevailing wages are required to be paid under the FORA Master Resolution; and any construction of vertical improvements for which prevailing wages are required to be paid under Labor Code sections 1720 *et seq*. . . . ." The FORA Master Resolution requires the payment of prevailing wages on "first generation construction." That term is defined as construction performed during the development of real property contemplated in the DDA "at the time of transfer" to a developer until issuance of a certificate of occupancy by the initial owners or tenants of each parcel.

The Monterey/Santa Cruz County Building and Construction Trades Council (Trades Council) filed suit against EGPI and Cypress Marina Heights LP, the developer of the University Villages/Dunes on Monterey Bay, to compel the payment of prevailing wages on the East Garrison Project and the University Villages Project. On February 26, 2009, the Monterey County Superior Court issued a judgment granting injunctive and declaratory relief against the two developers and in favor of the Trades Council. As set forth in the judgment, the Superior Court found two separate and distinct bases for coverage under the prevailing wage law: (1) the two projects are covered by the prevailing wage requirements in the FORA Master Resolution and implementing documents; and (2) the East Garrison Project "is also a public work within the meaning of California Labor Code Division 2 Part 7 Chapter 1 (sections 1720-1861) and hence subject to the requirements therein."[3] The injunctive

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[2] The Department possesses no information about the nature and extent of improvements to the Site that may have been carried out by EGPI, if any, between 2005 and 2009, when UCP obtained title to the Site.

[3] In its request for a coverage determination, UCP quotes from the Superior Court judgment with regard to both the contractual basis for coverage (originating in the FORA Master Resolution) as well as the statutory basis for coverage under the Labor Code.

relief granted by the Superior Court required that prevailing wages be paid on all first generation construction on the covered projects, and that "'first generation construction' means construction performed during the development of each parcel of real property at the time of transfer from the public agency to . . . EGP until issuance of a certificate of occupancy by the initial owners or tenants of each parcel." The judgment goes on to state that "All bound parties involved in the East Garrison project shall also comply in all other respects with [Lab. Code, §§ 1720 et seq]."[4]

UCP now intends to carry out renovations, repairs, and improvement to the historic chapel at the former Fort Ord, and it has requested a determination as to whether such work is covered under the prevailing wage law.

Discussion

Labor Code section 1771[5] generally requires the payment of prevailing wages to workers employed on public works. Section 1720, subdivision (a)(l) defines "public works" generally under a three pronged definition: "(c)onstruction, alteration, demolition, installation, or repair work done under contract, and paid for in whole or in part out of public funds . . .." Section 1720(b)(3) states: "(f)or purposes of this section, paid for in whole or in part out of public funds" includes the "[t]ransfer by the state or political subdivision of an asset of value for less than fair market price." It is undisputed that the Project meets the first and second requirements for public works coverage, in that it constitutes "construction, alteration, demolition, installation, or repair work" and it is "done under contract." The last requirement, that the Project be "paid for in whole or in part out of public funds" is the one at issue in this case. This element turns on whether the Project at issue here is part of the larger East Garrison Project, for which coverage is not disputed.

A. Contentions of the Interested Parties.

UCP argues that the above-referenced judgment rendered by the Superior Court is controlling, and, based on the precise terms of the injunctive relief, UCP urges that prevailing wages are payable for only for first generation construction in the East Garrison Project. Since the chapel was a completed structure in use by the Army before the development of the Site began, the chapel already had "the equivalent of a certificate of occupancy." UCP also contends that, because work on the chapel is not mentioned in the DDA or the FORA Master Resolution, the Project was not contemplated by the DDA at the time of transfer of the chapel to the developer. Consequently, according to UCP, the

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[4] Cypress Marina Heights LP, but not EGPI, appealed the Superior Court's judgment. This resulted in a published decision from the Sixth District Court of Appeal that affirmed the judgment. *Monterey/Santa Cruz County Bldg. and Const. Trades Council v. Cypress Marina Heights LP* (2011) 191 Cal.App.4th 1500. In that decision, the Court of Appeal specifically noted that the East Garrison Project was covered by prevailing wage requirements because EGPI did not purchase the land for fair market value. The facts and circumstances supporting this conclusion are discussed below. The Court of Appeal also rejected the contention that prevailing wage covenants could not validly run with the land.

