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>> Councilmember Nguyen: Good afternoon. At this time I'd like to call the Rules and Open Government committee to order. Let's review the February 1, 2011 council agenda. Any changes to page 1? 2 or 3?

>> Madam Vice Mayor, on page 3, item 3.2 will be deferring that to the 8th. One of the candidates is not available on the 1st.

>> Councilmember Nguyen: Okay. And then page 4 or 5? All right.

>> A reminder, there were two items from yesterday that were deferred to this agenda. So those will appear on the amended. One was the San José financing authority item, the other one was the tax ordinance.

>> Tax qualification retirement plans.

>> Councilmember Nguyen: That's here already.

>> 4.1.

>> Councilmember Nguyen: Okay, 6 or 7? We don't need that.

>> Councilmember Constant: Motion to approve.

>> Councilmember Herrera: Second.

>> Councilmember Nguyen: We have a motion to approve. All those in favor? Opposed hearing none motion carries. And we'll move to city council agenda on February 8th. Page 1. 2 or 3? I have on here that you might need a sunshine waiver for 3.2.

>> That's correct. That will be out on Friday with the regular packet.

>> Councilmember Nguyen: Okay.

>> Just a 14-day.

>> Councilmember Nguyen: 4 or 5? 6?

>> Excuse me, madam Vice Mayor, we have an add for a 3.X item. It's the mayor's budget prioritization survey results.

>> Councilmember Nguyen: Okay.

>> And there's actually a correction to that. The labor negotiations update, that should be placed on the February 1st agenda.

>> Councilmember Nguyen: Oh, okay.

>> That was February 1st.

>> As well as for February 8th.

>> I don't think the 8th yet, just the 1st.

>> Councilmember Oliverio: Question would that be a normal item agendized for every week now?

>> City Attorney Doyle: Well, I don't know if that's a standing item or like the City Manager's report. As needed so it would be the 1st only.

>> Councilmember Constant: So maybe what I can do is make a motion to add this neighbor negotiations update to the agenda we just approved on February 1st.

>> Councilmember Nguyen: Okay so that would be amended to the -- to the motion for February the 1st agenda, okay.

>> Motion to approve February 8th I think --

>> Councilmember Nguyen: Going back to February 1st. So all those in favor? Opposed hearing none motion carries with the amendments. And now we're on to February.

>> Councilmember Herrera: Motion to approve February 8th agenda.

>> Councilmember Constant: I'll second that assuming it includes the sunshine waiver specifically and the adds.

>> Councilmember Herrera: I'll add that to the motion.

>> Councilmember Nguyen: We have a motion and second. All those in favor, opposed motion carries. We will move to the agency agenda for February 1st. Page 1. 2 or 3.

>> Madam chair if I may Gary Miskimon with Redevelopment Agency. On item 8.1, the report has already been out for 8.1A however we do anticipate a supplemental report will be issued for B and C. And on 8.2 which is the cooperation agreement, the agency recommends that item be dropped.

>> Councilmember Nguyen: All right, thank you. 4 or 5?

>> Councilmember Constant: So I'll make a motion to approve with that correction.

>> Councilmember Herrera: Second.

>> Councilmember Nguyen: Thank you, we have a motion and second to approve the agenda with the amendments. All those in favor? Opposed? Hearing none motion carries. And the RDA agenda for February 8th, any changes to page 1? 2 or 3?

>> Madam chair Gary Miskimon again. In the same way as the city the agency will request a 14 day sunshine waiver. We anticipate the report will be out this Friday, ten days before the meeting.

>> Councilmember Constant: I'll make the motion to approve that with the sunshine waiver.

>> Councilmember Herrera: Second.

>> Councilmember Nguyen: We have a motion and second to approve the RDA agenda, with the sunshine waivers. All those in favor, opposed hearing none motion carries. Thank you. I think I made a mistake. I think I'm supposed to add --

>> Councilmember Constant: We did it in the motion.

>> Councilmember Nguyen: Okay with the downtown association? Wow, you guys are just on top of things, aren't you? Makes my job easier. Move down to item C, review of the upcoming study session, approve the agenda for council study session, disaster policy seminar from February 22nd, 8:00 to 12:00 noon at the Hayes mansion.

>> Councilmember Herrera: I have a question on that.

>> Councilmember Constant: Me too.

