

**Office of
The City Attorney
City of San Diego**

**MEMORANDUM
MS 59**

(619) 533-5800

DATE: February 5, 2019

TO: Honorable Mayor and Councilmembers

FROM: City Attorney

SUBJECT: Prevailing Wage Compliance on Affordable Housing Projects

INTRODUCTION

The San Diego Housing Commission (Housing Commission) administers the City of San Diego's (City) Affordable Housing Fund, which consists primarily of two funding sources: (a) the Inclusionary Housing Fund, funded from fees charged to residential development; and (b) the Housing Trust Fund, funded from fees charged to commercial development. San Diego Municipal Code (Municipal Code or SDMC) section 98.0513 requires the Housing Commission to adopt an annual plan for the use of Affordable Housing Fund revenues and to issue an annual report on Affordable Housing Fund activities for the prior fiscal year.

During the San Diego City Council (Council) meeting on September 25, 2018, Housing Commission staff delivered its Fiscal Year 2018 report regarding the Affordable Housing Fund. In connection with the item, the Council heard public testimony in favor of applying prevailing wage requirements to all affordable housing projects that receive Affordable Housing Fund assistance.

In response to the staff report and public testimony, then-Council President Myrtle Cole expressed an intent to refer the prevailing wage discussion to a Council Committee in the future. She also inquired whether the Housing Commission's Notice of Funding Availability (NOFA) for local affordable housing projects would trigger compliance with state prevailing wage laws on any projects that receive Affordable Housing Fund assistance through the NOFA. This memorandum is provided to assist with a future Council Committee discussion regarding the applicability of prevailing wage requirements to locally-subsidized affordable housing projects.

QUESTIONS PRESENTED

1. Do prevailing wage requirements apply when the Affordable Housing Fund is used to subsidize the cost of local affordable housing projects?
2. If not, may the Council nevertheless impose prevailing wage requirements on local affordable housing projects when the Affordable Housing Fund is used to subsidize the cost of those projects?

SHORT ANSWERS

1. Not in all instances. State prevailing wage laws generally provide that publicly-financed affordable housing projects are subject to prevailing wage requirements, but contain several statutory exemptions. Determining whether an affordable housing project qualifies for one of the statutory exemptions typically requires a detailed, fact-specific analysis of the project's funding sources and deal structure.

2. Yes. The Council may adopt an ordinance requiring all locally-subsidized affordable housing projects to comply with prevailing wage requirements without regard to whether those projects might qualify for a state statutory exemption. In that event, it is likely that the City or the Housing Commission, or both, would need to enforce compliance with prevailing wage requirements for local affordable housing projects that would be statutorily exempt under state law.

DISCUSSION

I. THE APPLICABILITY OF PREVAILING WAGE REQUIREMENTS TO A SUBSIDIZED AFFORDABLE HOUSING PROJECT DEPENDS ON THE SPECIFIC FINANCING STRUCTURE FOR THE PROJECT

Municipal Code section 22.3019 requires the City to comply with state prevailing wage laws set forth in California Labor Code sections 1720-1784.¹ The City's prevailing wage law generally applies to a "public work" that includes construction work done under contract and "paid for in whole, or in part, out of public funds." Cal. Lab. Code § 1720(a); SDMC § 22.3019.² If a project qualifies as a "public work" under California Labor Code section 1720(a), the entire project is subject to prevailing wage requirements unless a statutory exemption applies. *Azusa Land Partners v. Dept. of Indus. Relations*, 191 Cal. App.4th 1, 29 (2010).

¹ This Office has issued several memoranda addressing compliance with state prevailing wage laws. See City Att'y MS 2015-17 (Sept. 23, 2015); City Att'y MOL No. 2013-18 (November 19, 2013); City Att'y MOL No. 2013-10 (June 17, 2013); and City Att'y MS 2011-14.

² The phrase "paid for in whole, or in part, out of public funds" includes a public agency's transfer of an asset of value for less than fair market price. Cal. Lab. Code § 1720(b)(3). The California Department of Industrial Relations (DIR) has determined that an affordable housing project benefitting from a land write-down is a public work subject to prevailing wage requirements, unless a statutory exemption applies. Public Works Case No. 2013-008, Mid-Celio Apartments/City of Fernando (Nov. 13, 2013).

The California Legislature has established several statutory exemptions from prevailing wage requirements for certain publicly-financed affordable housing projects.³ A commonly-used exemption applies to a residential project that receives public funding in the form of one or more below-market interest rate loans, if the project dedicates at least 40 percent of its units to low-income occupants. Cal. Lab. Code § 1720(c)(5)(E). A second exemption applies to affordable housing projects that receive money from the Low and Moderate Income Housing Fund administered by former redevelopment agencies. *Id.* § 1720(c)(4). A third exemption applies to affordable housing projects subsidized by federal and state low income housing tax credits. *Id.* § 1720(d)(3); *State Bldg. & Constr. Trades Council v. Duncan*, 162 Cal. App.4th 289, 294 (2008).

