

DEPARTMENT OF INDUSTRIAL RELATIONS

Katrina S. Hagen, Director

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December 30, 2021

Roy C. Gunter III, Esq.
Law Offices of Roy C. Gunter
P. O. Box 2259
Monterey, California 93942-2259

Re: Public Works Case No. 2020-017
Fort Ord Medical Officer's Barracks, Parker Flats Cutoff Road
City of Seaside

Dear Mr. Gunter:

This constitutes the determination of the Director of Industrial Relations regarding coverage of the above-referenced project under California's prevailing wage laws, and it is made pursuant to Labor Code section 1773.5¹ and California Code of Regulations, title 8, section 16001, subdivision (a). Based on my review of the facts of this case and an analysis of the applicable law, it is my determination that the proposed renovation and rehabilitation of the Fort Ord Medical Officer's Barracks, also referred to as the Parker Flat Apartments (Project), are subject to prevailing wage requirements.²

Facts

The Project consists of a proposed 38-unit apartment complex on a 4.98-acre site located at 4386-4387 Parker Flats Cutoff Road in the City of Seaside (City). The property is improved with two buildings that were formerly used as barracks for medical officers at Fort Ord. The proposed development is expected to include parking spaces, a laundry room, and a fitness room. The Project is owned by Alfred P. Glover doing business as AP Glover Enterprises, LLC, a California limited liability corporation (Glover or Owner).

¹ Unless otherwise indicated, all further statutory references are to the California Labor Code and all subdivision references are to the subdivisions of section 1720.

² AP Glover Enterprises, LLC previously requested a coverage determination on this Project on March 23, 2018. By letter dated July 18, 2018, Glover was advised that the matter was not ripe for a coverage determination, as the property had yet to be transferred from the Fort Ord Reuse Authority to the City of Seaside, and the financing of the Project could not be ascertained at that time.

A. The Project is Subject to the Fort Ord Reuse Authority (FORA) Master Resolution and the Implementation Agreement.

In 1991, the Fort Ord Military Base was closed, leaving 44 square miles of property to develop or repurpose for civilian use. The Fort Ord Reuse Authority (FORA) was created to transition the 44 square miles from military use to civilian use. (Gov. Code, § 67678.) FORA is governed by member representatives of Monterey County and eight cities, including the City. (Gov. Code, § 67660, subd. (a).) On or about March 14, 1994, FORA adopted a Master Resolution, which in part, dictates future land use of the former Fort Ord property. Among other provisions, the Master Resolution requires prevailing wages to be paid on all “first generation construction.”³

On May 31, 2001, FORA and the City entered into an Implementation Agreement that governs the use of former Fort Ord property within the City. The Implementation Agreement was recorded in the Office of the Monterey County Recorder. The Implementation Agreement requires the City to transfer any former Fort Ord property in compliance with, inter alia, the Master Resolution.

On July 11, 2017, the City received two unsolicited proposals regarding redevelopment of the subject property, as well as a third in-person inquiry a few days later. One of the unsolicited proposals was from Glover. On October 16, 2017, the City and Glover entered into an Exclusive Negotiating Agreement (ENA) with regard to the subject property.⁴ At that time, the property was owned by FORA, and was expected to be transferred to the City in 2019. As stated in the ENA:

FORA and the City will enter into an agreement allowing the Developer to plan and develop the Project during the transfer process. The City and Developer will also enter into an agreement allowing the Developer to plan and develop the Project during the transfer project [sic]. The City, upon Project completion and all final inspections, will issue a Certificate of Occupancy regardless if the title transfer to the City has been completed.

Although the ENA contemplated 1) an agreement between FORA and the City to allow Glover to develop the property during the transfer process and 2) a separate but similar agreement between Glover and the City, it is unclear whether such agreements were entered into or what the terms are. Neither the Implementation Agreement between

³ Section 1.01.050 of the Master Resolution defines “First Generation Construction” as “construction performed during the development and completion of each parcel of real property contemplated in a disposition or development agreement at the time of transfer from each member agency to a developer(s) or other transferee(s) and until issuance of a certificate of occupancy by the initial owners of tenants of each parcel.”

