

Azusa Land Partners v. Department of Industrial Relations
Written by Dennis B. Cook, Esq.

Under the California Prevailing Wage Law (CPWL), prevailing wages are to be paid for construction work on “public works” of \$1,000 or more. For decades, the requirement to pay prevailing wages applied to discrete construction work that was paid for in whole or in part out of public funds. However, during the Governor Gray Davis administration, the Department of Industrial Relations (DIR) began to expand this interpretation so that an entire development project could be subject to the CPWL if only a small portion of the overall project was constructed with public funds. This was especially true in situations where a public entity provided public funds for public work of improvement associated with an otherwise private development. The Department adopted a five part test to determine if there was a single integrated project to which the CPWL applied or a series of independent projects where prevailing wages were paid only for “public work.” *Vineyard Creek Hotel and Conference Center, Redevelopment Agency, City of Santa Rosa*, PW Case No. 2000-016 (2000).

In 2001, the Legislature passed and Governor Davis signed Senate Bill 975 which redefined “public works” in Labor Code Section 1720(a), defined the term “public funds” in Section 1720(b), and included various exclusions and exemptions in Section 1720(c). Concerns of developers and contractors were partially addressed in Section 1720(c). Specifically, Section 1720(c)(2) stated that:

If the state or a political subdivision requires a private developer to perform construction, alteration, demolition, installation, or repair work on a public work of improvement as a condition of regulatory approval of an otherwise private development project, and the state or political subdivision contributes no more money, or the equivalent of money, to the overall project than is required to perform this public improvement work, and the state or political subdivision maintains no proprietary interest in the overall project, then only the public improvement work shall thereby become subject to this chapter.

Thus, rather than subjecting the entire project to the CPWL, Section 1720(c)(2) limited the requirement to pay prevailing wages to the public work of improvement on private construction projects so long as the conditions in Section 1720(c)(2) were met.

One of the major issues addressed in the recent case of *Azusa Land Partners v. Department of Industrial Relations* (2011) 191 Cal.App.4th 1 was whether an entire project is subject to the CPWL if only a portion of the overall project is funded with

public funds. The court sent a mixed message. While stating that the *Vineyard Creek* five part test may no longer be a useful analytical tool and endorsing the DIR's broad reading of the term "public works" to include the entire "project," it did not provide a working definition of the term "project." Instead, it focused on the language in Section 1720(c)(2) in stating that all public improvement work required as a condition of regulatory approval is subject to the CPWL while private work within the overall project is not covered under the CPWL.

It was not terribly controversial for the court to hold that prevailing wages must be paid for public improvement work under the conditions stated in Section 1720(c)(2). What is difficult is the notion that "public works" equates with "project." In this instance, the project was a 500 acre development including over 1,200 homes and 50,000 square feet of commercial construction. This work could take years to complete, be undertaken by a variety of general contractors, and performed under separate plans, specifications and contracts for distinct aspects of construction, yet the court incorporated all of this work under the single project umbrella. This is a broader definition than that used by the DIR which previously recognized that a single development in appropriate cases should be divided into separate projects and prevailing wages only required for the "public works" aspect of the project. Thus, for instance, in *Lorena Apartments, City of Los Angeles*, PW Case No.2009-045 (2009), the Director held that environmental mitigation measures and the construction of the subterranean parking garage were public works of improvement, but the remaining portion of the project was not subject to the CPWL.

In addition, the court found that Mello-Roos bonds are a form of public financing that constitutes a payment of public funds under the CPWL because the bond proceeds are controlled by a community facilities district and local city, and paid to a private developer for construction of public improvements. The entire 500 acre project was determined to be a public work in part because the bond proceeds partially funded the construction of public work of improvement. The court distinguished "conduit" bonds such as those issued by the California Statewide Communities Development Authority for affordable housing because, unlike "conduit" bonds, Mello-Roos financing is controlled by governmental entities, the bonds are repaid with tax revenues, and bond proceeds enter public coffers. Mello-Roos financing was also not a loan, according to the court, since the bonds were repaid with special taxes that flow with the land, despite the fact that the bonds were repaid at interest rates commensurate with tax-free bonds.

The issue posed in *Azusa Land Partners v. Department of Industrial Relations* is whether the private construction project, not otherwise subject to the CPWL, may be converted to public works because it is part of a larger development where public

funds were used to pay for a distinct aspect of construction. If the public funds are used to pay for public improvement work as described in Section 1720(c)(2), the payment of prevailing wages would be limited to the construction of the public improvement work. On the other hand, if another part of the overall project is funded with public funds, under *Azusa Land Partners*, it may be difficult to argue that prevailing wages should only be paid for that portion of the project funded with public funds. While the court in *Azusa Land Partners* stated that the five part test in *Vineyard Creek* may no longer be a useful tool, it will be necessary for the DIR to devise a new test to analyze the scope of a “project” on a case-by-case basis. Until that test is announced, developers and contractors will be left to decide on their own, or through the submission of coverage determination requests, whether construction of an otherwise private project is public works because a portion of the larger development received public funds.