Prevailing Wage Compliance Monitoring: Practical Advice for City Officials

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INTRODUCTION

Over the past decade, cities have had to evolve in response to two significant paradigm shifts – the expansion of the prevailing wage law and the elimination of redevelopment. The reach of the prevailing wage law has become more and more broad, particularly for charter cities. Under long-established precedent, charter cities did not have to pay prevailing wages for projects constituting municipal affairs. Though this precedent was upheld in the *City of Vista* case, the Legislature adopted SB 7, making charter cities ineligible for state funding unless they comply with state prevailing wage laws. SB 7 effectively imposed prevailing wage requirements on charter cities for the first time, at least in relation to projects constituting municipal affairs.

SB 7 is not an outlier; it is just one example of the State's relatively recent policy of expanding the reach of prevailing wage rules. Though prevailing wage laws have existed in California for nearly a century, the Legislature has continued to significantly broaden and redefine the types projects that require the payment of prevailing wages. Though originally oriented toward traditional public works, a more diverse array of project are now within the ambit of prevailing wage requirements, including solar projects, tenant improvement projects, and even the installation of freestanding modular office furniture. Along with changes in the laws, a series of cases has nearly eliminated cities' ability to partner with or subsidize private projects without subjecting the private developer to prevailing wage requirements. The courts have moved firmly to a "project-based" approach that looks to any sort of public subsidy when determining whether a project is subject to prevailing wages.

This broadening of the scope of the prevailing wage law has coincided with the State's elimination of redevelopment in 2011. As redevelopment agencies became successor agencies, a significant tool for economic and housing development disappeared. To fill this void, many cities may be looking into new ways of partnering with private interests to support new economic development and housing. Thus, as cities become more active in supporting private development, a greater need arises to understand and address potential prevailing wage issues that may arise for private developers. This paper therefore provides an overview of state prevailing wage law, codified at Labor Code section 1720 *et seq.*, with a particular emphasis on its application to various types of private projects.

ANALYSIS

State prevailing wage law applies to all projects that fall within the scope of the term "public work," as it is defined in the Labor Code. In most circumstances, the projects in question are public projects being contracted for directly by an agency. However, prevailing wage requirements will also apply in some situations to work performed by a private party. This paper addresses the application of prevailing wage requirements on the following private project scenarios:

- Private developer constructs public improvements on private property which are then dedicated to the agency for public use. The agency contributes no public funds[1] for the public improvement work.

- Private developer constructs public improvements on private property which are then dedicated to the agency for public use. The agency contributes public funds for the public improvement work.

- Private developer constructs public improvements on private property which are then dedicated to the agency for public use. Private developer is required to construct the public improvements to be of sufficient capacity to accommodate subsequent developments in the immediate area. The agency does not contribute public funds for the public improvement work but does obligate other developers that are developing properties benefited by the public improvement work to cover their proportionate share of the cost of the public improvement work.

Additionally, this Paper discusses the common exceptions to the prevailing wage law that may apply on private projects, and the unique issues that may arise in relation to affordable housing development.

I. "PUBLIC WORKS" THAT ARE SUBJECT TO THE PREVAILING WAGE LAW

As a preliminary matter, the determination of whether prevailing wage will apply to a private development project requires the same analysis as the determination of whether prevailing wage will apply to a publicly-owned project. The analysis starts with addressing whether the project fits within one of the definitions of "public works" under Labor Code section 1720(a). The prevailing wage law also establishes a number exceptions, which may either prevent or limit application of the prevailing wage for certain private projects. Thus, even if a private project meets the definition of a "public work," it may still be exempt from prevailing wage requirements.

A. Work "Paid For In Whole Or In Part Out Of Public Funds"

The most oft-used definition is set forth in Labor Code section 1720(a)(1), which defines "public works" to mean "[c]onstruction, alteration, demolition, installation, or repair work done under contract and paid for in whole or in part out of public funds[2]...." There are two key components to this definition – the nature of the work and the source of the funding.

Labor Code section 1720(b) contains examples of payments that are made in whole or in part out of public funds; the list is broad and includes virtually any type of public subsidy. Not

[1] "Public funds" can be made up of local, state and federal monies. (8 Cal. Code Regs., § 16000.)
[2] Labor Code section 1771 also includes "maintenance" within the definition of "public works." (See 8 Cal. Code Regs., § 16000 for the definition of maintenance.)

only does the direct payment of money constitute a payment of public funds, but also the performance of work, transfer of an asset for less than fair market value, reduced or waived fees or other payments, contingent loans, and credits against repayment obligations.