⁴ The City did not promulgate any request for proposals for development of the subject property. EKB Partners submitted the other unsolicited proposal for the property, and proposed a purchase price of \$950,000. Glover’s unsolicited proposal did not include any proposed purchase price. The City’s reasoning for selecting Glover over EKB Partners is unclear.

FORA and the City nor the ENA between the City and Glover mention anything about Glover developing the property before the property is acquired by Glover. The ENA did acknowledge prevailing wage requirements in Paragraph 9, which states:

Developer acknowledges that (a) if the Site or any portion thereof was part of the former Fort Ord, prevailing wages shall be paid in connection with the development of and construction on the Site by Developer (and any transferee of Developer) pursuant to Section 2(a) of the Implementation Agreement between City of Seaside and the Fort Ord Reuse Authority and Section 3.03.090 of the Fort Ord Reuse Authority Master Resolution described therein; and (b) prevailing wages may otherwise be required to be paid if the City provides any financial assistance to the Developer in connection with the Project.

On February 26, 2018, FORA and Glover entered into a Right of Entry (ROE) agreement that allowed Glover access to the property between January 22, 2018 and June 30, 2019, in preparation for building restoration. The request – by either Glover or the City – that triggered the granting of the ROE is not part of the Department’s records. As outlined in the ROE, “[p]reparation activities include investigation, repair, replacement of utilities (outside and inside the buildings) and roadways (including parking areas), and removal of obstructing coverings (such as soils, paving, drywall and wall coverings to enable engineering investigations/studies and proper sizing/replacement of restoration utilities to meet municipal requirements).” The ROE became valid when it was acknowledged by the City on February 27, 2018.

B. After Two Appraisals, the City Sold the Property to Glover.

As of March 22, 2018, Glover proposed to purchase the property for \$250,000 based on a valuation by the City’s Economic Development Manager. By April 20, 2018, the City Council rejected the \$250,000 valuation. On May 17, 2018, the City Council adopted a resolution to approve a purchase and sale agreement to sell the property to Glover for \$750,000.

On June 27, 2018, Keep Fort Ord Wild, an unincorporated association, filed a petition for writ of mandate and complaint against respondent City and real party in interest Glover, alleging violation of the California Environmental Quality Act (CEQA), failure to comply with the City’s Parks, Recreation and Community Services Plan, failure to comply with the California Subdivision Map Act and the City’s Subdivision Ordinance, failure to comply with the City’s Zoning Ordinance, and failure to comply with the Fort Ord Reuse Authority Act and the Fort Ord Reuse Plan. The petitioner sought to vacate the City’s resolution to sell the property to Glover. This litigation was resolved by settlement, and the petitioner dismissed the action on September 7, 2018. The terms of the settlement agreement are unknown, but Glover paid the City \$20,000 pursuant to an indemnity clause in the ENA. The same day that the litigation was filed on June 27, 2018, Glover gave notice to the City that it intended to terminate the purchase and sale agreement approved on May 17, 2018. A special meeting was called on June 28, 2018, to rescind the purchase and sale agreement. According to the meeting minutes, members of the public questioned why requests for proposals were not issued for the project and

encouraged the City to issue requests for proposals. The mayor noted that this was a non-solicited proposal and while there were other proposals offered, Glover's was the one chosen. The City Council voted to rescind the purchase and sale agreement.

On June 26, 2019, a few days before the ROE expired, the property was appraised on behalf of the City for \$1,660,000 based on the hypothetical conditions that it is approved as a 4.98-acre legal lot of record with the necessary lawful access to Parker Flats Cut-Off Road and approved for the development of a total of 40 dwelling units.⁵ "The scope of the assignment is to value the property, as if a legal lot of record, based on the available data including costs and construction budgets for the completion of the remediation to help provide the client with an understanding of the residual value as of the valuation date." The appraiser was instructed that the highest and best use of the property was the redevelopment of the existing building structure as 40 two-bedroom apartment unites on a 4.98 acre site. The appraised value of \$1,660,000 was obtained by taking the estimated present value of \$2,530,000, representing the site and improvements prior to remediation, and deducting the estimated remediation costs of \$223,695 and \$650,000 provided by Glover. The appraisal assumed that the City could further deduct Glover's actual cost of abatement from the \$1,660,000 appraised value to determine the residual contributory value of the land and improvements. The appraisal report was also predicated on the requirement of prevailing wages for the development of the property.