[5] All citations are to the California Labor Code; all subdivision references are to the subdivisions of section 1720 unless otherwise specified.

Project cannot be considered first generation construction pursuant to the Superior Court's interpretation of the FORA Master Resolution and its application to the East Garrison Project.

The Trades Council argues that the Project constitutes a public works because it is located on land that was conveyed to FORA, then to the Agency, and then to EGPI in a series of below market rate transfers that brings the entire Site within the definition of section 1720(b)(3). Since UCP assumed the contractual obligations of EGPI as set forth in the DDA, UCP benefits from the below market rate transfer of the Site and is obligated to pay prevailing wages for all construction on the East Garrison Project, including the specific Project at issue here, involving the historic chapel. The Trades Council argues that while the exact terms of the injunctive relief granted by the Superior Court only dealt with UCP's *contractual* obligation to pay prevailing wage rates on first generation construction on the Site, the Superior Court's judgment was also based upon UCP's independent *statutory* obligation to pay prevailing wage rates found in the Labor Code, such as section 1720(b)(3). Therefore, according to the Trades Council, the question of whether the Project is first generation development is irrelevant to the issue of coverage under section 1720(b)(3).

The County agrees that the Project is not first generation development, but also agrees with the Trades Council's position that the Project is the product of a transfer of property for less than fair market value under section 1720(b)(3), bringing the Project within the reach of the prevailing wage law. Both the County and the Trades Council cite *Azusa Land Partners v. Department of Indus. Relations* (2010) 191 Cal.App.4th 1 (*Azusa*) as support for the argument that the Project here cannot be considered a discrete construction project in and of itself, and must instead be deemed a component part of the larger East Garrison Project.

B. The Renovation and Rehabilitation of the Historic Chapel is Part of the Larger East Garrison Project.

In *Azusa,* the court concluded that "section 1720 required a 'project' based analysis." (*Azusa, supra,* 191 Cal.App.4th at p. 36.) Employing this project-based analysis, the court in *Oxbow Carbon & Minerals, LLC v. Department of Indus. Relations* (2011) 194 Cal.App.4th 538 looked at the "totality of the underlying facts" to determine the scope of the "complete integrated object" of construction. (*Id.* at pp. 549-550.) The function and interrelationship between each aspect of construction, as well the overall purposes for the construction, are some factors to be considered in this analysis. (*Cinema West, LLC v. Baker* (2017) 13 Cal.App.5th 194, 212-214.) Under the project-based analysis, the underlying planning documents and development agreements should be examined to determine the project's scope. (*Id.* at pp. 212-213.)

The facts support the conclusion that the Project at issue in this case is a part of the larger East Garrison Project. It is undisputed that the historic chapel is located on the land constituting the Site. Significantly, the EGSP treats the ultimate rehabilitation of the chapel as part of the Arts District in Phase 3. The EGSP was incorporated by reference into the DDA and Development Agreement entered into by EGPI, and later assumed by UCP.

Following the project-based analysis endorsed in *Azusa*, *Oxbow,* and *Cinema West*, the Project here must be considered to be part of the East Garrison Project as a whole, involving the entire Site.