B. Improvement Work Done Under Public Direction or Supervision

The definition in section 1720(a)(1) is the only definition that uses public funding as a trigger. The prevailing wage law contains several other definitions where prevailing wage will apply even in the absence of public funding. Most notably, Labor Code section 1720(a)(3) defines "public work" to also mean "[s]treet, sewer, or other improvement work done under the direction and supervision or by the authority of any officer or public body of the state, or of any political subdivision or district thereof…." Under this scenario, a city's direction or supervision, rather than financial support, is determinative.

C. Tenant Improvement Work for Publicly-Leased Property

Under Labor Code section 1720.2, tenant improvement work that is done under a private contract is subject to prevailing wage if a city is going to lease 50% or more of the assignable square footage of the property. The rule attaches if the lease is entered into prior to the construction contract or if the construction contract is performed according to plans furnished by the city.

D. Renewable Energy and Energy Efficiency Work

Under section 1720.6, renewable energy or energy efficiency work is subject to prevailing wage if the work is done on public property and either 50% of the energy is purchased by a public agency or the energy efficiency improvements reduce public energy costs.

II. PRIVATE DEVELOPMENT - NO PUBLIC FUNDING SCENARIO

In this scenario, the private developer is required to perform certain public improvement work as a condition of approval imposed by the city on the development project but will receive no payment or reimbursement for the public improvement work. This scenario does not implicate the definition of public works under Labor Code section 1720(a)(1) because there is no public funding on the project. However, Labor Code section 1720(a)(3) may still apply. As noted above, section 1720(a)(3) applies if the improvement work is done under the direction and supervision or by the authority of the city.

In some instances, the Department of Industrial Relations ("DIR") has applied the 1720(a)(3) definition to work done by a private developer as a condition of approval of a private development project. In *City of Clovis Sewer Improvements Project*, Public Works Case No. 2001-041, the city required a private developer to construct certain off-site sewer improvements as a condition of the city's approval of the construction of a residential subdivision. The city and the private developer entered into a reimbursement agreement that required the private developer

to construct and install the sewer improvements according to city-approved plans and obligated the city to reimburse the private developer for the costs of construction. In finding that the project qualified as a public work under Labor Code section 1720(a)(3), DIR noted that the reimbursement agreement between the developer and the city provided that the sewer improvement plans must be approved by the city, required agency approval of all contracts for the sewer improvement work prior to commencing construction, required the sewer improvement work to be completed within 90 days subject to a liquidated damages clause in the event of delay by the private developer and transferred ownership of the sewer improvements to the city after completion. Under these circumstances, DIR determined that the sewer improvement work was done under the direction of the city and was therefore a public work under Labor Code section 1720(a)(3).

Applying DIR's reasoning here, the public improvement work performed by the private developer for the agency as a condition of approval *may* require compliance with prevailing wage law notwithstanding the lack of public funding if the improvement work is "done under the direction or supervision" of the agency pursuant to Labor Code section 1720(a)(3). There is no bright line rule as to what qualifies as "work done under the direction or supervision" of the city, which will need to be resolved on a case-by-case basis. Based on an analysis of the above DIR determination, as well as several others, it is clear that the more involvement the agency has as to the performance of the public improvement work, the more likely the work will be deemed to have been done under the direction or supervision of the agency, thereby qualifying it as a public work under Labor Code section 1720(a)(3). (See *Field Technician Observation and Testing*, Public Works Case No. 2001-068.) Notably, both DIR determinations addressing this issue involve reimbursement agreements for offsite improvements – that is, situations in which the developer was essentially contracting for work on behalf of the city even though the work was performed as a condition of approval of a private project.

Unfortunately, there is no coverage determination or case that provides an example of public improvement work that is *not* performed under public direction or supervision. The limits of section 1720(a)(3) remain unclear. Despite the lack of clarity, section 1720(a)(3) should not automatically subject all street or other public improvement work that work will be dedicated to a city to prevailing wages. Such an interpretation would render "direction and supervision" meaningless and would be inconsistent with the overall statutory scheme. (See, e.g., section 1720(c)(2), stating that improvement work required as a condition of approval "shall thereby become" if there is public funding; see also *Azusa Land Partners v. Department of Industrial Relations* (2011) 191 Cal.App.4th 1, 30-31 and fn. 11, implying that public funding triggers the requirement on work constructed as a condition of approval.) However, given that there is no bright line rule, cities should consider including indemnification provisions and other protections in contracts such as subdivision improvement agreements where improvements are constructed to city standards and specifications.

