

Construction & Infrastructure Law Blog

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Developers Must Pay Prevailing Wages for Privately Financed Public Infrastructure

By Bram Hanono and Greg Woodard

California Labor Code sections 1720 *et seq.* (the Prevailing Wage Law) ("PWL") require employers (including developers and contractors) engaged in public works projects to pay the prevailing wage to their employees if the project is "paid for in whole or in part out of public funds." The Second Appellate District Court of Appeal recently ruled that private developers must pay prevailing wages for the construction of *all* public improvements in connection with a development project if public funds are used to finance any part of the public improvements, even if the remaining public improvements are paid for with private funds. The California Supreme Court declined to hear the developer's appeal. Therefore, developers and contractors could face increased project costs as a result of this case.

Background & Summary

In [*Azusa Land Partners v. Department of Industrial Relations*](#), 191 Cal.App.4th 1 (2010), the developer proposed a master planned 500+ acre development that included up to 1,200 homes, 50,000 square feet of commercial, and public infrastructure and improvements. To obtain the City of Azusa's approval, the developer agreed to public infrastructure and improvement work, including construction of a public school and park, freight under-crossings, sanitation district facilities, and street, bridge, storm drain, sewer, water, utilities, park and landscaping improvements. The public improvements were to be funded by Mello-Roos bonds which were approved for indebtedness of up to \$120 million to be incurred by the Community Facilities District ("CFD"). The developer was required to construct the public improvements even if the actual costs exceeded the amount of bond funds sold by the CFD for the improvements. The total cost of the public improvements was approximately \$146 million but the CFD only sold \$71 million in bonds, leaving the developer on the hook for the remaining \$75 million.

A third party requested an inquiry into whether the entire project was a "public work" subject to the PWL. "Public works" is broadly defined by the PWL and includes work "paid for in whole or in part out of public funds." The Department of Industrial Relations (the "Department"), which was charged with the review, determined that even though the project was only partly funded with public funds, the entire project was nevertheless

a public work and subject to the PWL. However, the Department also found prevailing wage did not have to be paid on the entire project because the project met an exemption in the PWL (Labor Code section 1720(c)(2)) that required prevailing wage only for those public infrastructure improvements in the project required as a condition of regulatory approval. Accordingly, the developer had to pay prevailing wage for all those public improvements even though some were in fact privately funded due to the shortfall in CFD funding. The developer appealed, but the Department upheld its initial determination, meaning prevailing wage had to be paid for all of the public improvements.

The developer filed a petition for writ of mandate in superior court and the trial court denied the petition. On appeal, the developer argued it should only be required to pay prevailing wage for the public improvements actually financed with the Mello-Roos bond proceeds and not for privately funded infrastructure improvements for which no bond proceeds were received – the developer was seeking a more narrow interpretation under section 1720(c)(2) of the PWL.

The Court of Appeal disagreed with the developer. First, the court held that under the PWL, the entire project was a "public work" because the project was funded in part through public funds. Second, the court held that under the PWL, the Mello-Roos bond proceeds constituted public funds. Finally, the court rejected the developer's argument that even if the project was subject to the PWL, it should only be required to pay prevailing wage for the public improvements that were built with Mello-Roos bonds, and not any public improvements constructed at private expense. Instead, the Court of Appeal agreed with the Department and the trial court, interpreting the PWL to apply to all public improvements, regardless of whether or not they were paid for with Mello-Roos bonds.

On March 2, 2011, the California Supreme Court declined to hear the developer's appeal. As a result, the developer will be required to pay prevailing wage on the entire \$146 million cost for the project's public improvements, including the \$75 million in public improvements which it privately financed. **COMMENT:** Going forward, developers and contractors may be required to pay prevailing wage on the entire build-out of public improvements, even if the development is mostly privately financed and privately owned. This means each party should carefully determine in their development and construction contracts whether prevailing wage rules apply and which party will pay the increased costs.

Authored By:

[Bram Hanono & Gregory E. Woodard](#)