

DEPARTMENT OF INDUSTRIAL RELATIONS

Christine Baker, Director

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October 18, 2017

Sarah Farley
Farley Associates
3145 Geary Boulevard, Suite 440
San Francisco, CA 94118

Re: Public Works Case No. 2016-033
Mayfield Place Housing Project
City of Palo Alto

Dear Ms. Farley:

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 Labor Code section 1773.5¹ and California Code of Regulations, title 8, section 16001, subdivision (a). Based on my review of the facts of this case and an analysis of the applicable law, it is my determination that the Mayfield Place Housing Project is not public works and is therefore not subject to prevailing wage requirements.

Facts

A. The Development Agreement

In 2005, the City of Palo Alto (City) and Stanford University (Stanford) entered into a development agreement in which the City granted certain development rights to Stanford in exchange for Stanford's construction of a soccer complex and residential housing. Known as the "Stanford/Palo Alto Community Playing Fields," the soccer complex is already in operation and sits on the Mayfield Site at the corner of Page Mill Road and El Camino Real in Palo Alto. Stanford agreed to lease the Mayfield Site and the soccer complex to the City for 51 years at \$1 per year for the "operation of community athletic fields and other related public recreational uses." Upon termination of the lease, the soccer complex and any other improvements on the Mayfield Site automatically revert to Stanford.

The City, in turn, granted Stanford the rights to demolish approximately 300,000 square feet of existing office development at sites within the Stanford Research Park on El Camino Real and

¹ Unless otherwise indicated, all further statutory references are to the California Labor Code and all subdivision references are to the subdivisions of section 1720.

California Avenue and relocate to other locations in the Research Park. Stanford would be permitted to exceed the floor area ratio² on the relocation sites by up to 25 percent.

B. Mayfield Place

As part of the development agreement, Stanford agreed to build 250 housing units on the sites where the existing office development is demolished. According to the City's Below Market Rate (BMR) Housing Program, at least 20 percent of the 250 units must be BMR units. Stanford can elect to either: (1) construct the minimum 50 BMR units to be integrated with the rest of the units, which are market rate housing; or (2) construct 70 BMR units at a completely BMR project.

Stanford has elected to build 70 BMR units at locations separate from the market rate housing and has begun construction. This 70-unit BMR project is referred to as Mayfield Place. Related California, through its affiliated company Palo Alto ECR Partners, L.P. (ECR Partners), is the developer, and Segue Construction is the general contractor, for the construction of Mayfield Place.

C. Development Impact Fees

Under the development agreement, the City will not impose development impact fees³ on the 300,000 square feet of existing development that will be relocated. The City will, however, impose fees on any other construction under the development agreement, including the construction of the new housing units. For the 70 BMR units at Mayfield Place, the City will impose development impact fees on only 50 of the units.

Discussion

“Public works” under the California Labor Code is generally defined as construction, alteration, demolition, installation, or repair work that is done under contract and paid for in any part out of public funds. (§ 1720, subd. (a)(1).) Public funds in this context are not limited to a direct payment of money from a public entity to a contractor. Instead, public funds include subsidies such as transfers of property for less than fair market value; below-market interest rate loans; or waivers of fees that would normally be required in the execution of the public works contract. (See § 1720, subd. (b).) Workers employed on public works must be paid the prevailing wage. (§ 1771.)

Segue Construction is the general contractor for the construction of 70 BMR units at Mayfield Place. The construction work is indisputably done under contract. The dispute centers on whether the construction is paid for out of public funds.

² Under the City's municipal code, floor area ratio “means the maximum ratio of gross floor area on a site to the total site area.” (Palo Alto Mun. Code, § 18.04.030, subd. (a)(57); see also *San Francisco Tomorrow v. City and County of San Francisco* (2014) 228 Cal.App.4th 1239, 1249 [floor area ratio is “the ratio between gross floor area to lot area.”].)

³ A development impact fee is a fee collected by local agencies to mitigate the impact of new development. (See Gov. Code, § 66000 et seq.)

A. The City Did Not Waive Development Impact Fees.

The Northern California Masonry Labor Management Cooperation Committee (Masonry LMCC) claims that the City waived its right to development impact fees on 20 of the 70 BMR units that are being built at Mayfield Place. That waiver, Masonry LMCC argues, constitutes public funds under subdivision (b)(4), which reads:

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.

(§ 1720, subd. (b)(4), added italics.)

In response, the City and ECR Partners point out that Palo Alto Municipal Code section 16.58.030(f) provides an exemption from development impact fees for BMR units above the minimum required by the City's BMR Housing Program.⁴ Review of section 16.58.030(f) confirms that it does appear to exempt the 20 BMR units beyond the 50 BMR unit minimum from development impact fees. This exemption is not specific to Mayfield Place – it is generally applicable to all qualifying projects in Palo Alto.

Masonry LMCC also asserts that the City waived development impact fees for the approximately 300,000 square feet of existing office development that would be relocated. The City responds that the existing office development is merely being relocated to other sites and, without citing any authority, contends that no development impact fees are imposed where no square footage is added. The City's argument is sound. Palo Alto Municipal Code section 16.58.020, which no interested party cited, provides that development impact fees only apply to new development. "New development" is defined to "mean, with respect to nonresidential development, any development that creates additional square footage. Where a development project includes replacement of existing square footage, the 'new development' shall mean only the portion that constitutes additional square footage." (Palo Alto Mun. Code, § 16.58.010, subd. (b).) Under these provisions, there is no "new development" contemplated with the relocation of the existing office development and no development impact fees are due, because no additional square footage is being developed.

