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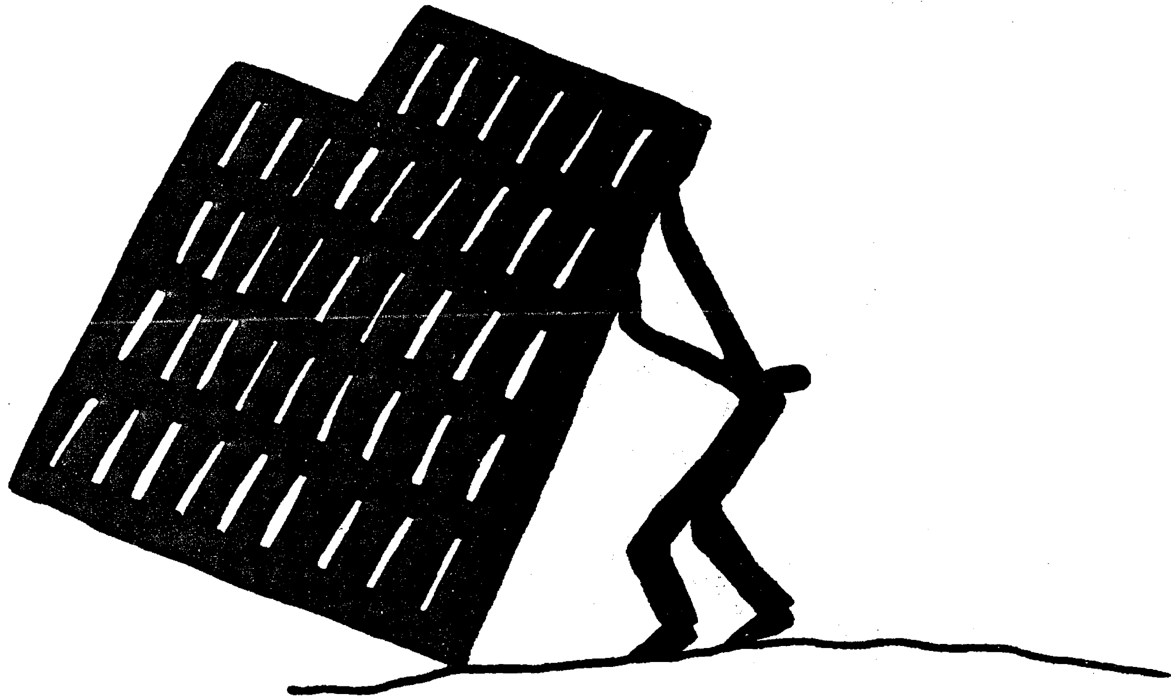
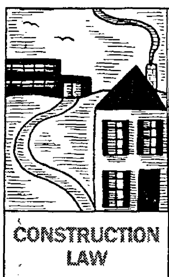


High Court Tackles Scope of State's Prevailing Wage Law

By Robert C. Pearman Jr.

In *City of Long Beach v. Department of Industrial Relations*, 34 Cal.4th 942 (2004), the California Supreme Court addressed the application of the state's prevailing wage law (see Labor Code Sections 1770, et seq.) to private construction of a $10 million animal control facility in Long Beach.

The city had sought to overturn the State Department of Industrial Relations' determination that the project was subject to the prevailing wage law. The Court of Appeal sided with the industrial relations department — but the Supreme Court ruled the project was not a "public work" within the meaning of Section 1771 and former Section 1720.



The environment of the prevailing

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■ A Department of Industrial Relations regulation (approvingly cited in an attorney general's opinion) that defined "construction" as including "field survey work traditionally covered by collective bargaining agreements," when such surveying is "integral to the specific public works project in the design, preconstruction, or construction phase." (California Code of Regulations, Title 8, Section 16001(c).)

■ The principle that the department's interpretation is to be given great weight (e.g., *People ex rel. Lungren v. Superior Court*, 14 Cal.4th 294 (1996)).

■ An Assembly committee report indicating that "the bill [amending Section 1720] codifies current Department practice."

The Supreme Court saw things a bit differently.

It first noted that the law permits public agencies to form alliances with the private sector, to enter into leases of public lands and to give financial incentives to encourage private, nonprofit construction projects that provide public services at low cost. See Government Code Section

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the costs of surveying, architectural design and supervision and project management paid for by the city.

Furthermore, some of the city-funded costs were not paid at the outset of the project: "The SPCA-LA's contract with (the) project manager ... said the latter's duties included Construction Management of all phases of construction of the Project."

A city letter also mentioned that smaller portions of the legal and insurance costs had yet to be paid. Thus, she argued the city did not pay merely for "preconstruction" costs but also for expenses incurred while the facility was being constructed.

So what can we glean from this decision? For one, although the contract at issue was executed under the pre-2000 amendments, the discussion by the Supreme Court definitely sheds light on its interpretation of the prevailing wage law, and the 2000 amendments in particular.

The court carves out an interesting niche in the "construction" definition,

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The environment of the prevailing wage law has been altered significantly in recent years by legislative enactments (in SBs 1999, 975, 972 and 966) and by shifting political climate in Sacramento. This case, then, presented the Supreme Court an initial opportunity to give input on some of the new developments.

In 1998, the city agreed to contribute $1.5 million to assist SPCA-LA in the development and preconstruction phases of a facility that would serve as an animal shelter and as SPCA-LA's administrative headquarters — and that would provide kennels and office space for the city's animal control department.

