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Prevailing Wage Update: Projects with Public Funding of Infrastructure May be Required to Pay Prevailing Wages

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The Second District Court of Appeal rendered a potentially significant decision impacting private projects that obtain public funding for public infrastructure associated with the private project.

In the case of *Azusa Land Partners v. Department of Industrial Relations*, decided in late December, the Court, while coming to a not surprising conclusion given past determinations by the Department of Industrial Relations, established a significant judicial precedent. If upheld by the California Supreme Court, the opinion will affect developer's decisions whether, and to what degree, it makes sense to request public funds to assist in the development of private projects.

What does the decision mean for the development community? What does the decision do with regard to the application of prevailing wage requirements for private projects? What does it not do? What are the lessons to be learned?

The project was a mixed use project comprised of residential and commercial uses. The developer entered into a development agreement with the City whereby the developer agreed to construct all of the public improvements required as a condition of approval for the project. The City, in turn, agreed to establish a Community Facilities District under the provisions of the Mello-

Roos Act that would issue bonds to reimburse the developer for a portion of the cost of constructing the required public improvements. The City and the developer agreed that prevailing wages would need to be paid but only for the portion of the improvements to be funded by the Community Facilities District.

An opinion was sought from the Director of Industrial Relations by a labor compliance committee which contended that the entire project, including all of the private improvements, were funded in part with public funds and therefore prevailing wages must be paid for all of the work, both private and public under Labor Code Section 1720 ("Prevailing Wage Law"). The Director agreed that the entire project was funded in part by public funds but concluded that an exception to the payment of prevailing wages on the private aspects of the project applied. Citing Labor Code Section 1720(c)(2), the Director found that no more public funds were contributed than required to pay the cost of the public infrastructure improvements required as a condition of project approval and, therefore, prevailing wages only had to be paid for the construction of the public improvements. The Court of Appeal, in upholding the decision of the Superior Court and the Director, sustained the Department's long standing interpretation of the Prevailing Wage Law.

So What Does This All Mean For The Development Community?

What the decision does not do -

- There never was an argument over whether the private portions of the project would be subject to prevailing wages because an exemption clearly applied based on the fact that the public works were required as a condition of project approval. Labor Code Section 1720(c)(2) provides that public improvements required as a condition of approval of a project that are funded with public funds that do not exceed the

cost of the public improvements do not require the private improvements to be constructed with prevailing wages.

- The court did not hold, as some seem to assert, that public improvements constructed with entirely private funds must be constructed using prevailing wages. If no public funds are contributed to the project, there is no case holding that prevailing wages must be paid even if the improvements are to be dedicated or conveyed to a public entity at a later date.
- While the Court did note that previous determinations of the Department were no longer precedential, and in particular that the seminal determination in *Vineyard Creek Hotel and Conference Center* (October 16, 2000), Dept. Industrial Relations PW 2000-16, was distinguishable as having been decided prior to the most recent amendments to Labor Code Section 1720, the Court did not revisit, as it was not really an issue, the test for determining whether or not public and private project should be considered to be a single project for prevailing wage determination purposes. It will be for a future court to consider whether or not a private project is so coupled with a publicly funded project that the two projects are to be considered a single project for the purpose of the Prevailing Wage Law.

What the decision does do -

- For years the Department has taken the position that Mello Roos funds are public funds. See *Tustin Fire Station* (June 28, 1994), Dept. Industrial Relations PW 93-054. No cases challenged that position until now. The Court agreed with the Department's longstanding position.
- Unless an exemption applies, any public funds provided to a private project, including all of its components, will trigger a requirement of

the payment of prevailing wages for the entire project. Public funds are defined extremely broadly in the Prevailing Wage Law. It includes not only the payment of money or the direct construction of some of the improvements but also includes not so apparent funding such as transfers of land to the project at less than fair market price, development fees that are reduced or waived, loans to the project at less than market rates, etc. Labor Code Section 1720(b).

What are the lessons learned for the development community?

- Whether or not the decision in *Azusa* is overturned or modified by the California Supreme Court, now more than ever, any potential contribution of “public funds” to a private project must be carefully scrutinized to ensure that a requirement for prevailing wages does not thereby become applicable to the entire project.
- The exemptions in Labor Code Section 1720(c) are likely to be strictly construed if this Court’s view of the public policy behind the requirement for the payment of prevailing wages holds up to further judicial scrutiny.
- Combining a public and a private project should be avoided if at all possible. It is unknown what standard future courts will adopt in considering whether otherwise unrelated projects will be considered a single project for prevailing wage purposes.

If a single development entity is to construct both private and public facilities, the contracts should be entirely separate and not the subject of any common features if at all possible. Here the *Vineyard* test may well continue to be instructive notwithstanding the language in the *Azusa* case.