



# CONSTRUCTION ALERT

A NEWSLETTER TO THE CONSTRUCTION INDUSTRY

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## RESTRICTION IN DEED REQUIRING PAYMENT OF PREVAILING WAGES ENFORCEABLE

*By Darryl J. Horowitz*

Prevailing wages are required to be paid by most contractors on Public Works projects. They are less frequently paid on Private Works projects. What happens, however, if the deed for real property requires the payment of prevailing wages on a construction project performed on public property? This question was recently answered by the Sixth District Court of Appeal in *Monterey/Santa Cruz County Building and Construction Trades Council v. Cypress Marina Heights, LP* (January 10, 2011) 2011 DJDAR 1324, that the restriction is enforceable.

In the action, Cypress Marina Heights ("CMH") purchased Fort Ord land from the City of Marina's redevelopment agency. CMH intended to construct a project known as Marina Heights.

At the time the deed was conveyed from the redevelopment agency to CMH, it included a covenant that required the payment of prevailing wages to workers on all development on the property. This restriction was included in the deed at the time the redevelopment agency purchased the land from the Fort Ord Re-Use Authority.

CMH sought to develop the property, but did not want to pay prevailing wages inasmuch as the development was on private property. The Monterey/Santa Cruz County Building and Construction Trades Council sued on the basis that the covenant in the deed requiring the

payment of prevailing wages was enforceable. Plaintiff filed a motion for summary judgment, which was granted when the court found that it was undisputed that the deed required CMH to pay prevailing wages on the Marina Heights project. Plaintiff was also awarded attorneys' fees and costs. CMH appealed on the grounds that a triable issue existed as to whether prevailing wages were required to be paid and on the grounds that the court abused its discretion in awarding excessive attorneys' fees to the plaintiff.

The appellate court affirmed the judgment of the trial court in all respects. It found that at the time the Fort Ord Re-Use Authority was formed, a master resolution was adopted that required the payment of prevailing wages on all projects on the property. When the redevelopment agency asked for proposals for the property, it advised all property owners that prevailing wages would need to be paid if the property were developed. Thus, when CMH submitted a bid in response to the redevelopment proposal, it knew that prevailing wages would be required.

A review of prior deeds also disclosed the deed restrictions and covenant requiring the payment of prevailing wages. Based on these undisputed facts, the appellate court found that the trial court correctly ruled on the motion for summary judgment.

Although CMH argued that the master resolution provisions should not apply to the project because they were limited to Public Works projects, the court disagreed. CMH also attempted to argue that an agreement signed by the parties, known as the "implementation agreement," contained provisions that would require CMH to pay prevailing wages. Again, the court found that the implementation required the redevelopment agency to include a provision in all deeds requiring the payment of prevailing wages. The court then looked to the deeds themselves and found that the deed and the covenant contained in it was enforceable. Thus, though CMH attempted to argue that the covenants in the deed did not bind successors-in-interest, the court found otherwise, citing the language in the deed that the redevelopment agency had covenanted for itself as well as successors, assigns, and every successor-in-interest to the property.

CMH also attempted to argue waiver of those provisions and that the plaintiff lacked standing, but the court rejected these arguments as well. Lastly, the court found that the award of attorneys' fees was not an abuse of the court's discretion.

This holding certainly benefits the unions who pay prevailing wages. It serves as an important reminder for developers to review proposals before submitting a response to a Request for Proposal. It serves as an important reminder to contractors also that on some Private Works projects, prevailing wages may be required by covenants in deeds or other redevelopment requirements.

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