

FORT ORD REUSE AUTHORITY BOARD REPORT		
BUSINESS ITEMS		
Subject:	2 nd Vote: FORA Prevailing Wage Program	
Meeting Date:	March 11, 2016	ACTION
Agenda Number:	8a	

RECOMMENDATION:

Second vote: Adopt the Prevailing Wage Compliance Program Option A (**Attachment A**).

BACKGROUND/DISCUSSION:

This item failed to receive a unanimous vote at the February 12, 2016 Board Meeting.

Please see the attached February 12 Board Report regarding this item (**Attachment B**).

Please also see the attached opinion of Authority Counsel regarding the question posed by the Dunes on Monterey Bay developer (**Attachment C**).

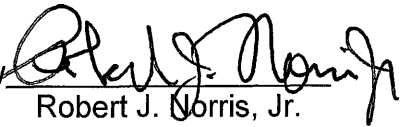
FISCAL IMPACT:

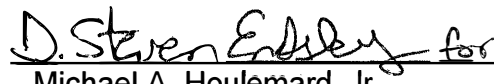
Reviewed by FORA Controller 

The annual budget includes about \$380,000 in property tax revenue that could be used to fund up to \$200,000 for the Prevailing Wage monitoring effort.

COORDINATION:

Authority Counsel, Executive Committee

Prepared by 
Robert J. Norris, Jr.

Approved by  for
Michael A. Houlemard, Jr.

Fort Ord Prevailing Wage Policy Options

Attachment A to Item 8a
FORA Board Meeting, 3/11/16

Description	Option A	Option B	Option C
Summary	FORA compliance with mix of 1 FORA staff and consultant monitors as needed	FORA compliance through staff monitors	Status Quo compliance provided by individual jurisdictions
FORA Master Resolution Amendment	Yes	Yes	Yes
Estimated Cost	80 hours week compliance software \$200,000 per FY.	Assuming 2 FTE compliance software: \$350,000 /per year.	Varies by jurisdiction
Estimated Schedule	Selection period Estimated 2 months.	Selection period Estimated 4 months.	Unknown
Estimated Duration	5 years if jurisdictions assume after 06/30/20	5 years if jurisdictions assume after 06/30/20	5 years or more; May change after 06/30/2020
Flexibility with changing development cycles	Flexibility could be addressed in contract	Hiring additional personnel when needed will be challenging	
Long-term obligations	FORA responsibility ends on 06/30/2020	Any retiree benefits will be addressed in FORA dissolution plan	

FORT ORD REUSE AUTHORITY BOARD REPORT
BUSINESS ITEMS

Subject: Fort Ord Reuse Authority Prevailing Wage Program

Meeting Date: February 12, 2016

Agenda Number: 8a

INFORMATION/ACTION

RECOMMENDATION(S):

- I. Approve the deferred Board action to adopt the Prevailing Wage Compliance Program Option A (**Attachment A**), now determined by Finance Committee (FC) review on February 1, 2016 that there is sufficient funding available to carry out the proposed program expenditures of up to \$200,000. FC did not consider the item for funding.

BACKGROUND/DISCUSSION:

It is staff's interpretation that, since FORA and the jurisdictions accept reduced land sales revenue from nearly every historical Fort Ord private sector project (based on the economic analyses performed by the jurisdictions that assess the cost of FORA mitigation fees, building removal, prevailing wage, and other costs) individual development projects may qualify as a public work.

FORA staff researched options for a FORA prevailing wage compliance program. **Attachment A** compares three (3) options for a FORA prevailing wage compliance support program. FORA staff's assumption of two full-time staff positions or equivalent consultant hours to monitor, respond to inquiries, and prepare reports is based on FORA Capital Improvement Program development forecasts.

Finance Committee has determined that adequate funding for this compliance work in the revised mid-year budget. If approved the cost for FORA to perform this work in the staff recommended option could range up to \$200,000/year. A PowerPoint has been prepared to explain the FORA Prevailing Wage Compliance Support program (**Attachment B**).