>> Councilmember Nguyen: Councilmember Herrera.

>> Councilmember Herrera: Yeah I was wondering why the Hayes mansion. Why wouldn't we want to do it down at City Hall, since we're going to have council there? (inaudible).

>> Hayes mansion because it provides an offsite location for both the councilmembers and senior staff. The Department of Homeland Security who is actually sponsoring facilitating the event strongly recommends moving the staff offsite in order to prevent any outside distractions that kind of thing as well as we wanted to make use of the Hayes mansion as it is a city associated location. DHS actually wanted to go with a private hotel somewhere else.

>> Councilmember Herrera: I can certainly see the idea of looking someplace else, with the idea we might need offsite locations. What's the cost differential because I wouldn't want to see it hit on the General Fund.

>> This entire program is being underwritten by Homeland Security, costs us \$35,000 in total but is totally federally funded.

>> Councilmember Nguyen: Good question. Councilmember Oliverio.

>> Councilmember Oliverio: And is the public allowed to attend that meeting?

>> Yes the first part of the session actually the first three and a half hours will be considered to be open session. That is the discussion will take place. However, given that the scenarios of terrorist based attack on the city if questions regarding critical assets, vulnerabilities or countermeasures were to arise we have the opportunity to go into closed session for the final 30 minutes to address those.

>> Councilmember Oliverio: Thank you.

>> Councilmember Herrera: I'd like to make a motion to approve.

>> Councilmember Constant: Second.

>> Councilmember Nguyen: We actually have someone who wants to speak on this item. Mr. Wall.

>> David Wall: I would like to thank everybody involved with this process. I think it's way overdue. I think there's a lot more work that could be done on the local side, with reference to your individual districts. Specifically, how much water, fresh water per person per day, should be articulated, how much food reserved, integration of how the fire department could act as a storage location for supplies but specifically get out the word to people using the bully pulpit of your own offices to make a level of personal responsibility here personal accountability like the mayor said you're going to be on your own for a while and people need to know how much water and whatnot to have on hand. Thank you.

>> Councilmember Constant: Thank you. Councilmember Constant.

>> Councilmember Constant: I just wanted to thank Chris for getting this in front of us. It's something I've been asking questions about since I got here. And it's between the booklet that you created for us and this, I think it's very important. Thank you.

>> Councilmember Nguyen: Thank you. We have a motion made by Councilmember Herrera.

>> Councilmember Herrera: And I just wanted to say thank you as well. I think this is a great program and very happy to hear that we're getting this outside funding to make that possible.

>> Councilmember Nguyen: Wonderful, okay. All those in favor, opposed none motion carries thank you very much. Move down to legislative update anything from state or federal? Okay, none.

>> Councilmember Constant: They're both still dysfunctional.

>> Councilmember Nguyen: We'll move down to meeting schedules. I don't think we have any scheduled.

>> Councilmember Constant: No.

>> Councilmember Nguyen: Item F, the public record. Mr. David Wall.

>> David Wall: Due to councilmember Oliverio great insight on performance appraisals to initiate the discussion, I believe a special performance appraisal which is customary within the performance appraisal system to be considered by Your Honors to the City Manager. This is in reference to poor decision-making and the six months' severance pay, at-will people specifically the City Manager have a six-month severance pay written into the employment contract. I find that objectionable. Because if you want to lay off city employees as a function of substandard performance, the employees don't get a six months' severance pay. They just get laid off and that's that. But more importantly, it gives a flexibility for council to continually have a six month and one day notice that services will be terminated if a continuation of poor decision making is continued. Council may set the criteria of the performance, the special performance targets in a reasonable fashion that you've been doing so for some time. This just gives you a better flexibility, and shall we say, improves the initiative of the office of City Manager with reference to the City Manager herself to get with with the principal and maim some good decisions or you're out the door without your severance pay. Thank you very much.

>> Councilmember Constant: Motion to note and file.

>> Councilmember Oliverio: Second.

>> Councilmember Nguyen: Okay we have a motion and second to note and file. All those in favor, opposed, hearing none motion carries. We'll move down to item G, boards commissions and committees. And we have one

from Councilmember Herrera, to appoint Bob Dhillon to the project diversity screening committee for a term to expire December 31st, 2012. Councilmember Herrera.

>> Councilmember Herrera: Yes thank you chair I'd like to move approval of my appointment.

