

DEPARTMENT OF INDUSTRIAL RELATIONS

Katrina S. Hagen, Director

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May 26, 2021

Dennis Cook
Cook Brown LLP
2407 J Street, Second Floor
Sacramento, California 95816

Re: Public Works Case No. 2020-009
University Glen 32-Acre Development
California State University Channel Islands

Dear Mr. Cook:

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 1773.5¹ 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 construction of the University Glen 32-Acre Development located on land leased from California State University Channel Islands (CSUCI) is not subject to prevailing wage requirements.

Facts

A. CSUCI and the Site Authority.

Established in 2002, CSUCI² is an approximately 1,200-acre campus of the California State University system located on the grounds of the former Camarillo State Hospital in Ventura County.³ CSUCI is expressly authorized to sell and lease interests in this property "that are not needed for campus purposes" and any sale or lease proceeds are made available to fund CSUCI improvements and programs. (Educ. Code, § 89009, subd. (c).) A portion of the property, including the 32 acres on which the Project will be built, has been ground leased to the CSUCI Site Authority.

¹ Unless otherwise indicated, all further statutory references are to the Labor Code.

² CSUCI is administered by the Trustees of the California State University. (Educ. Code, § 66600.) CSUCI is used to refer both to the campus and to the Trustees.

³ Transfer of the Camarillo State Hospital land and improvements to CSUCI is specifically authorized under section 89009 of the Education Code.

The Site Authority is composed of representatives of CSUCI and the local government, and was created for the purpose of facilitating optimal uses of the former hospital site compatible with CSUCI's mission. (Gov. Code, § 67470, et seq.) The Site Authority was also tasked with preparing a specific reuse plan for the site. (Gov. Code, § 67473, subd. (b).)

B. University Glen.

East of John Spoor Broome University Library, within the CSUCI campus, is an area known as University Glen. According to CSUCI documents, University Glen is a master-planned community originally designed to provide up to 900 residential units and 31,000 square feet of retail and commercial space, and was intended to be developed in two phases. Phase 1, developed in 2006 by developer Brookfield Campus Holdings, is comprised of the Town Center, a multi-use building including residential, retail and commercial space, 474 rental apartments, 184 for-sale attached and detached homes, and amenities including two swimming pools and open spaces. The for-sale homes "were sold at well-below market prices as an incentive to attract and retain faculty and staff in an area with a very constrained and relatively expensive housing market" and the Site Authority imposed a limit on the price that the homes could be resold.

Phase 2 was a project that was planned for development on a separate undeveloped 32-acre parcel, and originally designed for 242 for-sale homes. The Site Authority's specific reuse plan allowed low to low-medium residential density for the 32-acre parcel. The infrastructure for Phase 1 and the 32-acre parcel in Phase 2 was installed in the same time frame at the cost of approximately \$52 million, paid for through Site Authority bond financing. About \$6 million was attributed to the infrastructure for the undeveloped 32-acre parcel. Due to the Great Recession, development of Phase 2 was no longer deemed feasible, and development ceased. At the time work stopped, the infrastructure for Phase 2 was only partially completed.

C. 32-Acre Development.

Beginning in 2008, the 32-acre parcel of the abandoned Phase 2 sat dormant and was leased to a vendor as a parking lot to store automobiles. The Site Authority retained Jones Lang LaSalle (JLL) to develop concepts for the use of the land. JLL determined that developing a project with both multi-family and single-family housing would maximize the revenue generated and such use was compatible with CSUCI's mission. In fact, this type of residential project was preferable to only single-family homes as envisioned in the abandoned Phase 2 because it could serve a broader segment of the CSUCI community. In addition, generating more revenue allows the Site Authority to finance the expansion of the fledgling campus. In March 2016, the Site Authority issued a Request for Proposals (RFP) to develop the 32-acre site. Kennedy Wilson, one of three qualified bidders that responded to the RFP, proposed long-term ground subleases with the Site Authority and development of a total of 589 residences, including 310 market-rate rental units, 170 senior affordable housing units, and 109 single-family homes (32-Acre Development). Kennedy Wilson agreed to be responsible for all costs of the design and construction of the residences, amenities, and related infrastructure.