The city's funds were to be used only for expenses related to project development, including "investigation and analysis" of the site, "permit, application, filing and other fees and charges," and "design and related preconstruction costs." Use of the funds "to pay overhead, supervision, administrative or other such costs" was specifically precluded.

The city owned the land on which the facility was to be built but leased it to SPCA-LA for $120 per year. The city in turn agreed to pay SPCA-LA $60 a year as rent for its animal control department space.

A portion of the city's $1.5 million was spent on preconstruction expenses including architecture and design, project management, legal fees, surveying and insurance. An additional $152,000 in such expenses would be required for project completion.

Assuming some limited city funds were spent during construction, the record (according to the court's majority) failed to demonstrate they were used for construction.

In identifying principles to help guide its decision, the court favorably noted *Lusardi Construction Co. v. Aubry*, 1 Cal.4th 976 (1992), and *McIntosh v. Aubry*, 14 Cal.App.4th 1576 (1993). The overall purpose of the prevailing wage law is to protect and benefit employees on public works projects. *Lusardi*.

As of 1998, "public works" was defined as "[c]onstruction, alteration, demolition or repair work done under contract and paid for in whole or in part out of public funds." Section 1720(a). The term "construction" was undefined.

After the city's grant money was used for preconstruction expenses, a 2000 amendment to Section 1720(a)(1) was adopted to include within the term "construction" such activities as "the design and preconstruction phases of construction," including "inspection and land surveying work" — items the city partly funded in this case.

The Court of Appeal (and the lone Supreme Court dissenter) observed a number of authorities and interpretive aids that supported the department's position, including:

- The common dictionary meaning of the word "construction."

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cost. See Government Code Section 26227; *McIntosh*.

The court gave less deference to the Department of Industrial Relations: "When an administrative agency construes a statute in adopting a regulation or formulating a policy, the court will respect the agency interpretation as one of several interpretive tools that may be helpful. In the end, however, '[the court] must … independently judge the text of the statute.'"

It found other, inconclusive dictionary definitions of the term "construction."

As to the cited attorney general's opinion, the question of whether that regulation comported with the prevailing wage law was not before the attorney general. But "in any event … the Attorney General's opinions are entitled to 'considerable weight,' but are not binding on us."

The city viewed the 2000 amendment as a change in existing law, relying in part on a letter from the amendment's author, state Sen. John Burton, reciting that the amendment was "intended only to operate prospectively." The court agreed, stating that, under the circumstances, the letter carried weight as indicative of probable legislative intent.

"Moreover," the court wrote, "Senator Burton's remarks conformed to the well-established rule that legislation is deemed to operate prospectively only, unless a clear contrary intent appears." The court referenced an Assembly committee report, and the legislative counsel's digest to the bill, as indicating that the 2000 amendment was more than a simple restatement of existing law.

Also, it appears neither litigant furnished any legislative history bearing on the intent of the Legislature in 1937, when it used the word "construction" in former Section 1720(a).

Finally, the fact that federal law generally confines its prevailing wage law to situations involving actual construction activity was entitled to some weight in construing the pre-2000 version of the statute.

Thus the Supreme Court held that, under the law in effect when the contract was executed, a project that private developers build solely with private funds on land leased from a public agency remains private. "It does not become a public work subject to the [prevailing wage law] merely because the City had earlier contributed funds to the owner/lessee to assist in defraying such 'preconstruction' costs or expenses as legal fees, insurance premiums, architectural design costs, and project management and surveying fees," the court wrote.

In dissent, Justice Joyce Kennard noted that the word "construction" in former Section 1720(a) refers to work that is "integrally connected to the actual building and without which the structure could not be built." That includes

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niche in the "construction" definition, which practitioners on both sides of the fence might creatively utilize. The niche is in the use of public funds for certain costs that, while somewhat related to construction and expended during construction, are somehow "other than construction costs," and therefore their funding would not trigger prevailing wages. While not necessarily a new category of costs, the emphasis on this distinction may be of practical import in future cases.

In supporting its decision, the court approvingly cited two earlier cases on the prevailing wage law, *Lusardi* and *McIntosh*. In each case there were a number of factors supporting a finding of a public work and prevailing wage law applicability — but, nevertheless, each held the prevailing wage law did not apply. Later Department of Industrial Relations decisions chipped away at the "pro-contractor" stance of those cases. So the court's approval suggests the philosophy of those cases continues to be useful interpretive guides.

SB 975 amended Section 1720 and included some clarifying exclusions for housing developments. At Section 1720(c)(3) it provided: "(I)f a public subsidy to a private development project that is de minimis in the context of the project, an otherwise private development project shall not thereby become subject to the requirements of this chapter." In the *Long Beach* case, while not speaking directly to this section of the prevailing wage law, the court did describe $14,500 surveying work (treated as "public funds") out of total project cost of $10 million as "minimal." Though there are no cases directly interpreting this language in Section 1720(c)(3), practitioners in the field have believed that something on the order of 1 percent or 2 percent, at most, to be de minimis.

Lastly, the court deliberately left open for consideration important questions. One is whether, assuming the project indeed was a "public work" under Section 1771, it should be deemed a "municipal affair" of a charter city and therefore exempt from prevailing wage requirements. (The Department of Industrial Relations has accepted that view in certain circumstances; see Precedential Public Works Coverage Determination, Case No. 2003-029, Jan. 28, 2005.)

The second question is whether the prevailing wage law is a matter of such "statewide concern" that it would override a charter city's interests in conducting its municipal affairs. Charter cities may resurrect such arguments in the future.

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