>> Councilmember Oliverio: Second.

>> Councilmember Nguyen: We have a motion and second to approve the recommendation. All those in favor, opposed, hearing none, motion carries. Work plans or annual reports, none, okay. Move down to item H, rules committee reviews recommendations or approvals. H-1, workload assessment for council requests and referrals, none. 2, approve the memorandum from Councilmember Liccardo to the Rules and Open Government committee dated January 20th, 2011 recommending the approval of the let's move campaign.

>> Councilmember Constant: Move.

>> Councilmember Herrera: Second.

>> Councilmember Nguyen: Question, I want to clarify, if the council does decide to approve this resolution we are not spending any city funds as a part of this campaign or to promote that campaign.

>> Councilmember Herrera: I'd put that in my motion.

>> Councilmember Nguyen: I think we have Ruth here.

>> Ruth with Councilmember Liccardo's office. There is no need for the city to spend funds and Santa Clara County Public Health will help us with strategizing this. I think a lot of the things we're asking for the city is already doing, we have trails we have fitness centers and all that so --

>> Councilmember Nguyen: Thank you Ruth. Mr. David Wall you want to speak on this item?

>> David Wall: This is difficult, so you don't think I'm bad-mouthing anybody. This is a good idea by Councilmember Liccardo. But I have reservations on giving credit to the totality of the program to the first lady. I believe that the structure should be regional so San José could have something to be proud of and something to say to the world, this is what we're doing within this framework but with modification specific to San José. This is in reference to integrating more agricultural programs into the school, uses of the park for more food production areas and looking at a healthier environment. This is not to belittle the first lady's program. This is to augment it to make the City of San José stand out as an individual region who's taking this basic framework and improved upon it which I sincerely think we can and I don't like the language of Councilmember Liccardo's memorandum to you and is too boilerplate and gives too much credit to Washington, D.C. and not enough credit to your own districts and your own leaderships within those districts. Thank you.

>> Councilmember Nguyen: Thank you. Councilmember Herrera, you had a motion on this? Councilmember Constant.

>> Councilmember Constant: Yes. First of all, thanks, David but the resolution I think does accomplish exactly what you asked as far as concentrating what we're doing here locally. It doesn't really mention the Washington stuff. I just want to make sure kind of editorialize a little bit. With the pension reform and the issues of trying to make things better for our businesses that it doesn't get confused with let's move out of San José because we no longer have any services. I'm serious, I know it can be taken as a joke. But we really have to be sure our messaging is clear.

>> Councilmember Nguyen: Yes, Councilmember Herrera.

>> Councilmember Herrera: I just want to speak in favor of the motion. I think this is a great idea and I had the opportunity to visit Washington, D.C, in fact our Vice Mayor was also with me and we had a chance of seeing some of the wonderful things being done by the first lady, in the garden, organic and promoting some things. I

think it's wonderful to have the opportunity to do this in San José, I have no doubt each district will customize it, have the opportunity to become healthier and more vibrant. I support what Councilmember Liccardo is doing.

>> Councilmember Nguyen: No?

>> Councilmember Oliverio: No need.

>> Councilmember Nguyen: All right sounds good. We have a motion to approve the item. All those in favor, opposed hearing none motion carries. Move down to item H-3 approve memorandum from attorney Rick Doyle to Rules and Open Government committee dated January 20th, 2011, responding to the January 21st, 2011 public record item.

>> City Attorney Doyle: Madam Chair, members of the committee, I'm going to tee it off and I'll let the Public Works staff address the details. This has come before this committee, has to do with prevailing wages. Some history is important. This goes back to an initiative led by then councilmembers LeZotte and Reed. Find ways to strictly enforce our prevailing wage requirements in Public Works contracts. What we were finding in the past away was that there were violations of prevailing wages but we had very little ways to enforce or dis-incentivize if there is such a word people from not paying for prevailing wage. What we adopted and what the council adopted and it's been the policy since 2003 is a contractual provision in our Public Works contracts which provide that in the event there is a finding of prevailing wage violations, or that there is treble damages. And it's not something that can be waived. The staff has no ability to negotiate or determine intentional or nonintentional, it is flat liquidated damages that the city is not seeking to enforce this policy that damages are extremely difficult to ascertain. As I mentioned in the memo, again this isn't the first time this has come before this committee in a similar context but if the council wants to consider and revisit whether or not there should be some process for waiver that something would have to then be referred to the full council for a further discussion. And Nina Dave I don't know if you want to talk about the specifics.