III. PRIVATE DEVELOPMENT - PUBLIC FUNDING SCENARIO

In this scenario, the project will likely qualify as a public work under Labor Code section 1720(a)(1) because it will involve "construction, alteration, demolition, installation or repair work" that will be "done under contract" between the developer and its contractor and will be "paid for in whole or in part out of public funds" through the reimbursement by the agency. The project also could qualify as a public work under Labor Code section 1720(a)(3) if the project is done under the direction and supervision of the agency.

Once a project is deemed to be a "public work" as defined under Labor Code section 1720(a), the entire project becomes subject to prevailing wage requirements. (*Azusa Land Partners v. Department of Industrial Relations* (2011) 191 Cal.App.4th 1, 29.) In *Azusa Land Partners*, the California Court of Appeal held that proceeds received from community facilities district bonds do constitute "public funds" and use of such funds for a development project constitutes a "payment of public funds" that triggers state prevailing wage requirements. The developer argued only those specific improvements that were paid for using bond funds should be subject to prevailing wage requirements. The court concluded that "once the determination is made that the project is a 'public work' under section 1720, subdivision (a)(1), the entire project is subject to [prevailing wage law]." (*Id*. at 36.) The court's holding highlights an important rule of prevailing wage law – subject to an exception, the entire project is subject to prevailing wage law even if only a portion is paid for with public funds.

It is also important to note that creative contracting is not a failsafe way to avoid prevailing wage requirements. The California Court of Appeal's decisions in *Cinema West, LLC v. Baker* (2017) 13 Cal.App.5th 194, 210-14, *Oxbow Carbon & Mineral, LLC v. Department of Industrial Relations* (2011) 194 Cal.App.4th 538, 547 and *Hensel Phelps Const. Co. v. San Diego Unified Port Dist.* (2011) 197 Cal.App.4th 1020, suggest that the court will look to the underlying facts rather than to the explicit terms in the contract to determine if prevailing wage law applies. Courts recognize the strong incentives of an awarding body and the other party to the contract to avoid prevailing wage law and to structure their contracts to circumvent it. (*See Cinema West,* 13 Cal.App.5th at 210-14; *see also Oxbow Carbon,* 194 Cal.App.4th at 547.) Accordingly, courts look to the "totality of the underlying facts" rather than the contract itself to determine whether prevailing wage law applies. (*Id*.)

In *Hensel Phelps*, the San Diego Port District granted the Hilton Hotel a reduction in rent to build a hotel on the publicly owned property. The Hilton argued that the construction was not "done under contract" because the Port District did not enter into a construction contract with the Hilton to build the project. The Port District only entered into a lease for raw land with the Hilton. According to the Hilton, there was no construction under contract because it was not possible to "connect the dots" to establish that money went from the Port District to the Hilton. The Court of Appeal rejected this argument and determined that since the lease called for the Hilton to construct a building on the property according to the Port District's specifications, the project was properly classified as construction done under contract. Moreover, the court also

looked to the factual history behind the transaction, which showed that the purpose of the Port District entering into the lease with the Hilton was to obtain construction of the hotel. The factual history also showed that the rent credit the Port District provided under the lease was intended to subsidize the construction of the project; the costs of constructing the project had increased from initial estimates and the Hilton asked the Port District to subsidize some of those increased costs so that the project could go forward. The court concluded these facts establish that the rent credit was given for the purpose of subsidizing the construction thereby triggering prevailing wage on the project.

In *Oxbow Carbon*, the City of Long Beach leased its port facility to Oxbow, which used the facility for storage. After a change to the Air Quality Management District Act required enclosed storage, Oxbow needed to reconstruct its facilities with new conveyors and a new roof. The city amended its lease with Oxbow and agreed to reimburse Oxbow for construction of new conveyors. Even though the lease amendment did not include reimbursement for, or even mention, construction of the roof, the court held that *both* the construction of the conveyors and the roof were subject to the prevailing wage law. To reach this conclusion, the court looked to the "totality of the underlying facts," which showed that: (1) the Air Quality Management District Act's rule changed; (2) the facility became unusable; (3) Oxbow negotiated and made plans with the city "to make the site usable again"; and (4) a memorandum from the city's director stated, "in order to accomplish the City's and Oxbow's goal of maximizing the use of the facility in compliance with the new rule, both the conveyors and roof will have to be constructed." Thus, the the construction of the conveyors and the roof were components of a single integrated project.