FISCAL IMPACT:

Reviewed by FORA Controller 

The annual budget includes about \$380,000 in property tax revenue that could be used to fund up to \$200,000 for the Prevailing Wage monitoring effort.

COORDINATION:

Authority Counsel, Finance Committee

Prepared by 

Robert J. Norris, Jr.

Approved by 

Michael A. Houlemard, Jr.

Placeholder for Item 8a Attachment C

2nd Vote: FORA Prevailing Wage Program

**This item will be made available on the FORA website in
advance of the Board meeting.**

MEMORANDUM

KENNEDY, ARCHER & GIFFEN
A Professional Corporation

DATE: March 4, 2016
TO: FORA Board of Directors
FROM: Authority Counsel
MATTER: Relationship Between California Prevailing Wage Law and Cypress Marina Heights Settlement

I. ISSUES

Authority Counsel has been asked to analyze the following issue:

- A. What is the relationship between § 1725.5 (SB 854), Disclosure Requirements under Section 1776 (AB 766), and the Settlement Agreement re: University Villages/Dunes on Monterey Bay Development (“UV/DMB”)?**

As far as Authority Counsel understands the question presented to it, there is little or no direct link between the Labor Code requirements, which are enforced by the Department of Industrial Relations, and the Settlement Agreement regarding UV/DMB, which is a private agreement (to which FORA is not a party) and enforceable as a matter of contract law through a civil action in court.

II. FACTS

The following facts inform the analysis of the foregoing issues.

A. UV/DMB Settlement Agreement

In October 2006, the Monterey/Santa Cruz County Building and Construction Trades Council (“Council”), along with a couple unions and individuals, filed suit in Monterey Superior Court (case no. M81343) against Marina Community Partners LLC; Shea Properties LLC; W.L. Butler Construction, Inc.; City of Marina Redevelopment Agency; Board of the The City of

Marina Redevelopment Agency, individuals sued in their official capacities; Cypress Marina Heights LP; East Garrison Partners I LLC; Redevelopment Agency of The County of Monterey; Board of The Redevelopment Agency of the County of Monterey, individuals sued in their official capacities. The dispute related to the UV/DMB Development, and specifically to the basis and scope of prevailing wage requirements. In September 2008, the Plaintiffs settled with some of those defendants, namely: Marina Community Partners LLC; Shea Properties LLC; W.L. Butler Construction, Inc.; City of Marina Redevelopment Agency; Board of the City of Marina Redevelopment Agency, individuals sued in their official capacities (“Settlement”). That Settlement recited that:

In exchange for (1) Defendants’ prospective agreement that “First Generation Construction” ... undertaken on the UV/DMB Development ... shall be subject to (a) the prevailing wage provisions of the FORA Master Resolution, (b) the California Prevailing Wage Law, and (c) the terms and conditions of the Stipulation and Order set forth at Exhibit 1[.]

(Settlement, p. 2, Recital G.)

The Settlement incorporates a “Stipulation.” The Stipulation provides that the settling defendants would “pay prevailing wages and shall require all of their contractors and subcontractors to comply in all respects with the prevailing wage law, in accordance with Labor Code section 17200 et seq. and implementing regulations of the Department of Industrial Relations, on all ‘First Generation Construction’ work associated with the redevelopment project known as” UV/DMB.”¹ (Stipulation, 2:9-14.) The settling defendants also:

... shall require their contractors and subcontractors, (a) to keep and retain certified payroll records, in compliance with Labor Code section 1776, demonstrating payment of prevailing wages, (b) to provide notice of the location of such certified payroll records, as required by Labor Code section 1776, to the City of Marina Redevelopment Agency and to Plaintiffs, and (c) to provide true and correct copies of such certified payroll records, redacting or obliterating to prevent disclosure only the

¹ “The term ‘First Generation Construction’ means construction performed during the development and completion of each parcel of real property subject to the DDA at the time of transfer from the City of Marina Redevelopment Agency to a developer(s) or other transferee and until issuance of a certificate of occupancy to the initial owners or tenants of each parcel.” (Stipulation, 2:14-17.)

employees' names and first five digits of their Social Security numbers, to any joint labor-management committee request such records no later than 10 business days after receiving a written request therefor, subject to the joint labor-management committee's payment of copy costs pursuant to Labor Code section 1776 and the regulations promulgated thereunder.

