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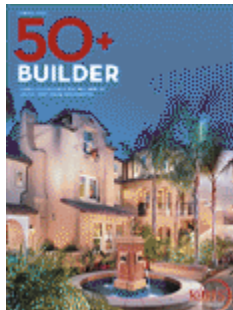
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DEVELOPERS WIN MAJOR BATTLE IN THE WAR OVER PREVAILING WAGES

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When most people think of public works projects, they probably picture highways, dams and military installations. But according to California's labor unions, privately owned, low-income housing projects that receive certain federal tax benefits are classified as public works projects.

Under California law, as under federal law and the laws of other states, workers who are employed on public works projects must be paid government-mandated prevailing wages that are typically higher than market-wage rates. The unions' interpretation of the law has raised concern among developers and public agencies that inflated labor costs will make it more difficult to meet the tremendous demand for affordable housing in the state. It has also sparked a political and legal debate over the limits of prevailing wage laws.

Rancho Santa Fe Village Apartments

At the center of the debate is a 120-unit, privately owned and operated apartment building called Rancho Santa Fe Village Apartments, currently under construction in San Marcos, Calif. Los Angeles-based developers David Rubin and Marc Gelman, of Enhanced Affordable Development Company, or EADC, are financing the purchase and construction of the project using tax-exempt private activity bonds and federal tax credits. Amendments to the California Labor Code that were passed in 2001 expanded the definition of "public works" to cover projects funded by a wide range of public sources. Although neither tax credits nor tax-exempt private activity bonds were listed among a detailed list of public subsidies that transform a project into public works, many observers believed that the amendments covered such types of financing implicitly.

Faced with legal uncertainty, EADC engaged the law firm Pillsbury Winthrop Shaw Pittman LLP to seek a determination from the California Department of Industrial Relations, or DIR, that Rancho Santa Fe was not a public works project and therefore not covered by prevailing wage laws. Pillsbury filed briefs with the DIR that were opposed by the State Building and Construction Trades Council of California AFL-CIO, or SBCTC. On Feb. 25, the DIR issued a precedential determination that prevailing wage laws did not cover the project.

Signs of a new era

The DIR's no-coverage determination regarding Rancho Santa Fe Village Apartments partially reflects a policy shift in California initiated by the election of Gov. Arnold Schwarzenegger. During the Gray Davis era, the reach of prevailing wage requirements expanded. The amendments to the Labor Code that broadened the definition of "public works" in 2001 codified prevailing wage coverage determinations that were issued by the Davis administration. The most far-reaching of these determinations was made in Public Works Case No. 2000-006, regarding the SPCA-LA Animal Shelter in Long Beach. In this Long Beach case, the DIR issued a determination that a privately-owned animal shelter that received a grant from the City of Long Beach to defray "pre-construction" costs — such as fees to architects and lawyers — was public works and therefore subject to prevailing wage laws.

Although the decision was eventually overturned by the California Supreme Court on a legal technicality, the Long Beach determination demonstrated the potential extension of prevailing wage requirements to privately owned and operated projects such as Rancho Santa Fe Village Apartments.

Traditionally, California law has required some sort of public involvement besides mere financing to transform a development into public works, thus triggering prevailing wage laws. It has been necessary that the project be constructed, owned or operated by the government. The San Francisco Bay Bridge is a prototypical public works project. The bridge is owned and operated by the government, and its construction — like its current retrofit, which is expected to cost five times its original \$1.3 billion budget — was paid for by taxpayers.

California courts will probably have the last word on whether Rancho Santa Fe Village Apartments is enough like the Bay Bridge to require payment of prevailing wages. On March 28, the SBCTC appealed the Rancho Santa Fe determination to the Director of Industrial Relations. The director will no doubt sustain the determination, and the SBCTC will then likely appeal the decision to the state superior court. If the courts decide that affordable housing projects like Rancho Santa Fe Village Apartments are subject to prevailing wage requirements, it is almost certain that fewer housing projects will be built in California.

According to a 2003 study conducted by U.C. Berkeley researchers and funded by the U.S. Department of Housing and Urban Development, the imposition of prevailing wage requirements on affordable housing projects would increase construction costs by as much as 32 percent. But unlike the builders of the Bay Bridge, private developers such as EADC cannot simply raise taxes or issue bonds to cover cost overruns.



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