On June 29, 2020, a quit claim deed was recorded that conveyed the property from FORA to the City. As stated in the quit claim deed:

The responsibilities and obligations placed upon, and the benefits provided to, the [FORA] by the Government shall run with the land and be binding on and inure to the benefit of all subsequent owners of the Property unless or until such responsibilities, obligations, or benefits are released pursuant to the provisions set forth in the [Memorandum of Agreement Between the United States of America Acting By and Through the Secretary of the Army, United States Department of the Army and the Fort Ord Reuse Authority For the Sale of Portions of the former Fort Ord, California, dated the 20th day of June 2000, as amended], the Government deed [recorded on May 8, 2009 by the Office of the Monterey County Recorder as Document 2009028282], and Deed Amendment No. 1 [recorded on May 11, 2010 by the Office of the Monterey County Recorder], and the Government Release and Warranty [Quitclaim Deed to Extinguish Certain Land Use Controls And To Modify Certain Land Use Controls And Issue Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA) Warranty, Parcels E18.1.1, E18.1.3, E18.4, E20c.2, E23.1, E23.2, E24, and E34, Former Fort Ord, City of Seaside, California, County of Monterey, California,

⁵ A "hypothetical condition" is defined per the Uniform Standards of Professional Appraisal Practice as "a condition, directly related to a specific assignment, which is contrary to what is known by the appraiser to exist on the effective date of the assignment results, but is used for the purpose of analysis." (See The Appraisal Foundation (2018–2019) Uniform Standards of Professional Appraisal Practice.)

Environmental Restriction, dated June 25, 2020 and recorded in the Office of the Monterey County Recorder as Document 2020030791].

The quit claim deed also stated that: “The [City] covenants for itself, its successors, and assigns and every successor in interest to the Property, or any part thereof, that [City] and such successors and assigns shall comply with all provisions of the Implementation Agreement.” In addition, the quit claim deed provided that: “The conditions, restrictions, and covenants set forth in this Deed are a binding servitude on the herein conveyed Property and will be deemed to run with the land in perpetuity.”

Between July of 2017 and June of 2020, Glover claims to have spent \$1,243,172.59 on the property, which include the following sums:

\$62,184.29 related to the ENA of October 16, 2017 (including prepayment of the City’s related expenses such as appraisals)

\$15,932.13 to the City for plan check permits

\$251.00 to the City for a demolition permit

\$20,000.00 to the City for legal fees related to the indemnity agreement for the Keep Fort Ord Wild litigation

\$771.83 to the City for a remediation permit

\$23,018.11 to FORA for fees related to remediation construction

\$33,000.00 to Marina Coast Water District for plan review fees

In its Staff Report dated September 17, 2020, the City acknowledged that Glover spent approximately \$1.3 million to remediate the property.

On September 1, 2020, the property was appraised at \$650,000 on behalf of the City. As noted by the property appraiser in the Appraisal Report: “We are appraising the subject under the extraordinary assumption that the site development costs provided by the developer are accurate. In addition, per the scope of work with the client, the valuation analysis specifically credits the developer with costs incurred prior to the effective date for remediation work, the costs of prospective remediation work, and the costs of off-site utility extensions, and deducts those costs to determine the value.”⁶ In this regard, the appraised value of \$650,000 was obtained by taking the land value of \$1,843,895 plus the \$500,000 adjustment for existing improvements, and subtracting the developer’s remediation costs and off-site utility costs calculated at \$1,694,404. Unlike

⁶ An “extraordinary assumption” is defined per the Uniform Standards of Professional Appraisal Practice as “an assumption, directly related to a specific assignment, as of the effective date of the appraisal results, which, if found to be false, could alter the appraiser’s opinions or conclusions.” (See The Appraisal Foundation (2018–2019) Uniform Standards of Professional Appraisal Practice.)

the prior appraisal report, this appraisal report assumed that the development of the property did not require payment of prevailing wage:

The appraisers understand from the City of Seaside that prevailing wage requirement is not applicable to remodeling an existing building, only new construction. Thus, the subject's existing structure provides a basis for significant costs savings compared with new construction within the former Fort Ord. For a new component, such as an elevator which is was [sic] never present in the existing buildings, prevailing wage requirement is applicable.