>> Madam Chair, David Sykes, acting director of Public Works. Nina Grayson. This is a electrical contract out at the sewage treatment plant. Nina's staff determined there was a wage violation and the contractor was immediately notified of the violation and of the liquidated damages due as Rick mentioned there's no discretion for us in terms of being able to waive the liquidated damages and so we have retained this damage from the contractor's payment. Available for questions.

>> City Attorney Doyle: For the record there is a chronology, summary of the investigation, in the packet. It's page 32, it's an attachment and Nina.

>> Councilmember Nguyen: Councilmember Constant.

>> Councilmember Constant: Thank you and Rick I know you've mentioned that we've heard this before in Rules Committee and I thought I recall former Vice Mayor Chirco bringing up that we should have this have this council discussion. I can't remember what happened after that, we had a sort of discussion about options but I don't remember the result.

>> City Attorney Doyle: There is a and we are I think charged with coming back and revisiting with respect specifically to the airport living wage requirements. Where the -- that these aren't Public Works contracts where it is the city paying these. These are living wage requirements imposed on parties that do business with the airport, that they were charged to come back and revisit any amendments to the ordinance that would allow for some kind of notification sort of a warning first. Those are the types of things we've been looking at. Nina you know more than I do.

>> Part of the revised -- it was part of the revised ordinance that the council adopted in December regarding the airport living wage ordinance.

>> City Attorney Doyle: So we did come back with the ordinance and it wasn't just to provide for the exemption to everyone equally, but we also allowed for a warning period but that again is living wage specifically with respect

to the airport only. The distinction here is these are Public Works contracts when it's actually our money being paid.

>> Councilmember Constant: Well I definitely think this is something we should revisit. I mean if you look through the packet we got and how much -- how complicated the requirements and the reporting is, it's not surprising that people make mistakes. And I think that there's no doubt there will be people, have been people or will be people that will intentionally violate our prevailing wage policy and I think that's completely different than people who administratively make an error, or do it with no ill intent. And there are people that fight these things for a long time and there's people who find the issue and correct it immediately, and I think that we should have ways for them to do that without being stuck with what is crazy damages sometimes, the treble damages come out to, in very high amounts that are I think excessively punitive for what are sometimes minor mistakes. And I think that I don't know what the rest of the committee thinks about this but I think we should refer this for a future discussion, whether it's by a committee to -- before going to the council or directly to the council, I think it's something that we should do. So I wanted to hear from my colleagues and then I'll be more than willing to make a motion when the time comes.

>> Councilmember Nguyen: Councilmember Herrera.

>> Councilmember Herrera: Thank you chair. I wanted to ask a question of Nina. So this vendor, would they have an opportunity to have a discussion with you about maybe paying less than the treble damages, is that in stone that they have to pay that or is there -- can you help me understand if there's a procedure where they might be able to pay less?

>> The policy is that if there's a violation that's identified by my staff, the restitution is paid and then the liquidated damages assessed. And that's at three times the amount of the restitution. Now, in that, when we issue the notice of violation, there's a due process step, steps in there. So that if they don't feel that the violation is correct, or the amount is not correct, they have an opportunity to provide us with additional information. And we may revise the restitution amount which then could lower the liquidated damage amount. But I cannot change the three-times.

>> That's more driven by and gives the contractor the opportunity to clarify information in case we made a mistake. In this particular case the contractor admits the mistake. And the current policy does not provide us with any provision to make any modification to the liquidated damage once we know there has been a mistake in the wage payment.

>> Councilmember Herrera: Okay.

>> City Attorney Doyle: And again, this -- I go back to the history that we were at the time, in 2003, it was -- we were finding that we were having a tough time enforcing prevailing wage and this was seen as a way to show that the City of San José was on its own contracts, its own Public Works contracts was going to be very strict about enforcement of prevailing wage. And the other argument is you don't want to put staff in a position where they have to determine is it intentional, unintentional, if it's not paid it's not paid and the damages flow.

>> Councilmember Herrera: I was under the impression that there were some cases where that was -- there were some extenuating circumstances.

>> Councilmember Oliverio: Bankruptcy?

