

COUNCIL AGENDA REPORT

City of El Centro

MEETING DATE: May 6, 2009
AGENDA ITEM NO. _____
Approved by:
City Attorney: _____
City Manager: _____

FROM: Jon A. Edney, Council Member, Chairperson
Efrain Silva, Council Member, Vice-Chairperson
Ruben A. Duran, City Manager

Assistance From: Grace Connor, Executive Assistant

SUBJECT: Discussion and Any Necessary Action Regarding the El Centro City Council Task Force Findings and Recommendations: 1) Shall the City Council consider changing the structure of its governance from a General Law City, to one that operates under a Voter Approved Charter?

BACKGROUND:

On October 15, 2008 the El Centro City Council formed a task force made up of Council Members, City staff and members of the public to review four main items. Task Force meetings were held on several dates to discuss the four issues. The final recommendations from the Task Force were presented to City Council on February 18, 2009.

DISCUSSION:

At the February 18, 2009 Council Meeting, the City Council took action on three of the four issues and requested additional information on the one remaining issue.

CITY COUNCIL ACTION:

ISSUE 1

Shall the City Council consider changing the structure of its governance from a General Law City, to one that operates under a Vote Approved Charter?

City Council directed staff to provide the following information:

A. Specific project analysis from Public Works Department regarding Measure D funding & Design Build:

Response:

-Design Build will not result in any savings on projects currently in construction. The major savings in design build projects are that they can be constructed much quicker without the formal bidding process.

-Typically transportation projects are awarded to local contractors who use more local labor with 70-80% local employees. (estimate only)

Water and Wastewater projects are generally awarded to out of town contractors who use less local labor (local firms don't usually bid water/wastewater projects)

WM Lyles	50 employees on site	13 local employees	26%
Pacific Hydrotech	6 employees on site	0 local employees	0%

B. Prevailing Wage Language in Assembly Bill No. 642 as it relates to Design Build for Cities.

Response from Public Works Director, excerpt from Bill:

"This bill would authorize any city, with the approval of the appropriate city council, to enter into design-build contracts, as defined, in accordance with specified provisions. The bill also would extend these provisions until January 1, 2016.

C. Do bond funds require payment of prevailing wage?

Response:

-According to Don Hunt (bond counsel) YES the current bond funds will require the payment of prevailing wage because they were issued while the law had that requirement. Any future bond sales would be governed by the city charter or laws in affect at that time.

D. What, if any, would be the savings on the landscaping contract if the would not have to pay prevailing wage?

Response from Parks & Recreation

A project that is labor only could be up to 80% more than it otherwise would be. On a total bid including materials and labor a 38% - 40% increase over a non-prevailing wage job.

E. Prevailing Wage Language in Senate Bill No. 9 as it relates to Charter Cities. Response from City Attorney:

Response:

Joseph Pannone of the law firm of Aleshire & Wynder LLP, on March 17, 2009 provided an opinion which in summary states:

It is currently unclear whether SB 9 will require charter cities to pay prevailing wages on all public works projects. Mr. Pannone believes a court will uphold the provisions of SB 9 that require a charter city to pay prevailing wages on projects that extend a city's water, sewer or storm drain facilities to a disadvantaged community in an unincorporated area. The final determination will be made by the courts.

F. Does Charter affect the ECRMC in any way?

Response from City Attorney:

Pursuant to a City Council request you have asked whether or not the adoption of a City Charter will affect El Centro Regional Medical Center, hereinafter referred to as "ECRMC", in any way. It is my understanding that the question really pertains to public contracting by ECRMC. As currently written it is not clear that the draft Charter would affect public contracting by ECRMC.

ECRMC (formerly known as El Centro Community Hospital), was created by a vote of the electorate of the City pursuant to a special election on April 13, 1954 as authorized by Government Code Sections 37605 to 37623 in effect at that time. ECRMC is an agency of a general law city and is governed by the general laws of the state of California as is the City since there are no specific provisions in the municipal hospital law that govern contracting for hospital construction projects. Consequently, this office has long held that ECRMC is subject to the same requirements and limitations for bidding for public projects as set forth in the City Code and state law.

The current draft of the City Charter presented to the Charter Review Committee reads in Section 300 as follows:

"The City is exempt from the provisions of all California statutes regulating public contracting and purchasing except as provided by ordinance or by agreement approved by the City Council. The City shall establish all standards, procedures, rules and regulations to regulate all aspects of public contracting."

As currently written, it is arguable that this provision would not apply to ECRMC. If the intent was to have this charter provision apply to ECRMC and in order to clarify the matter, then both sentences of Section 300 would need to be amended to provide that the City's agencies were also exempt from state public contracting regulations, etc., and that the City's standards, etc., would apply to all City agencies. Conversely, if the intent was to not have the charter provision apply to ECRMC, then both sentences of Section 300 would need to be amended so that they did not apply to agencies of the City.

ISSUE 2

Shall the City Council consider the idea of going to district elections in regard to council seats?