Glover purchased the Project site on September 17, 2020, from the City of Seaside for \$700,000. The reason for the purchase, as stated in the Purchase and Sale Agreement, was as follows: "Buyer desires to purchase the Property from Seller and intends to rehabilitate and renovate the existing Medical Officer's Barracks, which was previously used for housing for the military's personnel, for use as affordable housing." As noted in the City of Seaside's Staff Report dated September 17, 2020, "The purchase price for the property is \$700,000 based on a reuse of the existing structures on site."⁷ The Staff Report also noted that the purchase of the property did not include any public subsidies.

The Purchase and Sale Agreement and Escrow Instructions dated September 17, 2020, specifically acknowledged prevailing wage requirements at Paragraph 5.9:

Buyer and all associated successors and assigns and their prime contractors or sub-contractors, shall comply with the FORA Master Resolution section 3.03.090, as that section may be amended from time to time, mandating the payment of prevailing wages on First Generation construction, including but not limited to the requirement that all contractors and subcontractors prior to performing work on the property shall be registered with the Department of Industrial Relations. To the extent prevailing wages are required to be paid pursuant to Labor Code sections 1720 and following, the Buyer, his successors and assigns shall comply with the State's labor code requirements in all respects. Buyer, specifically agrees and shall cause any successor or assign, and their respective contractors and subcontractors to comply with the provisions of this paragraph, keep certified payroll records and make un-redacted copies of such records available to City or its agents for purposes of monitoring and ensuring compliance with this section. Buyer shall make or cause such documents produced to City or its agent within 10 business days of a written request for said documents. Finally, Buyer for himself, his successors and

⁷ The purchase price of the property is not described as "fair reuse value," which is a term used in connection with redevelopment projects. Fair reuse value is less than fair market value as fair reuse value takes into account the added burdens assumed by developers in having to comply with covenants and conditions imposed by disposition and development agreements for redevelopment projects. (See Health & Saf. Code, § 33433, subd. (b)(2).) Here, there is no applicable disposition and development agreement.

assigns hereby agree that the Department of Industrial Relations may enforce the provisions of this Paragraph as though the Project was subject to the public works requirements of the Labor Code.

By letter dated September 28, 2020, 1st Capital Bank, N.A., provided a reference letter on behalf of Glover, advising that the bank was processing a financing application for Glover to build a 40-unit apartment building on the project site, and that “[t]he initial construction analysis and project preform information supports financing up to \$7.5 million to development [sic] the referenced project.” However, the construction financing for the Project has not yet been finalized.

Discussion

All workers employed on public works projects must be paid at least the applicable prevailing wage rates. (§ 1771.) Section 1720, subdivision (a)(1) defines “public works” to mean construction, alteration, demolition, installation, or repair work done under contract and paid for in whole or in part out of public funds. It is undisputed that the construction of the Project meets the first and second elements for public works coverage under subdivision (a)(1), in that it constitutes “construction” that is “done under contract.” Thus, the only issue presented is whether the Project is “paid for in whole or in part out of public funds.”

Public funds in this context are not limited to a direct payment of money from a public entity to a contractor. Instead, subdivision (b) provides in relevant part that “paid for in whole or in part out of public funds” also means the “[t]ransfer by the state or political subdivision of an asset of value for less than fair market value.” (§ 1720, subd. (b)(3).)

The real property comprising the Project site is unquestionably an “asset of value” as that term is used in subdivision (b)(3). For the property to have been transferred at a “fair market price” within the meaning of subdivision (b)(3), there must be evidence that the purchase price was determined by competitive market forces. (PW 2004-035, *Santa Ana Transit Village – City of Santa Ana* (Dec. 5, 2005/June 25, 2007) (*Santa Ana Transit Village*)). Fair market value, which is “deemed to be synonymous” with fair market price in this context, has been previously defined in prior coverage determinations as “the value of the land at its highest and best use as determined by a bona fide appraisal.” (*Ibid.*) “The purchaser has the burden to demonstrate that the property was purchased at fair market value.” (PW 2003-014, *Phase II Residential Development Victoria Gardens – City of Rancho Cucamonga* (July 20, 2005).) A property’s fair market value is determined by a bona fide and credible appraisal, unless there is credible evidence to the contrary. (*Santa Ana Transit Village, supra*, PW 2004-035.)