(Stipulation, 3:2-11.)

B. Shea Homes' Request for Analysis

On February 19, 2016, Wendy Elliot of Shea Homes, on behalf of "Marina Community Partners," sent an email to FORA Staff. She states:

Please consider this written confirmation of a request we've made, to both the Admin Committee and to the FORA Board, that FORA staff and Authority Counsel prepare an analysis of the interaction between the DIR registration and disclosure process under SB 854 and the process for disclosure of payroll information set forth in the Settlement Agreement We understand FORA staff believes that ALL projects located on the former Fort Ord could be defined as "public works" however, we would like FORA counsel to opine on this assertion within the requested analysis.

III. ANALYSIS

A. FORA Registration Requirements (SB 854/ § 1725.5) and Payroll Disclosure Requirements (AB 766/ § 1776)

Section 1725.5 (SB 854) provides that "[a] contractor shall be registered pursuant to this section to be qualified to bid on, be listed in a bid proposal ... or engage in the performance of *any public work* contract that is subject to the requirements of this chapter." Section 1776 (AB 766) provides that "[e]ach contract and subcontractor shall keep accurate payroll records ... *in connection with the public work.*" (§ 1776, subd. (a).) If a project is not a "public work," the PWL does not apply and the contractor is not obligated to be registered under section 1725.5/SB 854 or to keep or provide such records under section 1776/SB 1776. So far, the DIR has not ruled that any project on Fort Ord qualifies as a public work. Of course, discussions are ongoing on that point. The fact that Fort Ord properties are specifically discounted when sold to developers to allow the payment of prevailing wages suggests that the development is a "public

work.” (§ 1720, subds. (a) & (b).) But that determination is for the Department of Industrial Relations to make with respect to a given project; so far, it has not made it.

B. Relationship Between Settlement and PWL

Shea Homes requested:

Authority Counsel [to] prepare an analysis of the interaction between the DIR registration and disclosure process under SB 854 and the process for disclosure of payroll information set forth in the Settlement Agreement We understand FORA staff believes that ALL projects located on the former Fort Ord could be defined as “public works” however, we would like FORA counsel to opine on this assertion within the requested analysis.

If a project such as the UV/DMB Development is a “public work,” then SB 854 would require contractors and subcontractors to register with the Department of Industrial Relations pursuant to SB 854. (§ 1725.5.) The contractor would also be subject to the disclosure requirements of AB 766 by virtue of that legislation. (§ 1776.) That is for the DIR to interpret and enforce. Meanwhile, if any party to the Settlement had disclosure or other obligations pursuant to the Settlement and Stipulation, those obligations would be privately enforceable by parties to those instruments pursuant to Code of Civil Procedure section 664.6, or by whatever other legal measures they wish to pursue. However, FORA is neither a party to the Settlement nor a spokesperson for the DIR whose charge it is to enforce the PWL.

MEMORANDUM

KENNEDY, ARCHER & GIFFEN
A Professional Corporation

DATE: March 4, 2016
TO: FORA Board of Directors
FROM: Authority Counsel
MATTER: FORA's Authority to Access Unredacted Payroll Information

I. ISSUES

Authority Counsel has been asked to analyze the following issue:

A. Does FORA have the authority under Assembly Bill (AB) 766/ Labor Code section 1776¹ to inspect unredacted payroll records?

Executive Summary of Analysis: The threshold issue is whether a project is a "public work" as section 1720, subdivisions (a) and (b) uses that term. FORA contends that certain projects, if not all development projects, are "public works." However, the Department of Industrial Relations ("DIR") has yet to make that determination. Without such a determination, it is unlikely that FORA can demand a contractor on a development project to comply with the inspection and disclosure provisions of section 1776.