Under Kennedy Wilson's 32-Acre Development, the single-family homes will be sold at market value to homeowners who will own their homes for the duration of the ground lease to the Site Authority, currently slated to end on June 30, 2098. The senior affordable residences will be sold to a separate limited partnership that will take advantage of low-income housing tax credits (LIHTCs). Kennedy Wilson will retain ownership of the rental units. In order to proceed with the 32-Acre Development, the specific reuse plan had to be amended to account for the increased density from "low to low-medium" to "low-medium to medium-high."⁴

According to Kennedy Wilson, it is drawing exclusively from various private funding sources to develop the rental units and single-family homes. The senior affordable housing component will be funded with a mix of private funding, LIHTCs, and proceeds from conduit revenue bonds. In addition to these funding sources, Kennedy Wilson will pay the Site Authority the following amounts for its ground subleases:

- \$2,500,000 ground sublease payments
- \$1,500,000 contribution towards the cost of a child care facility
- \$25,000 per house paid at close of escrow
- 7 percent of gross effective income on 310 market-rate rental units
- 7 percent of gross effective income of 170 age/income-restricted rental units

The Site Authority retained the firm known as CBRE to prepare an appraisal of the 32-acre parcel. The appraisal report set out to determine the market value of the land and whether Kennedy Wilson's proposed ground sublease payments to the Site Authority constituted market value. Consistent with JLL's determination, CBRE indicated that the highest and best use of the land "is the development of a mixed-use and single-family residential community development." CBRE estimated that it would cost approximately \$5 million to finish⁵ the site for the original Phase 2 development, but around \$10 million for Kennedy Wilson to perform grading on the site to accommodate the 32-Acre Development. After reviewing comparable ground leases, CBRE concluded that the "proposed rent would appear to be at market levels as compared to other similar sites."

Discussion

All workers employed on public works projects must be paid at least the applicable prevailing wage rates. (§ 1771.) Section 1720, subdivision (a)(1) 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.

⁴ The Site Authority's specific use plan defined "low to low-medium" density as containing a density range of 0-10 dwelling units per acre and "low-medium to medium-high" density with a range of 10-20 dwelling units per acre.

⁵ CBRE defined finished lots as "having completed streets and utilities with lot pads fine graded and development fees paid, with the exception of building permit home construction fees."

The work to be performed is indisputably construction done under contract as the 32-Acre Development will be built by private contractors. The issue is whether the construction is “paid for in whole or in part out of public funds.” Kennedy Wilson asserts that no public funding pays for any of the construction on the 32-Acre Development. However, because Phase 1 and Phase 2 were paid for out of public funds, the 32-Acre Development would be deemed to be paid for “*in part* out of public funds,” if either Phase 1 or Phase 2 and the 32-Acre Development were considered part of a single project. (§ 1720, subd. (a)(1), italics added.) In addition, Kennedy Wilson’s ground sublease payments to the Site Authority must be evaluated to determine whether they are “reduced, charged at less than fair market value, waived, or forgiven by the state or political subdivision.” (§ 1720, subd. (b)(4).)

A. The 32-Acre Development is a Separate Project.

Appellate decisions have set forth the framework for analyzing whether constructed components form a “complete integrated object.” (*Oxbow Carbon & Minerals, LLC v. Department of Industrial Relations* (2011) 194 Cal.App.4th 538, 549 (*Oxbow*).) The determination of what constitutes a single, integrated project requires an examination of the “totality of the facts.” (*Cinema West, LLC v. Baker* (2017) 13 Cal.App.5th 194, 212 (*Cinema West*)). This determination is often fact-intensive, and always fact-specific.

Phase 1 and Phase 2 were part of the same plan for development, were overseen by the Site Authority, were paid for out of the same bond financing, likely would have been developed by the same developer, and were envisioned as phases of a single project. For these reasons, Phase 2, had it not been abandoned, likely would have been considered part of the same overall project with Phase 1.