C. The East Garrison Project is a Public Works Project.

As seen above, the Site was assigned a fair reuse value of $19 million before it was conveyed to EGPI for just $1.5 million. "Fair reuse value" is "a term unique to redevelopment projects . . . [and] assumes the proposed restrictions in the disposition and development agreement on the use of the property, and thereby distorts the property's value such that a market-based appraisal is not possible." (PW Case No. 2004-035, *Santa Ana Transit Village/City of Santa Ana* at p. 5 (December 5, 2005.) Before they were abolished, redevelopment agencies were authorized by Health and Safety Code section 33433 to sell property acquired with tax increment monies to private developers for less than fair market value so long as the transfer was for at least the fair reuse value of the property. Here, no tax increment funding was involved because the Agency acquired the Site from FORA at no cost. It appears that the Agency did not consider itself bound by the re-sale restriction set forth in Health and Safety Code section 33433. Instead of transferring the Site to EGPI for the fair reuse value of $19 million, the Agency apparently negotiated a purchase price of only $1.5 million. The only explanation in the record for this discrepancy are the statements by FORA staff and FORA counsel that the reduced price represents a discount based on the developer's obligation to comply with the prevailing wage law.[6]

The real property comprising the Site is unquestionably an "asset of value" as that term is used in section 1720(b)(3). For the Site to have been transferred at a "fair market price" within the meaning of subdivision (b)(3), there must be evidence that the purchase price was determined by competitive market forces. In this case, the $1.5 million purchase price was not derived from the competitive real estate market.[7] The purchase price was even lower than the fair reuse value that took into account the restrictions placed on the property by the DDA. Therefore, the acquisition of the Site for only $1.5 million constituted the transfer of an asset of value for less than the fair market price, making the transaction a payment of public funds.[8]

UCP stepped into the shoes of the initial developer, EGPI, when it assumed EGPI's duties, rights, and obligations under the DDA. UCP is thus the direct beneficiary of the Agency's sale of the Site for less than fair market price, and this public subsidy means that the East Garrison Project on the Site was paid for in part out of public funds. This includes the historic chapel located within the Site and the specific rehabilitation Project giving rise to this determination.

Under this statutory analysis, it is unnecessary to consider whether there exists an independent contractual obligation to pay prevailing wage rates on the Project. Consequently, there is no need to determine whether the Project is "first generation construction," or whether the equivalent of a "certificate of occupancy" exists for the structure, as those terms are used in the FORA Master Resolution. Although, the Superior Court did interpret the scope and applicability of the FORA Master Agreement and related documents as a matter of contract, it also explicitly acknowledged the alternative statutory basis under the California Labor Code for finding the East Garrison Project

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[6] EGPI, succeeded by UCP.

[7] No conventional appraisal was ever obtained for the property comprising the Site.

[8] See PW Case No. 2012-041, *Volkswagen of Palm Springs/City of Cathedral City* (May 1, 2013).

to be covered, and determined that the parties were not excused from compliance with the prevailing wage law "in other respects."

Conclusion

For the foregoing reasons, the proposed renovation and rehabilitation of the historic chapel at the former Fort Ord is public work that is subject to California's prevailing wage requirements.[9]

I hope this determination satisfactorily answers your inquiry.

Sincerely,

Christine Baker
Director

[9] In the County's submission, it is noted rather elliptically that the East Garrison Project funding program includes proceeds of Mello-Roos bonds as well as tax increment financing from the Agency and its successor. Assuming the accuracy of this assertion, and based on the finding that the Project here is a component part of the East Garrison Project, these forms of financing constitute public funding under subdivision (b)(1). The Department has long considered tax increment financing from a redevelopment agency to be a form of public funds. (See, e.g., PW Case No. 2001-008, *Esplanade Shopping Center Redevelopment Project* (March 6, 2002).) The receipt of Mello-Roos bond funds also triggers coverage of the prevailing wage law absent an exemption. PW Case No. 2005-038, *Rosedale Project/City of Azusa* (July 2, 2008), affirmed by the Court of Appeal in the *Azusa* decision, *supra*. Given that the Project here is deemed covered under subdivision (b)(3), it is not necessary to ask the parties to address coverage under these additional grounds or to submit documentation concerning the details of these financing arrangements.