If a project *is* a public work, there are three classes of persons entitled to inspect payroll records under section 1776. First, the employee or employee's representative can inspect the documents. FORA is not the employee or the employee's representative, but there is a possibility here for FORA to work with labor representatives or attorneys, or with employees themselves, to require compliance with section 1776. Second, the DIR or the "body awarding the contract" can inspect documents. FORA is clearly not the DIR. And it is not a *party* to the development or construction contracts, but may argue that it is a body "awarding" the contract by

¹ Unless otherwise specified, all references herein to a statutory section shall refer to the Labor Code.

virtue of its special place disposing of the lands that are developed at below market prices. Third, any member of the public can inspect the employment documents. However, records produced to the public must be redacted and may therefore be less useful.

II. FACTS

The following facts inform the analysis of the foregoing issues.

A. Mechanics of FORA Conveyances

FORA received fee title for most of Fort Ord from the U.S. Army. It is the “principal local public agent” for purposes of acquiring, repurposing, and conveying that land. (See Gov. Code, § 67678.) To carry out those obligations, FORA entered into Implementation Agreements (“IAs”) with the local jurisdictions, the Cities of Marina, Seaside, and Monterey, and the County of Monterey. The IAs are recorded. And when FORA conveys land to those jurisdictions, the deed of conveyance incorporates the applicable IA. The IA, in turn, requires the jurisdiction to “use or transfer” any such property in compliance with the Master Resolution. (See *Monterey/Santa Cruz County Bldg & Constr. Trades Council v. Cypress Marina Heights, LP* (2011) 191 Cal.App.4th 1500, 1506 (*Cypress Marina Heights*).) Section 3.03.090 of the Master Resolution, FORA’s prevailing wage requirement (“FORA PWR”), provides that “[n]ot less than the general prevailing rate of wages ... will be paid to all workers employed on the First Generation Construction performed on parcels subject to the Fort Ord Reuse Plan.” Developers are obligated to abide by the terms of the FORA PWR as a matter of property and contract law. (*Cypress Marina Heights, supra*, 191 Cal.App.4th at pp. 1518-1520.)

B. Finances of Conveyances

When FORA conveys property at Fort Ord to its constituent jurisdictions, it typically does so at no cost to the jurisdiction. The jurisdictions then convey the same land to developers at prices that are reduced from open/fair market prices to account for developer fees, prevailing wage requirements, on-site mitigation, building removal (though FORA sometimes pays for

building removal), etc. For instance, the Reuse Valuation for the University Villages Project (“UV”) in Marina provided: “It is important to note that this Reuse Valuation assumes that all construction costs in the Project ... pay prevailing wages. Prevailing wages adds significantly to the cost of construction for the Project. If all construction in the Project is not required to pay prevailing wages, the Reuse Value may need to be adjusted.”² (UV Reuse Valuation, May 2005, p. 16 [underlining added].) Further, Tables 3 and 4 of the Reuse Valuation indicate that the added cost to the developer of paying prevailing wages was deducted from the sales price. The Reuse Valuation goes on to say that “The DDA includes covenants and conditions that impact the development economics and hence the value of the interests conveyed to the Developer.” (UV Reuse Valuation, May 2005, p. 17.) While prevailing wages are not specifically listed in the following discussion, there is still clear evidence in the Reuse Valuation that the cost of prevailing wages were a factor in determining the value of the UV project land sale price.

Once the local jurisdiction sold the land to the developer, it would remit one-half of the proceeds to FORA.

III. ANALYSIS

Restated, the issues are (A) when is a contractor bound to keep and disclose payroll records [answer: only on “public works” projects] and (B) to whom must the contractor disclose them [answer: the employee/employee’s representative, the DIR, or redacted copies to the public].