>> Councilmember Herrera: In every case it is paid, I just wanted to clarify?

>> Yes, we ensure that.

>> Councilmember Herrera: My concern is if we send this back to council and we open this up again that I think it's precedent-setting. Maybe I'm directing this to the City Attorney. What kind of precedent will be we be setting, what kind of flood gates would we be opening, to litigate all of these cases?

>> Councilmember Constant: That's not what I was suggesting to get it clear --

>> Councilmember Herrera: I just want to get the answer from the City Attorney.

>> City Attorney Doyle: I think that's why, when these cases have come to the rules committee, the rules committee has rejected them and kept the policy intact partially because they don't want to reopen the issue.

>> Councilmember Herrera: I'd like to make a motion that we reject the claim. Approve the memorandum and reject the reopening, the waiver.

>> Councilmember Nguyen: I would that. I feel we have a real good policy in place. I concur with staff, they are the expert on these type of issues, these type of cases. I'm not interested in revisiting this issue whatsoever. I think we have a really good policy in place, we have the people on our staff who provide us you know with really good professionalism, and Councilmember Herrera's right. I mean we are just opening a can of worms if we decide to revisit this issue. And so I hope that my colleagues agree and you know we should just move forward. Councilmember Constant.

>> Councilmember Constant: Well I couldn't disagree more on opening a can of worms. Because I was not insinuating that we go back and retroactively change it and tell everyone to come follow your claims with the city. But if we have a policy, we shouldn't revisit it to improve the policy going forward. If you look at this the letter was issued to Rand electric on October 13th of the violation. And within 48 hours, two days later, acknowledged that they made the mistake and started taking their steps to fix it. 48 hours. This was not an irresponsible contractor who was blatantly paying all of his workers working on a job sub-par wages. It was one person who had a wage mistake. There's a -- I think this is a very strict punishment for something that -- I mean if you go through these pages, I mean this thick, double sided of the stuff people have to go through, how anyone could not be concerned about the fact that you could make an innocent mistake in doing this. And if somebody is consistently doing this or their entire workforce is getting paid wrong and people are really getting short changed and the company is obstinate in refusing to pay, that's a whole different story. Then you go and you deal with those people correctly. But when you have people who are just simply -- they make a mistake, I mean we all

make mistakes every day and this is a big reason why a lot of people don't want to do the business with the City of San José. Is because we make things very difficult to do so.

>> Councilmember Nguyen: Councilmember Oliverio.

>> Councilmember Oliverio: Hi, Nina. From the way you explained the situation you and your position your title, the title again, director -- manager?

>> Division manager.

>> Councilmember Oliverio: Division manager. So the division manager with the current policy has no discretion to change the fine because it's triple the fine, right?

>> The liquidated damage, it's three times the amount.

>> Councilmember Oliverio: Right and then you said you have this process where they can go through and provide more information, et cetera. You said sometimes out of that process someone will pay less?

>> Yes, if there is -- you know my staff does the investigation, determines that there's a violation and there's always due process. So a contractor can say, you know you're wrong. You know it wasn't 200 hours, it was 150 hours. And can provide documentation to me, and I make the determination what that is. And based on that, the restitution amount could be reduced. Thereby, reducing the liquidated damage amount.

>> Councilmember Oliverio: Right and then Nina as the division manager, could you believe outside of what the council -- do you believe outside the council follow is, do you believe the position itself and the responsibility you hold should have discretion?

>> Well, it's -- it's difficult to -- to determine willful or nonwillful. It's very, very difficult. You know we deal with contractors, thousands of contractors. And there's a lot of -- a lot of excuses, explanations as to why they've done something that isn't in accordance with prevailing wage requirements. It could be a whole sort -- it's very difficult to be able to determine willful or nonwillful.

>> Councilmember Oliverio: Got it. Dave and Neipp ah I remember sitting on the council and we had sort of that process when it came to the library bids and the Public Works projects and I remember the council sort of being in this position of getting really in the weeds about -- and frankly things we had no concept of when it came to you know engineering and architecting and building things, and that seemed to be, I remember that, that was a really long discussion and people were really saying I don't know what I'm talking about but I'm going to talk. And then it went back to staff. So I sort of feel like this is an administrative process that needs to be handled by people that are technical, or familiar with the regulation. I mean you see an analogy here at all Dave?