In this case, the \$700,000 purchase price was not derived from competitive market forces. Although the City received two unsolicited offers to purchase the property (one of which offered \$950,000), the City did not promulgate any request for proposals, despite a recommendation from City staff and comment from the public encouraging that requests for proposals be issued. Instead, about two months after the City staff’s recommendation, the City entered into an exclusive negotiating agreement with Glover to develop the property. Glover then offered \$250,000 to purchase the property, which the City Council

rejected. A month later the City Council approved a sale of the property to Glover for \$750,000. Glover persuaded the City Council to rescind this sale right after Keep Fort Ord Wild filed its lawsuit.

Thereafter, the City obtained two appraisals that were premised on Glover's retrospective and prospective remediation costs for the property. The June 26, 2019 appraisal valued the property at \$1,660,000. The City obtained another appraisal before the City Council was set to vote again on approving a sale to Glover. The September 1, 2020 appraisal was obtained under the extraordinary assumption that the site development costs provided by Glover are accurate, and the appraisal report noted that the City's scope of work – which set forth the City's requirements for the scope of the appraisal – required that the value of the property be determined by deducting Glover's costs incurred prior to the effective date of the appraisal for remediation work, the costs of prospective remediation work, and the costs of off-site utility extensions. Specifically, the appraisal took the land value of \$1,843,895 plus the \$500,000 adjustment for existing improvements, and subtracted Glover's remediation costs calculated at \$1,694,404. However, the \$1,694,404 credit provided to Glover in the appraisal report was not accurate. Glover spent \$1,243,172.59 on the property prior to the September 1, 2020 appraisal report, and this amount included various permit fees.⁸ The inaccuracy of the extraordinary assumption of \$1,694,404 credit to Glover calls into question the validity of the appraisal report and significantly limits its utility in determining the market price. Because the appraisal is of limited utility, Glover has failed to carry its burden of demonstrating that the property was purchased at fair market value, and in fact, strongly suggests that the property was likely sold at below its market value.⁹ In short, the \$650,000 appraised value did not reflect the fair market price of the property, and the \$700,000 purchase price was not derived from the competitive real estate market. Accordingly, the acquisition of the subject property for \$700,000 constituted the transfer of an asset of value for less than the fair market price, making the transaction a payment of public funds.¹⁰

⁸ The credit of permit fees paid by Glover against the purchase price of the property potentially constitutes a separate basis for coverage under subdivision (b)(4) of section 1720, which provides that "paid for in whole or in part out of public funds" also means "fees . . . that would normally be required in the execution of the contract, that are paid, reduced, charged at less than fair market value, waived, or forgiven by the state or political subdivision."

⁹ Other facts also suggest that the sale price was not derived from competitive market forces: the parties allowed Glover to perform remediation work on the property before the City approved a sale; the parties agreed to a sale in May of 2018 for \$750,000 before any appraisals were conducted; and the second appraised value of \$650,000 in September 2020 matched roughly the May 2018 price, but only after the appraiser was instructed to deduct remediation costs that Glover provided, which the appraiser did not check and assumed were accurate.

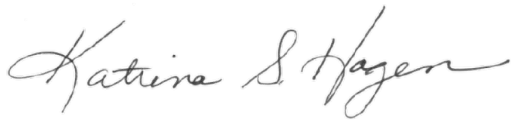
¹⁰ Under this statutory analysis, it is unnecessary to consider whether there exists an independent contractual obligation to pay prevailing wage rates on the Project. Consequently, there is no need to determine whether the Project is "first generation

Conclusion

For the foregoing reasons, that the proposed renovation and rehabilitation of the Fort Ord Medical Officer's Barracks, also referred to as the Parker Flat Apartments, are subject to prevailing wage requirements.

I hope this determination satisfactorily answers your inquiry.

Sincerely,

A handwritten signature in cursive script that reads "Katrina S. Hagen".

Katrina S. Hagen
Director of Industrial Relations

construction" as that term is used in the FORA Master Resolution, or whether the deed restrictions in the Implementation Agreement requiring compliance with the FORA Master Resolution run with the land in perpetuity and binds all successors in interest and assigns thereof as discussed in *Monterey/Santa Cruz County Building and Construction Trades Council v. Cypress Marina Heights LP* (2011) 191 Cal.App.4th 1500.