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Legal Alert

Protecting Projects with CFD Financing from Prevailing Wage Requirements

The California Director of Industrial Relations (the "DIR") recently issued a public works coverage determination (the "Determination") that provides valuable insights for developers seeking financing for public infrastructure improvements through a Mello-Roos Community Facilities District ("CFD"). The Determination makes it clear that CFD financing must be carefully structured to ensure that only public improvements funded from bond proceeds ("Bond Proceeds") are subject to a prevailing wage requirement. The requirement to pay prevailing wages can substantially increase construction costs. In particular, a developer should ensure that the "Regulatory Exemption" is available to protect the "private" elements of the project from a prevailing wage requirement by making it clear that:

- All improvements specified as eligible for purchase are "conditions of project approval."
- The portion of Bond Proceeds used to pay for public improvements will not exceed the actual cost of the improvements (this is a typical feature of any acquisition agreement, but is an important element to be satisfied).
- No public agency will retain any proprietary interest in the private development project (i.e., profit-sharing, reduced rent, rights to parking proceeds, options to lease or purchase, etc.).
- All private improvements will be constructed pursuant to separate contracts and if not, that construction contracts will require the payment and reporting of prevailing wages for all public improvements to be purchased with Bond Proceeds.

In those instances in which a CFD is intended to fund improvements that have not been imposed as conditions of project approval, it may still be possible to avoid the payment of prevailing wages on the private portions of the project without reliance on the "Regulatory Exemption". However, advanced planning must be undertaken to structure the transaction such that the CFD improvements and the private development improvements are separate and independent projects under the integration analysis set forth in a string of DIR determinations.

We also note that the DIR has reaffirmed its [decision](#) to discontinue the use of its own precedent decisions. This action is troubling in several respects because it introduces more uncertainty to an already precarious process.

Public funds and/or benefits can often make or break a private project but bring with them the risk of a prevailing wage requirement for private as well as public infrastructure improvements. Developers should seek early guidance from experienced legal counsel anytime public funds and/or benefits are contemplated as part of an otherwise private development. Please contact us to discuss any current or contemplated projects that involve public funds and/or benefits.

[Click here](#) to view the entire article.

[Click here](#) to view the Determination.

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