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REAL ESTATE & LAND USE

NEWSLETTER OF THE REAL ESTATE AND LAND USE PRACTICE OF MANATT, PHELPS & PHILLIPS, LLP

Low Income Housing Tax Credits Found Not to Trigger Prevailing Wages

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In a decision filed on April 23, 2008, the First Appellate Court of Appeal determined that Low Income Housing Tax Credits (LIHTCs) do not constitute public funds in the context of Labor Code Section 1720 and therefore do not trigger a requirement for the payment of prevailing wages on low income housing projects for which LIHTCs are granted. *State Building and Construction Trades Council of California v. Duncan* (A115491 and A115663, April 23, 2008). The court reasoned that tax credits are at best intangible inducements offered by government, but not actual expenditures by the government. Accordingly, they do not qualify as either the payment of the equivalent of money by the state or the transfer by the state of an asset for less than fair market value.

This decision was hailed by affordable housing providers as a boon to the provision of affordable housing in the state. Prevailing wages can result in significantly higher construction costs, which stretch already limited financial resources for the provision of affordable housing. Representatives of the building trades, however, fail to see the benefits or logic of LIHTC low income housing, which they view as subsidized by the government, if it is built by workers who are paid substandard wages and benefits.

Given the analysis and reasoning of the court, which emphasized that the legislature knows how to spell out its intent, it is likely that this issue will be addressed by the legislature in the near future. This was certainly the case with an earlier ruling by the same court which resulted in the adoption of Senate Bill 975 in 2001. *McIntosh v. Aurby*, 14 Cal. App. 4th 1576 (1993). In that case the court held that the payment of below market ground rent to a public agency

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did not constitute the payment of public funds under the then current language of Labor Code Section 1720. Senate Bill 975 (Cal. Stats. 2001, ch. 938) amended Section 1720 to specifically provide that items such as reduced rent would constitute the payment of public funds. Legislative consideration of this issue will be an interesting to observe given the strong public policy interests on both sides of the issue.

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