Despite the all-or-nothing nature of the prevailing wage law, a project does not become retroactively subject to prevailing wages. In *Quisenberry Letter*, Public Works Case No. 2009-039, a developer constructed and sold a property to a redevelopment agency through a disposition and development agreement. As part of the transaction, the developer and redevelopment agency entered into a separate tenant improvement agreement. DIR determined that the tenant improvement work, which was pursuant to a separate contract with a public agency, was paid for out of public funds. However, at the time the construction contract was entered, there was no public funding, and so only the tenant improvement work – not the initial construction work – was subject to prevailing wages.

IV. THIRD-PARTY PRIVATE FUNDING SCENARIO

In this scenario, the agency requires a private developer to perform certain public improvement work as a condition of approval and agrees to require other third parties that will benefit from the public improvement work to reimburse the private developer. That is, this situation might not involve any public funding (or city direction or supervision) if the third-party funding is solely from private sources. For example, if neighboring developers agree to share the cost of public improvements serving their developments, there is no public money in the project.

However, the analysis becomes more complicated if the city serves some role in administering the private funds.

When determining whether a project involves public funding, DIR looks to whether the funds were ever held in the public coffers. (See *Azusa Land Partners, supra*, 191 Cal.App.4th at 24, citing *Tustin Fire Station*, Public Works Case No. 93-054.) In most instances where multiple developers are contributing funds to complete a public improvement, the funds generally pass through the city's coffers. Rather than a private reimbursement agreement amongst the developers, one of the developers may complete the project in exchange for impact fee credits or reimbursement from the city. Even if the impact fee credits or reimbursement funds are ultimately paid by other developers, and are not from the city's general fund, the credits are still considered a form of public funding. (See Labor Code § 1720(b)(4) & (6); *The Commons at Elk Grove*, Public Works Case No. 2008-037.)

The "public coffer" analysis also arises in the form of public bond financing. Mello-Roos bonds, for example, are considered a form of public funding even though the debt service is paid entirely from a tax on private property owners. The bond proceeds are held by the city, which is able to authorize expenditures and control disbursement of the funds. (See *Azusa Land Partners, supra*, 191 Cal.App.4th at 24.) Other types of public bond financing might not trigger prevailing wage requirements if the public bonds never actually pass through public coffers. (See *Southwest Community Health Center*, Public Works Case No. 2010-008; *Rancho Santa Fe Village*, Public Works Case No. 2004-016.)

Finally, though not involving a private development, it is worth noting that the "public coffer" analysis also applies in the context of work paid for out of insurance proceeds. If a contractor's (or other private party's) insurance company directly performs repair work, then DIR has determined that prevailing wage does not apply. (See *Insurance Company Replacement of Esperanza High School Burned Out Wing*, Public Works Case No. 26-PW-20473; *Rebuilding of the Agricultural Commissioner Office Building*, Public Works Case No. 2007-011.) However, in Public Works Case No. 2007-011, *Rebuilding of the Agricultural Commissioner Office Building*, a county's insurance policy paid insurance proceeds to the county for replacement of the damaged facilities and the county controlled disbursement of those proceeds to the contractor performing the work. DIR determined that prevailing wage requirements applied because public funding came from two sources: (i) the insurance premiums the county paid for the policy and (ii) the insurance proceeds paid to the county that entered the public coffers before it was paid out to the contractor.

V. EXCEPTIONS TO PREVAILING WAGE REQUIREMENTS FOR PRIVATE DEVELOPMENT PROJECTS

There are four main private development specific exceptions under prevailing wage law that either eliminate or mitigate the application of prevailing wage requirements.

A. Private Residential Projects

Under Labor Code section 1720(c)(1), a private residential project built on private property is not subject to prevailing wage requirements unless the project is built pursuant to an agreement with a state agency, redevelopment agency, successor agency or local public housing authority. Though it appears obvious, DIR has concluded that a private residential project funded by a *city* meets this exception. (See *Mayfield Place Housing Project*, Public Works Case No. 2016-033.) In *Mayfield*, DIR determined that the project at issue did not receive any public funding, but even if it did, it would not be subject to prevailing wage because the only potential public funding was through a development agreement with a city and not a state agency, redevelopment agency or local public housing authority. The *Mayfield* represented a shift from DIR's position in *South Gate Senior Villas*, Public Works Case No. 2013-024, which attempted to limit the (c)(1) exception to private projects receiving no public funding. This determination was ultimately reversed by the court. (See *South Gate Senior Villas, L.P. v. Christine Baker, et al*, Case No. BS152917.)