-NO – The City Council agreed with the recommendation of the Task Force to not move forward with district elections at this time and revisit district elections in five years.

ISSUE 3

Shall the City Council consider moving the council elections from odd years to even years?

No. City Council did not agree with the recommendations of the Task Force and directed staff to explore voter outreach.

Staff Response:

-\$5,000 has been requested in the FY 2009-2010 budget to implement a voter outreach program through the Public Information Program.

ISSUE 4

Shall the City Council consider an alternative to its present rotation system for the position of Mayor?

City Council voted not to consider an alternative to its present rotation system for the position of Mayor and to revisit the issue in 5 years.

CONCLUSION

Shall the City Council consider changing the structure of its governance from a General Law City, to one that operates under a voter approved Charter?

Attachments:

- 1) Legal Opinion from the law firm of Aleshire & Wynder LLP regarding Senate Bill No. 9.
- 2) Article from San Diego Union Tribune 04-29-09 – “Charter city wins wage ruling”



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March 17, 2009

Luis Hernandez, City Attorney
City of El Centro
1275 Main Street
El Centro, CA 92243

Dear: Luis:

You have requested us to provide you an opinion whether SB 9, passed by the Legislature and signed by the Governor in February, 2009, requires a charter city to pay prevailing wages for a public works project. This issue has arisen because the City Council has expressed an interest in placing a measure on an upcoming ballot for the voters of the City of El Centro to determine whether the City should become a charter city. One of the reasons for that proposal is the impact prevailing wages can have on the City's costs for public works projects.

In summary, we do not believe SB 9 will be determinative of whether prevailing must be paid on all public works projects contracted for by a charter city.

I. LEGAL DISCUSSION

Section 1 of SB 9 states the following:

“(a) The Legislature has previously found that the prevailing wage law addresses statewide concerns (Section 1 of Chapter 892 of the Statutes of 2002; Section 1 of Chapter 868 of the Statutes of 2002) and has reaffirmed its intent that the prevailing wage law apply to all public projects, including the projects of charter cities (Chapter 135 of the Statutes of 2003).

“(b) Nothing in Section 8007 of the Water Code shall be interpreted to be inconsistent with that intent. The legal issue whether the Legislature has the constitutional authority to apply the prevailing wage law to the municipal projects of charter cities was declared to be an "open" question by the California Supreme Court in *City of Long Beach v. Department of Industrial Relations* (2004) 34 Cal.4th 942, 947 and that legal question is presently under submission before the California Court of Appeal in *State Building and Construction Trades Council v. City of Vista*, Case No. D0521181.



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“(c) The purpose of Section 8007 of the Water Code is solely to provide that, if the Legislature does not have the constitutional authority to apply the prevailing wage law to the municipal projects of charter cities, then the extension of a city's water, sewer, or storm drain system or similar system to a disadvantaged community in an unincorporated area shall not thereby subject future work on that system within that city's boundaries to the prevailing wage law.”

In addition, section 19 of SB 9 expressly deals with requiring prevailing wages for public works projects of charter cities. That section adds section 8007 to the California Water Code. That new section requires a charter city to pay prevailing wages when a contract for a capital improvement project is awarded to extend that city's water, sewer or storm drain system or similar system to a disadvantaged community in an unincorporated area. In addition, section 8007 provides if any subsequent project to construct, expand, reconstruct, install, or repair such systems that have been so extended as discussed above is conducted wholly within that city's political boundaries, prevailing wages are not required to be paid. A disadvantaged community, as referred to in section 8007, is defined to mean “a community with an annual median household income that is less than 80 percent of the statewide annual median household income,” as provided in Water Code section 79505.5.

Based on the foregoing, the State Legislature is attempting to address an issue left open by the *City of Long Beach* case. The Legislature is making clear its past and current intent was and is for the payment of prevailing wages on all public works projects to be a matter of statewide concern. The Legislature is providing that clarity because even charter cities must comply with matters of statewide concern. Therefore, if payment of prevailing wages is a matter of statewide concern, a charter city would also be required to pay those wages on its public works projects.

The California Supreme Court will sometimes show deference to the State Legislature when deciding whether a matter is of statewide concern. However, case law has clearly established the final determination of whether a matter is of statewide concern is decided by the courts. There currently is a case in the 4th Appellate District (San Diego County) that may address this issue. That court determined the matter to be resubmitted as of January 29, 2009. That means that court should be issuing its decision within 90 days after that date. We are sure no matter the determination of the appellate case the matter will be appealed to the California Supreme Court.

If the courts determine payment of prevailing wages on public works projects is not generally a matter of statewide concern, then we believe a court could still determine the types of projects described in Water Code section 8007 are matters of statewide concern. We believe the



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courts would so decide because the projects regulated by that section are only those extended beyond the jurisdictional boundaries of a charter city and only those dealing with affordable housing projects. The courts have indicated affordable housing is a matter of statewide concern.