Masonry LMCC was invited to respond to the arguments made by the City and ECR Partners. It declined to do so. Given these circumstances, it appears that the "waiver" of development impact fees is not actually a waiver, as the City cannot waive a fee it is not entitled to collect. Because there is no fee waiver, the construction of Mayfield Place is not paid for out of public funds.

⁴ ECR Partners makes the additional argument that Palo Alto Municipal Code section 16.58.030(c) fully exempts the entire Mayfield Place Housing Project from development impact fees because it is 100% affordable. It is not apparent, however, whether the Mayfield Place Housing Project is *permanently obligated* to be 100% affordable, as section 16.58.030(c) requires. Whatever the case may be, ECR Partners paid development impact fees for 50 BMR units, and section 16.58.030(f) is clear that no development impact fees are required for the additional 20 BMR units.

B. Even if There Were a Fee Waiver, the Public Subsidy is De Minimis in the Context of the Mayfield Place Housing Project.

ECR Partners states that Mayfield Place's total development costs are approximately \$35.4 million and offered to provide supporting documentation. Based on the fee schedule in effect in 2003, the City calculates \$138,600 as the amount of development impact fees that would be owed on 20 housing units (\$6,930 per unit).⁵ Masonry LMCC does not challenge these numbers.

The City and ECR Partners both contend that \$138,600 is de minimis in the context of the \$35.4 million in project costs. Even if development impact fees were required and waived for the additional 20 units, the public subsidy amounts to only 0.38 percent of Mayfield Place's total project costs (\$136,000/\$35.4 million = 0.384 percent). Citing subdivision (c)(3), the City and ECR Partners insist that Mayfield Place is exempt from prevailing wage requirements even if the \$138,600 were considered public funds for prevailing wage law purposes.

While de minimis is not defined in the statute, past determinations have held public subsidies to be de minimis when the "amount of public funds 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 this Project." (PW 2011-033, *Blue Diamond Agricultural Processing Facility – City of Turlock* (May 9, 2012).)

Blue Diamond involved a de minimis public subsidy that was 1.75 percent of the project's costs. In this case, the purported public subsidy amounts to only 0.38 percent. Accordingly, the development impact fees, even if considered waived, is de minimis in the context of the Mayfield Place project.

C. Mayfield Place Does Not Become a Public Works Project by Operation of Subdivision (c)(1).

Masonry LMCC further argues that subdivision (c)(1) subjects the construction of Mayfield Place to prevailing wage requirements. Stated simply, Masonry LMCC posits that a purely private residential project built on private property that *receives no public funding* is nonetheless public works, if the private residential project were built under an agreement with "a state agency, redevelopment agency, or local public housing authority." (§ 1720, subd. (c)(1).)⁶

⁵ Even under the fee schedule currently in effect, the development impact fees would not exceed \$250,000 for 20 units, constituting at most 0.7 percent of Mayfield Place's total project costs.

⁶ During the pendency of this request, the Legislature passed Assembly Bill 199 (2017) to amend subdivision (c)(1). Effective January 1, 2018, subdivision (c)(1) will read:

Private residential projects built on private property are not subject to the requirements of this chapter unless the projects are built pursuant to an agreement with a state agency, a redevelopment agency, *a successor agency to a redevelopment agency when acting in that capacity*, or a local public housing authority.

(Stats. 2017, ch. 610, §§ 1-1.5, italics added). Because AB 199 applies prospectively, it would not apply to this case. (See *Myers v. Philip Morris Companies, Inc.* (2002) 28 Cal.4th 828, 840.) Even if it were retroactive, AB 199 does not affect the analysis in this case in any way.

That argument is misplaced. Subdivision (c) begins with the preamble “Notwithstanding subdivision (b),” which suggests that to even reach subdivision (c)(1), a private residential project built on private property must receive public funding as identified in subdivision (b). And so subdivision (c)(1) operates by generally exempting those private residential projects built on private property that receive public funding. But, if the public funding comes from “a state agency, redevelopment agency, or local public housing authority,” then the private residential project generally *is* subject to prevailing wage requirements, unless another exemption applies, as funding from one of those public entities takes the project *out* of the ambit of subdivision (c)(1)’s exemption.

Coverage under Masonry LMCC’s subdivision (c)(1) argument requires two criteria to be met: (1) the project must receive public funding; and (2) the public funding must come from one of the enumerated public entities. Neither of those elements is satisfied under these facts. Not only does Mayfield Place receive no subdivision (b) public funds, even if it did, any public subsidy would come from the City. The City is not a “state agency, redevelopment agency, or local public housing authority,” and Masonry LMCC has not made any colorable argument to the contrary.⁷

Subdivision (c)(1), an exemption for private residential projects built on private property, does not transform Mayfield Place into a public works project under the facts presented here. Because Mayfield Place is a private residential project built on private property under an agreement with the City that does not include any public funding, subdivision (c)(1) does not come into play. On the contrary, subdivision (c)(1) works to *exempt* Mayfield Place from prevailing wage requirements.

Conclusion

For the foregoing reasons, the construction of the Mayfield Place Housing Project is not public works and is therefore not subject to prevailing wage requirements.

I hope this letter satisfactorily answers your inquiry.

Sincerely,



Christine Baker
Director

⁷ After the dissolution of redevelopment agencies in 2012, some cities have elected to act as “successors” to the agencies and retained the same housing assets and functions, including the duties and obligations previously performed by the redevelopment agencies. (See Health & Saf. Code, §§ 34172, 34176, subd. (a)(1).) Masonry LMCC has not made any argument that the City is acting here as a successor to a redevelopment agency.