B. Public Funding Limited to Public Improvement Work

The second exception is found at Labor Code section 1720(c)(2). Under this exception, if the agency requires a private developer to perform public improvement work as a condition of regulatory approval on an otherwise private development project, and the agency contributes no more money to the overall project than is required to perform this additional public improvement work and maintains no proprietary interest in the overall project, then only the public improvement work is subject to prevailing wage requirements. This exception does not result in the complete exemption of the project from prevailing wage requirements but instead limits the application of prevailing wage requirements to only the public improvement work. (See *Azusa Land Partners, supra*, 191 Cal.App.4th at 35-37.) This exception would apply in each of the scenarios discussed above by limiting the application of prevailing wage requirements to the public improvement work required by the agency.

C. Costs of Work that are Normally Borne By the Public

The third exception is found at Labor Code section 1720(c)(3) and provides that reimbursements to a private developer for costs that would normally be borne by the public will not subject an otherwise private development project to the prevailing wage law. There is a dearth of guidance or authority on the application of this exception. In general, the concept of the exception appears to be that a cost that is normally borne by a public agency is not a subsidy and therefore does not subject the rest of the project to prevailing wages.

This exception is distinct from the exception for work done as a condition of approval. To illustrate: if a condition of approval requires a developer to install a new sewer main, and the city pays for part of the sewer main, it is not a cost normally borne by a public agency. The developer normally pays for required public improvements, and hence there is a public subsidy. In this case, the exception at 1720(c)(2) applies. On the other hand, if the developer is *not* required to install a new sewer main, but the city requests that the developer install a new sewer main prior to paving above it, then section 1720(c)(3) would apply. The sewer main work is, of course, subject to prevailing wages, but the developer would not have to pay prevailing wages on the rest of the project simply because it agreed to perform the sewer main work for the city.

The key difference between the (c)(2) and (c)(3) exceptions is whether the cost of the work should be borne by the developer or the city. If normally borne by the developer, (c)(2) applies and all of the public improvement work is subject to prevailing wages, but the other components of the private development project are not. If normally borne by the city, (c)(3) applies and only the work that is subject to reimbursement from the city is subject to prevailing wages.

D. *De Minimis* Public Subsidy

The final exception is also contained at Labor Code section 1720(c)(3). This exception is generally referred to as the *de minimis* exception and it will only apply where the agency reimburses or provides a subsidy to the private developer. In this scenario, the public funds paid by the agency will not trigger prevailing wage if they are considered *de minimis* in the context of the cost of the entire project. The prevailing wage statutes do not provide guidance regarding what ratio of public funding to total project cost is considered *de minimis*, but DIR has provided guidance in a number of public works coverage determinations. The highest percentage of total project cost found by DIR to be *de minimis* under Labor Code section 1720(c)(3) is 1.75%. (See *Blue Diamond Agricultural Processing Facility*, Public Works Case No. 2011-033; see also *The Commons at Elk Grove*, Public Works Case No. 2008-037 [DIR considered a public subsidy of 1.1% of the total project cost to be *de minimis*]; *New Mitsubishi Auto Dealership*, Public Works Case No. 2004-024 [DIR considered 1.64 percent to be *de minimis*].)

Assembly Bill 251 (Levine) from the 2015 session attempted to codify a definition of de minimis as the lessor of 2% or $250,000. The Legislature passed the bill, but the Governor vetoed it. The Governor's veto message states that the,

> "Longstanding practice has been to view the subsidy in context of the project and use 2% as a general threshold for determinations. There has been no showing that the current practice is unreasonable. While I remain a staunch supporter of prevailing wages I am concerned that this measure is too restrictive and may have unintended consequences."

Though a veto message does not establish law, the Governor's statement at least provides support for a *de minimis* finding in the general vicinity of 2% of the total project cost. This message along with the DIR determination history implies that is a reimbursement or subsidy provided by a city to a private developer does not exceed 1.75% of the total cost of the private development project, the *de minimis* exception will likely apply to exclude the project, including the public improvement work[3], from state prevailing wage requirements.