Under current law, the applicability of prevailing wage requirements can generally not be determined at the initial stages of an affordable housing project (i.e., when the Housing Commission issues a NOFA) because a project typically includes numerous funding sources. Determining whether a project falls within a statutory exemption requires a detailed, fact-specific analysis of the project's funding sources and deal structure. For instance, if a project is subsidized through one or more below-market rate interest loans of public funds and dedicates at least 40 percent of its units to low-income occupants, the project is statutorily exempt from prevailing wage requirements. Cal. Lab. Code § 1720(c)(5)(E). However, if a project is subsidized through both a grant of redevelopment funds and one or more below-market rate interest loans of other public funds, the project is not statutorily exempt. *Housing Partners I, Inc., v. Duncan*, 206 Cal. App.4th 1335, 1342, 1348 (2012). Moreover, if a project receives federal funds, both state and federal prevailing wage laws may apply.⁴ Projects that receive federal funding or obtain project-based vouchers may trigger prevailing wage requirements under the federal Davis-Bacon Act. 40 U.S.C. 3141, *et seq.* Each federally funded program specifies when the Davis-Bacon Act applies to activities funded under the program.

II. THE CITY COUNCIL MAY ADOPT AN ORDINANCE THAT IMPOSES PREVAILING WAGE REQUIREMENTS ON ALL AFFORDABLE HOUSING PROJECTS SUBSIDIZED BY THE AFFORDABLE HOUSING FUND

State prevailing wage laws do not preempt local jurisdictions from requiring the payment of prevailing wages on locally-subsidized affordable housing projects. Cal. Lab. Code § 1720(h). Municipal Code section 22.3019 – the City's prevailing wage ordinance – incorporates state prevailing wage laws, allowing the City to rely on the DIR's interpretive decisions and enforcement of prevailing wage requirements. The Council may amend the City's prevailing wage ordinance to state that all affordable housing projects subsidized by the Affordable

³ In addition to the statutory exemptions, the DIR has concluded that certain tax-exempt bond financing mechanisms widely used for multifamily housing projects are exempt from prevailing wage requirements. Public Works Case No. 2004-016, Rancho Santa Fe Village Senior Affordable Housing Project (Feb. 25, 2005) (involving conduit bond financing); Public Works Case No. 2004-049, Silverado Creek Family Apartments (May 27, 2005) (involving private placement bonds). The DIR has explained that these bond financing mechanisms do not involve "the payment of money or the equivalent of money by the state or political subdivision" within the meaning of California Labor Code section 1720(b)(1) because the bond proceeds never enter the public agency's coffers. *Id.*

⁴ If a developer is required to comply with both state and federal prevailing wage laws on a project, the developer must pay the higher of the two wage rates on the project.

Housing Fund are subject to prevailing wage requirements, without regard to whether those projects might qualify for a state statutory exemption.⁵ If the City Council wishes to pursue this amendment, this Office recommends that the City Council adopt an ordinance that applies broadly to all locally-subsidized affordable housing projects in order to avoid a legal challenge under the Equal Protection Clause of the federal and state constitutions.⁶

If the Council seeks to apply prevailing wage requirements to all locally-subsidized affordable housing projects, it will need to consider logistical issues with respect to enforcement. The DIR is responsible for enforcing compliance with state prevailing wage requirements, but those requirements do not apply to some affordable housing projects due to the available statutory exemptions. The DIR may elect not to exercise jurisdiction over an affordable housing project that would be exempt from prevailing wage requirements under state law, but is made subject to those requirements solely by local ordinance. Thus, if the City Council prohibits the use of any statutory exemption for a locally-subsidized affordable housing project, it is likely that the City or the Housing Commission, or both, would need to enforce compliance with prevailing wage requirements for any projects that would be statutorily exempt under state law.⁷

⁵ Likewise, the Council could amend the prevailing wage ordinance to state that all affordable housing projects subsidized by other local public funds, such as the Low and Moderate Income Housing Asset Fund administered by the City as housing successor to the former Redevelopment Agency, are subject to prevailing wage requirements.

⁶ Any proposed ordinance must comply with principles of equal protection, which requires that parties are treated equally under the law if those parties are alike in all relevant aspects. U.S. Const. amend. XIV § 1; Cal. Const. art. I, § 7. Courts will review the ordinance based on a rational basis review as long as the ordinance does not distinguish between individuals within suspect classifications or affect fundamental rights or distinguish between individuals based on gender. A classification will be upheld “if there is any reasonably conceivable state of facts that could provide a rational basis for classification.” *F.C.C. v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993).

⁷ The Housing Commission has its own Labor Compliance Unit (Unit). However, the Unit only reports to the DIR or United States Department of Labor if it determines a developer has failed to comply with prevailing wage requirements. The Unit does not enforce compliance with those requirements.

CONCLUSION

State law contains several statutory exemptions from prevailing wage requirements for publicly-financed affordable housing projects. Under applicable law, the City must determine, on a case-by-case basis, whether an affordable housing project qualifies for one of those exemptions by conducting a detailed, fact-specific analysis of the project's funding sources and deal structure.

The Council may adopt an ordinance that imposes prevailing wage requirements on all locally-subsidized affordable housing projects, without regard to whether those projects might qualify for a state statutory exemption. In that event, it is likely that the City or the Housing Commission, or both, would be responsible for ensuring compliance with prevailing wage requirements for any projects that would be statutorily exempt under state law.

MARA W. ELLIOTT, CITY ATTORNEY

By /s/ Katherine Anne Malcolm
Katherine Anne Malcolm
Deputy City Attorney

KAM:jdf

MS-2019-4

Doc. No.: 1902535_5

cc: Kris Michell, Chief Operating Officer
Erik Caldwell, Deputy Chief Operating Officer, Smart and Sustainable Communities
Andrea Tevlin, Independent Budget Analyst