

DEPARTMENT OF INDUSTRIAL RELATIONS
OFFICE OF THE DIRECTOR
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January 2, 2009

David S. Gehrig, Esq.
Hanson Bridgett LLP
425 Market St., 26th Fl.
San Francisco, CA 94105

Re: Public Works Case No. 2008-037
The Commons at Elk Grove
City of Elk Grove

Dear Mr. Gehrig:

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 the construction of The Commons at Elk Grove ("Project") in the City of Elk Grove ("City") is not a public work subject to prevailing wage requirements.

Facts

The Commons at Sabrina Lane LLC ("Developer") is developing the Project, which entails the construction of a 95-unit senior care housing facility and associated off-site sewer and water lines. Developer estimates the total cost of the Project to be \$18,207,335.

In connection with the Project, the Sacramento Regional County Sanitation District ("District"), within which City is located, required Developer to pay sewer impact fees, which are assessed under District Ordinance No. SRSD - 0106 at a rate of \$7,450 per single-family dwelling equivalent ("ESD"). With 46 ESDs attributed to the Project, Developer paid District a total of \$342,700 in required sewer impact fees.

To partially offset this expense, Developer applied to City for sewer impact fee credits from District's Economic Development Treatment Capacity Bank ("Bank"). Bank represents excess sewer capacity purchased by District from industrial dischargers, and its purpose is to promote economic development by dispensing sewer impact fee credits to industrial and commercial sewer users. City approved the allocation of 31 sewer impact fee credits to Developer, amounting to a discounted sewer impact fee rate per ESD of \$923 for 31 out of the 46 ESDs; the non-discounted rate per ESD of \$7450 applies to the remaining 15 ESDs. Upon completion of the Project, Developer will receive a refund from District of \$202,337, which is the value of the 31 sewer impact fee credits.

With the exception of the sewer impact fee credits, the Project is being developed with private funds. Developer entered into a contract for construction of the Project with Three Oaks, Inc. dba CB 2 Construction, LLC.

Discussion

Labor Code section 1771¹ requires that prevailing wages must be paid to workers employed on public works projects. Section 1720(a)(1) defines “public works” as “[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) defines “paid for in whole or in part out of public funds” to mean, among other things:

- (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.

...

- (4) Fees, costs, rents, insurance or bond premiums, loans, interest rates, or other obligations that would normally be required in the execution of the contract, that are paid, reduced, charged at less than fair market value, waived, or forgiven by the state or political subdivision.

...

Section 1720(c)(3) sets forth the following exemption:

(c) Notwithstanding subdivision (b): ...

- (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.

The Project involves construction done under contract within the meaning of section 1720(a)(1). The issues presented in this case are whether the above-described sewer impact fee credits entail a payment out of public funds as defined by section 1720(b) and, if so, whether the Project is nonetheless exempt from prevailing wages requirements under section 1720(c)(3).

Developer concedes that City’s grant of sewer impact fee credits to Developer “potentially” or “arguably” constitutes the payment of public funds under section 1720(b), which might ordinarily subject the Project to prevailing wage requirements. The sewer impact fee credits clearly fall under the provisions of section 1720(b) quoted above. Under section 1720(b)(1), District’s refund of \$202,337 to Developer constitutes a payment of money by a political subdivision to a developer. Alternatively, City’s approval of sewer impact fee credits for 31 ESDs results in a fee being reduced by a political subdivision within the meaning of section 1720(b)(4).

¹ All statutory references are to the California Labor Code, unless otherwise indicated.

Notwithstanding the public funds payment, the exemption in section 1720(c)(3) applies. The value of the sewer impact fee credits is \$202,337, representing only 1.1 percent of the overall Project cost of \$18,207,335. This public subsidy is proportionately small enough in relation to the overall cost of the Project, such that the availability of the subsidy does not significantly affect the economic viability of the Project. As such, under section 1720(c)(3), the public subsidy is considered de minimis in the context of an "otherwise private development project" and, therefore, the Project is exempt from prevailing wage requirements.²

For the foregoing reasons, the public subsidy to the Project in the form of sewer impact fee credits is de minimis and does not convert this otherwise private development project into a public work requiring the payment of prevailing wages.

I hope this determination satisfactorily answers your inquiry.

Sincerely,



John C. Duncan
Director

²This is consistent with PW 2008-010, *Sewer Line Construction, City of Corona* (August 4, 2008) [a public subsidy representing four-tenths of one percent of the total project costs was found to be de minimis]; PW 2007-012, *Sand City Design Center, Sand City Redevelopment Agency* (May 15, 2008) [a public subsidy representing 1.4 percent of the total project costs was found to be de minimis]; and PW 2004-024, *New Mitsubishi Auto Dealership, Victorville Redevelopment Agency* (March 18, 2005) [a public subsidy representing 1.64 percent of the total project costs was found to be de minimis].