VI. SPECIAL RULES RELATED TO AFFORDABLE HOUSING

A. Exceptions for Affordable Housing in the Labor Code

In addition to the exception contained at section 1720(c)(1), the prevailing wage law contains several limited exceptions related to affordable housing projects. Sweat equity projects – where the home buyers perform 500 hours of construction work associated with the homes – are exempt from the prevailing wage law, as are certain projects involving not-for-profit emergency or transitional housing for homeless persons. (See Labor Code § 1720(c)(5)(A) - (B) & (D).) Homebuyer assistance programs are also exempt if the public funding is in the form of mortgage, downpayment, or rehabilitation assistance for a single-family home. (See Labor Code § 1720(c)(5)(C).) Finally, the prevailing wage law contains a general exemption for below-market interest rate loans for projects in which at least 40% of the units are restricted to individuals and families earning no more than 80% of the area median income for a period of at least 20 years.

B. Common Law Exception for Tax Credits

The prevailing wage law expressly exempts projects funded with tax credits prior to 2003, but it does not address whether new projects funded with state or federal low-income housing tax credits are publicly fund. (See Labor Code § 1720(d)(3).) In *State Building and Construction Trades Council v. Duncan* (2008) 162 Cal.App.4th 289, the court determined that the provision of state low income-housing tax credits to a developer does not constitute the payment of public funds. DIR has applied this ruling to projects funded through the federal low-income housing tax credit program. Thus, LIHTC projects generally will not be otherwise subject to prevailing wages; meaning that if cities contribute funding or other subsidies to LIHTC projects, they should consider whether the nature of the contribution meets the exceptions for private residential properties and/or affordable housing. (See, e.g., Labor Code §§ 1720(c)(1) and (c)(5).)

[3] In *Sewer Line Construction*, Public Works Case No. 2008-010, DIR concluded that both the public improvement work required as a condition of regulatory approval and private improvement work was not subject to prevailing wage as a result of the *de minimis* exception.

C. Prevailing Wage Requirements in the 2017 Housing Package

In the 2017 legislative session, the Legislature approved a package of 15 bills, often referred to as the Governor's housing package, which were designed to address the State's housing crisis and encourage construction of more affordable housing units. Despite the various prevailing wage exceptions for affordable housing projects, this recent legislation actually imposes *new* prevailing wage requirements on private projects that receive no direct public subsidy and would otherwise be outside the scope of the prevailing wage law.

The most notable bill from last year's housing package is Senate Bill 35, which created a streamlined process for affordable housing projects. In order to encourage such development and prevent NIMBYism, SB 35 prohibits cities who have failed to produce enough housing under their Regional Housing Needs Assessments from requiring conditional use permits or other discretionary review of such projects. (See Gov. Code § 65913.4.) The removal of discretionary review also makes applicable projects exempt from environmental review. However, developers may only utilize this streamlined ministerial process if they certify to the city that they will require payment of prevailing wages on the entire project. (Gov. Code § 65913.4(a)(8).) Developers are therefore going to balance whether the benefit of a streamlined process outweighs the costs of paying higher wage rates.

Senate Bill 540 enables cities to form "workforce housing opportunity zones," which are areas specifically planned for affordable housing. (See Gov. Code §§ 65620 et seq..) Cities may apply for grants from the Department of Housing and Community development to offset the costs of preparing the specific plan and environmental review to form the zone. Affordable housing developers who certify that they will pay prevailing wages on the entire projects within the zone are exempt from further environmental review. (Gov. Code § 65623(c)(9).)

Assembly Bill 73 goes even further than SB 35 and SB 540. The bill enables cities to form "housing sustainability districts," which essentially are overlay zones where affordable housing development is permitted as a matter of right. (See Gov. Code §§ 66200, et seq.) Cities who form housing sustainability districts are eligible for funding from the Department of Housing and Community Development to offset the planning and environmental costs of district formation. In order to form a district, however, cities must adopt an ordinance requiring all developers to pay prevailing wages on all projects in the district. (See Gov. Code § 66201(f)(4)(A).) Cities have to determine whether the benefit of HCD incentive funding outweighs the costs of imposing a new hyper-local prevailing wage requirement on developers within housing sustainability districts.

Therefore, while there are several tools enabling cities to support affordable housing without subjecting developers to prevailing wage requirements, the new tools created through the housing package do the opposite; they extend prevailing wage requirements to otherwise exempt projects. In considering policies to encourage the construction of more affordable housing, cities will need to factor in the potential labor costs of various approaches.

CONCLUSION

As the prevailing wage law continues to evolve, cities must remain diligent and mindful of new requirements and changes in the law. In addition to common understanding of prevailing wage applications – the classic public works scenario – cities need to be prepared to work with developers and other private stakeholders who may need to consider prevailing wage implications on their otherwise private projects.