A. To What Does § 1776 Apply? “Public Works”

Section 1776 provides that “[e]ach contract and subcontractor shall keep accurate payroll records ... *in connection with the public work.*” (§ 1776, subd. (a)). If a project is not a “public

² The Reuse Valuation also plainly provided: “To the extent prevailing wages are required to be paid either pursuant to Labor Code Sections 1720 et seq. or pursuant to the FORA Master Resolution, the Developer must cause the Project’s contractor and subcontractors to pay prevailing wages in the construction of the Project as those wages are determined pursuant to the Labor Code and implementing regulations of the Department of Industrial Relations.” (UV Reuse Valuation, May 2005, p. 4.)

work,” the PWL does not apply and the contractor is not obligated to keep or provide such records (unless there is some other source for such obligations). So far, the DIR has not ruled that any project on Fort Ord qualifies as a public work. Of course, discussions are ongoing on that point. The fact that Fort Ord properties are specifically discounted when sold to developers to allow the payment of prevailing wages suggests that the development is a “public work.” (§ 1720, subs. (a) & (b)). But that determination is for the Department of Industrial Relations to make with respect to a given project; so far, it has not made it.

B. Who Can Obtain Records and Under What Terms?

Section 1776, subdivision (a) provides that:

Each contractor and subcontractor shall keep accurate payroll records, showing the name, address, social security number, work classification, straight time and overtime hours worked each day and week, and the actual per diem wages paid to each journeyman, apprentice, worker, or other employee employed by him or her in connection with the public work.

(§ 1776, subd. (a).)

Subdivision (b) states that the records “shall be available for inspection at all reasonable hours at the principal office of the contractor on the following basis”:

- (1) A certified copy of an employee’s payroll record shall be made available for inspection or furnished to the employee or his or authorized representative on request.
- (2) A certified copy of all payroll records enumerated in subdivision (a) shall be made available for inspection or furnished upon request to a representative of the body awarding the contract and the [DIR].
- (3) A certified copy of all payroll records enumerated in subdivision (a) shall be made available for inspection or furnished upon request by the public for inspection or for copies thereof. However, a request by the public shall be made through either the body awarding the contract or the Division of Labor Standards Enforcement. If the requested payroll records have not been provided pursuant to paragraph (2), the requesting party shall, prior to being provided the records, reimburse the costs of preparation by the contractor,

subcontractors, and the entity through which the request was made. The public may not be given access to the records at the principal office of the contractor.

Subdivision (e) states:

Except as provided in subdivision (f), **any copy of records made available for inspection as copies and furnished upon request to the public or any public agency by the awarding body or the [DIR] shall be marked or obliterated to prevent disclosure of an individual's name, address, and social security number.** The name of the contractor awarded the contract or the subcontractor performing the contract shall not be marked or obliterated. Any copy of records made available for inspection by, or furnished to, a multiemployer Taft-Hartley trust fund (29 USC s. 186(c)(5) that requests the records for the purposes of allocating contributions to participants shall be marked or obliterated only to prevent disclosure of an individuals' full social security number, but shall provide the last four digits of the social security number. Any copy of records made available for inspection by, or furnished to, a joint labor-management committee established pursuant to the federal Labor Management Cooperation Act of 1978 (29 USC s. 175a) shall be marked or obliterated only to prevent disclosure of an individual's social security number.

(§ 1776, subd. (e).)

1. **An "Employee" or "Representative"**

If a project is a public work, the employee or an employee's representative can request unredacted copies of all records. (§ 1776, subd. (b)(1)). An employee's representative may include a labor representative; it would certainly appear to include an attorney. Therefore, the employee or its representative is in a position to obtain and forward any record which could assist anyone else in determining whether a contractor has fulfilled its obligations under the FORA PWR or the PWL. Even FORA does not have the authority to directly compel production of these records, it may be able to work with the employee or employee's representative/attorney to compel production of the records.

2. A “Body Awarding the Contract”

FORA is not a party *to* the contract. But neither is it a stranger to the contract. FORA’s gratis disposition of the land is what makes the contract (at below market rate to allow the payment of prevailing wage) possible in the first place. As such, it has a colorable argument, thus far untested, that it is therefore a “body *awarding* the contract.” If in fact it can demonstrate that it is an awarding body, FORA would have the right to inspect payroll records under section 1776, subdivision (b)(2)).

3. The “Public”

FORA certainly has authority as a member of “the public” to inspect records. (§ 1776, subd. (b)(3)). However, if it obtains records merely as member of the public, the party producing them would be obligated to redact certain information. (§ 1776, subd. (e).)