Before it was abandoned, there was some publicly-funded infrastructure work done for Phase 2 on the same 32-acre site where the 32-Acre Development is built. While there is no estimate of exactly how much infrastructure work was performed and at what cost, approximately \$6 million of the \$52 million public infrastructure budget was earmarked for the 32-acre site for Phase 2. Some of the previous Phase 2 infrastructure would have to be removed and redone, and the site would have to be regraded to accommodate the 32-Acre Development. Although public funding subsidized the old infrastructure work, most of that work was unsuitable for the new development, further severing any connection between the abandoned Phase 2 and the 32-Acre Development. It is true that Phase 2 and the 32-Acre Development sit on the same site and would have both been residential projects. However, Phase 2 was slated for 242 homes, while the 32-Acre Development is significantly denser, at close to 600 residential units. The Site Authority had to amend its specific reuse plan to account for this increased density. (See Gov. Code, § 67473, subd. (b).) The mix of housing also further reflected the needs of the diverse CSUCI community,⁶ and maximized the Site Authority’s revenue to expand the fledgling CSUCI campus. The developer of Phase 2 is also no longer in the picture, and

⁶ Kennedy Wilson asserted that apartments may be more suitable for students, while single-family homes may appeal to professors, other staff, and members of the community unaffiliated with CSUCI. Seniors from the CSUCI and broader community could benefit from the senior housing units.

Phase 2 was abandoned back in 2008. All these factual circumstances indicate that the abandoned Phase 2 effectively no longer exists.

Though not dispositive, the length of time that has elapsed between the construction of two developments can be a factor in deciding whether they constitute a single project. This factor becomes significant when other indicia of separateness are present, such as when the financing is distinct, the construction is overseen by different entities, and the developments are governed by separate agreements. Here, Phase 1 was built over a decade ago by a different developer, using different contractors, with different funding sources, and under a different plan and a different development agreement. Any connection between Phase 1 and the 32-Acre Development is sufficiently attenuated such that they are properly considered separate projects, despite their physical proximity. Under these specific facts, Phase 1 and the abandoned Phase 2 constitute a separate project from the 32-Acre Development.

B. The CBRE Appraisal Concludes that Kennedy Wilson's Ground Sublease Payments Constitute Fair Market Value.

As discussed, the Site Authority is leasing property from CSUCI. Part of that property is being subleased by the Site Authority to Kennedy Wilson, which is where the 32-Acre Development is built. Pursuant to its ground sublease, Kennedy Wilson will be making ground sublease payments, including rent payments, to the Site Authority. If certain conditions are met, those payments could constitute a public subsidy for the 32-Acre Development, as "a public agency may pay for construction out of public funds either by reducing rent or by charging rent at less than fair market value." (*Hensel Phelps Construction Co. v. San Diego Unified Port Dist.* (2011) 197 Cal.App.4th 1020, 1039; § 1720, subd. (b)(4).)

The CBRE appraisal provides factual support that Kennedy Wilson's ground sublease payments are charged at fair market value.⁷ Fair market value has been previously defined in prior coverage determinations as "the value of the land at its highest and best use as determined by a bona fide appraisal." (PW 2004-035, *Santa Ana Transit Village/City of Santa Ana* (Dec. 5, 2005).) After determining the "highest and best use" of the property, the CBRE appraisal concluded that Kennedy Wilson's ground sublease payments appeared to be consistent with market value. The information used in the CBRE appraisal appears to support a fair market valuation for the ground sublease payments. In addition to the appraisal, Kennedy Wilson's RFP proposal was chosen out of the three that were submitted, an indication that there were competitive forces at play to bolster the fair market valuation. Given that no other forms of potential public subsidy are being provided to the 32-Acre Development by the Site Authority, CSUCI, or other

⁷ The Site Authority is also generally responsible for ensuring "that all lease transactions are based upon fair market value rental rates appropriate to the type of facility, the terms of the lease, and the needs of the site authority." (Gov. Code, § 67476, subd. (c)(10).)

public agency,⁸ the construction is not paid for out of public funds. This determination is based on the facts presented. "If the assumed facts concerning this project change, a different result may obtain." (PW 2003-014, *Phase II Residential Development Victoria Gardens – City of Rancho Cucamonga* (July 20, 2005).)

Conclusion

For the foregoing reasons, the construction of the University Glen 32-Acre Development located on land leased from California State University Channel Islands is not subject to prevailing wage requirements

I hope this determination satisfactorily answers your inquiry.

Sincerely,



Katrina S. Hagen
Director of Industrial Relations

⁸ The 32-Acre Development will receive LIHTCs, but LIHTCs are not considered public funds under the prevailing wage law. (*State Building & Construction Trades Council of California v. Duncan* (2008) 162 Cal.App.4th 289, 318.)