II. CONCLUSION

At this time it is unclear whether SB 9 will require charter cities to pay prevailing wages on all public works projects. We believe a court will uphold the provisions of SB 9 that require a charter city to pay prevailing wages on projects that extend that city's water, sewer or storm drain system or similar system to a disadvantaged community in an unincorporated area. The final determination of whether payment of prevailing wages is a matter of statewide concern and, therefore, applicable to charter cities will be determined by the courts. Such a decision may result from the *State Building and Construction Trades Council* case, which may be forthcoming in next several weeks

Please let me know if you have any comments or questions regarding the foregoing.

Very truly yours,

ALESHIRE & WYNDER, LLP


Joseph W. Pannone

Charter city wins wage ruling

Nonprevailing pay OK'd for municipal projects

By [Rick Rogers](#)

Union-Tribune Staff Writer

2:00 a.m. April 29, 2009

OVERVIEW

Background: In 2007, the State Building and Construction Trades Council of California, AFL-CIO, sued Vista over its city charter, which allows the city not to pay prevailing wages, which are typically union wages.

What's happened: Yesterday, the state 4th District Court of Appeal upheld an earlier Superior Court ruling in favor of Vista.

The future: The trades council plans to appeal to the California Supreme Court.

VISTA — In a court decision potentially worth millions of dollars to Vista and scores of cities across California, the state 4th District Court of Appeal yesterday upheld the right of charter cities to pay less than the prevailing wage – typically what union workers make – for municipal projects.

The ruling was 2-1 in a widely watched case that followers believe will be taken up by the California Supreme Court.

“ It was the topic of conversation among cities, both charter cities and general-law cities, throughout the state,” said Patrick Whitnell, general counsel for the League of California Cities. “ We have not heard the last word on this issue.”

A statewide labor organization, the State Building and Construction Trades Council of California, AFL-CIO, sued Vista shortly after it became a charter city in 2007.

The trades council had argued that a city's charter does not supersede state laws that require municipalities to pay prevailing wages on public-works projects.

Sandy Harrison, a trades council spokesman, said the organization would appeal the case to the state Supreme Court.

“ A prevailing wage serves a statewide purpose,” Harrison said. “ If charter cities are allowed to pay substandard wages and benefits, it creates downward pressure through the entire region and, ultimately, the state.”

If the trades council had prevailed, it could have forced costly changes in contracting practices for many of California's 114 charter cities. Jobs paid at union scale are roughly 6.5 percent to 30 percent more expensive than non-prevailing-wage jobs, several sources say.

“ Obviously, it is a good win,” Vista City Attorney Darold Pieper said. “ This decision follows a long line of California court cases that have recognized the special status of charter cities under our constitution.”

San Diego County has six charter cities in addition to Vista: Carlsbad, Chula Vista, Del Mar, San Diego, San Marcos and Santee. Not all of them will be affected by the ruling.

San Diego passed a living-wage ordinance in 2005, and Del Mar already requires that the prevailing wage be paid for municipal projects.

In the majority court opinion, Justices Richard Huffman and Patricia Benke wrote that the prevailing-wage law “ does not address matters of statewide concern and therefore Vista, as a charter city, is not required to comply with” it on public-works projects solely financed with city revenue.

“ Rather, such contracts are municipal affairs over which Vista has paramount power. . . . We affirm the trial court's judgment denying (the trade council's) petition,” they wrote.

In dissent, Judge Joan Irion wrote, “ Having concluded that the prevailing-wage law is one of statewide concern based on the legislative purpose of maintaining the wage base in the construction industry and promoting quality apprentice training . . . I would conclude that despite its status as a charter city, Vista may not exempt itself from compliance with the prevailing-wage law.”

Determining the money a city can save on a project by not paying union wages is difficult, especially in a bad economy, when labor and materials costs are artificially lower.

Skip Hammann, Carlsbad's special-projects director, said that city's proposed 32-acre Alga Norte Community Park was estimated to cost \$32.7 million if prevailing wages were paid and \$28.5 million if they were not.

Hammann figured that about half the potential savings came from wages and half from lower costs for materials.

In Vista, the debate was a central election issue in 2007, when voters approved a city charter. The charter allows Vista to opt out of paying union wages for projects not funded with state or federal money.

At the time, Vista was planning to build \$100 million worth of projects, including a civic center, two fire stations and a sports park derived from a half-cent sales tax increase that voters approved in 2006.

In July 2007, the trades council filed suit in San Diego Superior Court against Vista to force it to pay prevailing wages for public-works projects.

This past November, Judge Robert Dahlquist ruled in the city's favor, prompting an appeal.

The debate over city charter status dates to the early 1930s.

A ruling in 1932 said state lawmakers could not require charter cities to follow the Public Wage Rate Act of 1931. A 1981 case also found that charter cities are not subject to the payment of prevailing wages.

Whitnell and Harrison said the divided ruling by the appeals court means the state Supreme Court probably will take up the case.