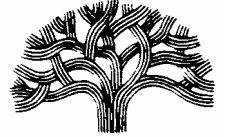


CITY OF OAKLAND



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OAKLAND CITY COUNCIL/REDEVELOPMENT AGENCY
Oakland, California

Re: Wood Street project

Dear President De La Fuente and members of the Council/Agency:

At the April 12 Community and Economic Development Committee, Vice-Mayor Brunner asked this Office for a public opinion on whether the Wood Street development should be considered a single project or multiple projects. That is, would City or Redevelopment Agency financial assistance to one development phase or development area of the Wood Street development, such as the train station renovation, trigger the City's employment and contracting requirements for all phases and development areas?

The City/Agency imposes its employment and contracting requirements -- local construction employment, local and small local business contracting, apprenticeship, prevailing wage, equal benefits, and living wage -- on projects developed by a private developer when there has been a City or Agency "subsidy" to the "project." A "subsidy" could be in the form of direct financial assistance, such as a grant, below-market rate loan, or tax rebate, or in the form of indirect or in-kind financial assistance, such as the sale of City- or Agency-owned real property at less than fair market value or the installation of off-site improvements that would normally be the responsibility of the developer. (Council policy is less clear whether the forgoing of revenue by the City, such as a fee waiver or a tax abatement, to encourage a project would also constitute a project "subsidy" for purposes of the requirements.)

Since none of the Wood Street developers have as yet formally applied for a City or Agency subsidy, it is premature to definitively address how the City or Agency would apply its requirements. The resolution of this question will depend in part on the source of the financial assistance and the method in which the assistance is granted. However, this Office can provide some general observations. First, the employment and contracting programs were adopted as

City/Agency policy and thus the City/Agency has broad discretion in applying these programs. Second, the written guidelines and policies for the programs adopted by Council and the City Administrator provide little or no guidance to this Office on this question. The guidelines simply state that the requirements will be applied to subsidized “projects,” and do not address whether a development with multiple phases, multiple owners, or multiple development areas would be considered a single project or multiple projects.¹ Third, there are no Council precedents that would guide us here. There have been few if any developments similar in scale or structure to Wood Street that have received a City/Agency subsidy since these requirements were adopted. Therefore, since there are no written guidelines or past Council practices that would dictate how the requirements would be applied in this context, Council will have the discretion to determine how its employment and contracting programs should be imposed on Wood Street if and when it authorizes the City or Agency financial assistance. Council would be free to treat each development phase or development area of Wood Street as a separate project, and impose its requirements only on the phase or development area that receives the financial assistance; or Council could treat the entire Wood Street development as one integrated project and impose its requirements on the project as a whole as a condition of receiving the City/Agency financial assistance.

Please note that state law also separately imposes prevailing wage requirements on projects that are “paid for in whole or in part out of public funds,” including most forms of City or Redevelopment Agency financial assistance. (Cal. Labor Code Section 1720.) The Labor Code prevailing wage requirement is a separate requirement from the City and Redevelopment Agency’s own prevailing wage policy, and would be applied independently, whether or not the City/Agency chooses to impose its own prevailing wage requirement.² The California Department of Industrial Relations (“DIR”) is responsible for determining how state prevailing wage requirements are

¹ The program guidelines for the Local and Small Local Business Enterprise Program (“L/SLBE”) and the Apprenticeship Workforce Development Partnership System focus on construction contracts, not projects. The L/SLBE and apprenticeship requirements are imposed on any “Public Works Contract,” defined as including “any construction, alteration, demolition, or repair work done under contract and paid for in whole or in part with public funds, or by a developer who receives any type of government subsidy.” A “developer” is defined as a “person, entity or business that prepares or develops real property for new development or redevelopment and receives a city subsidy.” A “subsidy” is defined as a “grant, loan, credit, tax rebate, or any other way that provides a measure of value to the developer from the City.” This would suggest that, for the L/SLBE/apprenticeship analysis, a key factor would be whether the work on the various phases or development areas of the Wood Street project is done through one construction contract or through separate contracts. By contrast, the guidelines for the Local Employment Program focus on projects as well as contracts. The Local Employment requirement is imposed on any “Public works project,” defined as “any construction, alteration, demolition, or repair work done under contract and paid for in whole or in part out of public funds, or by a developer who receives a City subsidy for the project.” Both programs still leave open the question of how to define the scope of the covered project in the case of developments with multiple components.

The Redevelopment Agency resolution that created the prevailing wage policy (Resolution No. 87-4 C.M.S.) also focuses on “projects,” not “contracts.” The resolution simply states that the prevailing wage requirement should be applied to all of “its projects” but begs the question of what constitutes a “project.” The Living Wage Ordinance and its implementing regulations are equally non-specific.

² The Agency prevailing wage resolution makes reference to the Labor Code for purposes of determining what the prevailing wage rates are for the various trades, but does not on its face incorporate the Labor Code definition of “project.”

imposed. The DIR has developed and applied a test to determine when a “construction undertaking” should be considered a single integrated project or a series of separate projects. The DIR will consider the following factors on a case-by-case basis: (1) the manner in which the construction is organized in view of, for example, bids, construction contracts and workforce; (2) the physical layout of the project; (3) the oversight, direction, and supervision of the work; (4) the financing and administration of the construction funds; and (5) the general interrelationships of the various aspects of construction. (*Vineyard Creek Hotel and Conference Center*, Public Works Case No. 2000-16, Oct. 16, 2000.) In applying these factors to the Wood Street development, some aspects of the development (such as the single land use designation) would favor treating the development as one integrated project, while other aspects (such as multiple developers) would favor treating the development as separate projects. Ultimately this would be a determination made by the DIR, not the City.

In applying the Agency’s own prevailing wage policy to an Agency-subsidized project, the Agency is not bound to apply the DIR test, since the Agency’s policy is created and imposed by Agency resolution, not by the Labor Code. The Council is of course free to use the DIR test as instructive in applying its own policy; but the DIR test is not dispositive.

Finally, because of liability concerns, the City Attorney’s Office strongly urges the City to refrain from any statements on the applicability of the Labor Code prevailing wage law to this or any other private project. Labor Code Section 1726(c) creates a cause of action on the part of a contractor against the “awarding body” (presumably the Redevelopment Agency in this context) to recover the difference between prevailing wages and actual wages paid, if the awarding body either (1) affirmatively represented to the contractor in writing (erroneously) that the project was not a “public work” for purposes of prevailing wages, or (2) received notice from the DIR that the project was a “public work” and failed to disclose this to the contractor. Therefore, the City/Agency should avoid making any affirmative representations to any of the Wood Street developers or contractors as to the applicability of the Labor Code prevailing wage requirement, in order to avoid the possibility of City/Agency liability for payment of prevailing wages under section 1726(c).³

Very truly yours,

JOHN A. RUSSO
City Attorney

³ In any event, as a condition of the funding and development approval, the Agency and City will require the Wood Street developers to indemnify the City/Agency for any liability that arises from the prevailing wage statute. The proposed project conditions of approval currently before the Council/Agency require developer indemnity for any claims related to the project approvals, and this Office has recommended adding a further requirement that any future City/Agency subsidy would be conditioned upon developer indemnification.