
Prevailing Wage e-Alert: That CFD Might Cost You Millions More Than You Thought

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If you are a builder or developer and you only want to hear good news, stop reading this article now. For those of you still reading this, if you have used or intend to use a Community Facilities (or Mello-Roos) District (“CFD”) or some other form of “public funds” to pay for some or all of your project’s required public improvement work, you need to know about the recent decision in *Azusa Land Partners v. Department of Industrial Relations*. This case could require you to comply with prevailing wage requirements when building out some or all of your otherwise private development project.

California’s prevailing wage laws (California Labor Code Section 1720, *et. seq.*) impose a host of costly obligations on certain projects “paid for in whole or in part out of public funds.” For purposes of this e-alert, it is sufficient to note that a project subject to prevailing wage requirements must generally pay higher labor costs and comply with fairly complicated reporting, apprenticeship and monitoring obligations. In addition, builders who fail to comply could be subjected to costly administrative and legal proceedings and ultimately held liable for the payment of back wages and significant fines.

Given the above, the *Azusa Land Partners* case could have huge implications for the development community. By way of background, Azusa Land Partners is the owner and developer of a 500 acre master planned project approved for more than 1,200 homes and 50,000 square feet of commercial space. As a condition of approval, the City of Monrovia required Azusa Land Partners to construct a host of public improvements such as schools, parks, in tract streets and storm drain facilities. Azusa Land Partners asked the City to form a CFD and issue up to \$120 million in bonds to pay for certain eligible facilities. Significantly, the CFD formation documents defined eligible facilities as including all “public infrastructure and facilities required as a condition of approval of the Project.” However, Azusa Land only received \$71 million in CFD bond proceeds even though the total cost of the City-required public improvements exceeded \$146 million. An administrative complaint filed by a labor backed organization, followed by adverse rulings by the State Department of Industrial Relations and the trial court, led Azusa Land Partners to appeal the case to the Court.

Although CFD bonds are ultimately paid off by the private property owners who benefit, the Court found that CFD bond proceeds are “public funds” that trigger prevailing wage laws. The Court also rejected Azusa Land Partners’ attempt to rely on post-CFD formation agreements to limit the prevailing wage obligations to those improvements actually paid for with CFD funds. Instead, under the above facts, the Court ruled that the entire master planned project was a “public work” subject to prevailing wage laws and that prevailing wage requirements applied to all of the project’s public infrastructure work regardless of the source of funding.

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Now that you have picked your jaw up off the floor, you should note the following: First, the *Azusa Land Partners* case is just one appellate court's opinion on some issues not previously addressed in a published decision. Second, *Azusa Land Partners'* problems would have been exponentially worse if the court had applied prevailing wage requirements to all the project's construction activities rather than just the in public improvements. Third, an argument still exists that a project can rely on legislative carve outs in Labor Code section 1720(c) to further limit the law's coverage by, for example, establishing from the outset a more narrowly tailored infrastructure and funding agreement with the public agency. Finally, for those of you who are or will be relying on CFD proceeds or other forms of "public funds" to finance components of your project, the case is proof that labor backed groups are watching what you do, and it demonstrates why you should immediately consult with experienced counsel.

Luce Forward is a full service law firm with offices throughout California. The author, Brian Fish, is a land use/development partner at Luce Forward who advises clients about prevailing wage considerations in the context of real estate development. You can reach Brian Fish at 619.699.2424 or bfish@luce.com, or any of our other land use lawyers by searching at www.luce.com/landuse.

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