>> Sure, I think there's really two basic issues here. One is of discretion, and current policy affords us no discretion and as Nina was mentioning we're not necessarily arguing for discretion. And there's the policy itself, some would say maybe punitive, others say helps you enforce. So those are two different things that can be looked at. I think, you know, when it comes to discretion, that gets a little tricky because as Nina mentioned at many times it's very difficult to get to the truth of whether the infraction was intentional or not intentional. So that would be a challenging endeavor to do on a project-by-project basis.

>> Councilmember Oliverio: Then is our fine schedule, what else do you want to call it?

>> It is a liquidated damage. It's not a fine.

>> Councilmember Oliverio: Penalty, it's money.

>> City Attorney Doyle: It's liquidated damages it's designed that way contractually for a reason. It's based on strict liability and not fault.

>> Councilmember Oliverio: Liquidated damages. Are we on par with other major California cities on that 3X?

>> City Attorney Doyle: I don't know how other California cities handle it. At the time -- at the time this was adopted it was proposed, I sat through the committee hearings and then ultimately council, and now Mayor Reed but then councilmember Reed and councilmember LeZotte were very concerned that we did not have a strong enough amount in terms of damages that would serve as an incentive to enforce or disincentive not to pay prevailing wage and that's why we came one the three times.

>> Councilmember Oliverio: And how many liquidated damages to we have in a year, you don't have to give me the exact number but --

>> It varies from year to year, this year I believe we came in about \$450,000 in liquidated damages.

>> Councilmember Oliverio: How many incidences is that roughly?

>> Roughly, oh gosh, I'm thinking 40, 45.

>> Councilmember Oliverio: Okay and that's probably would you say that's 5% of the amount of Public Works projects that are going along?

>> Oh, gosh --

>> Councilmember Oliverio: Again I'm not going to hold you to it. Off the top of your head is fine.

>> I'm not sure. Last year we had a rather large liquidated damage from a contractor. Obviously that's why that number is much higher. It went on for a long period of time. And so that number goes up. So -- and there's not a trend. It varies from year to year. And it just depends on the contractors, whether you have contractors that are

making sure that they're not doing -- you know having violations, that they're committed to doing it correctly. And those that aren't. And you know, when you have a down economy, you've got bids that are coming in lower. And you have -- we're seeing more violations. As a result of that.

>> Councilmember Oliverio: Hopefully this will be my final question. Do you see Nina from your experience that liquidated damages tend to occur more often on local firms or firms that are far away?

>> Oh, it's across the board.

>> Councilmember Oliverio: Nothing to do with geography or home team advantage?

>> No.

>> Councilmember Oliverio: Obviously this is a policy of the council and if at the time this is a policy and a mechanism to enforce it, if the council wants to have a different discussion as a charter city for dealing with this but I'll leave this and leave it at the administrative level.

>> Councilmember Nguyen: Thank you, Councilmember Herrera.

>> Councilmember Herrera: I just think this is the policy we should try to unwind right now. It's obvious that we've done a lot of burden on staff to try to sit there and make these individual decisions. Even in the current budget situation I think it's not a good idea. At the risk of asking you to go back in time I would guess that before we had this policy there might have been more violations before we had the strict enforcement. Did you hazard a guess on that?

>> We did. We had repeat violators the same contractors doing the same type of violations. And they were very willing, if we -- when we caught them they were very willing to pay the restitution. But it was a continual, it was a habitual issue. We don't typically see the same contractor doing it consistently. Any longer.

>> Councilmember Herrera: Would I guess not with treble damages. The last thing is, I want to say I like the way this policy does not lay blame or try to accuse people. In terms of the punishment it's saying you know, we have a very strict affirmative policy on making sure prevailing wage is enforced and it's not really saying that you know if you can -- if you go back and correct it you're still going to have to pay it but we're certainly not, we welcome businesses here we're certainly not trying to trap somebody but we are saying that the value of prevailing wage is important. We're not trying to sit there and adjudicate how many ways to resolve this thing. I hope you'll support my motion.

>> Councilmember Nguyen: Councilmember Constant.

>> Councilmember Constant: I certainly don't think that the only way we want to fix this is let the staff member make the decision. We could perhaps finds a way to improve the system. And to sit here, after we've heard many of these, and say we don't even want to talk about improving the system I think is not doing the right thing. And there it could be ways on giving a very short but fixed time period to cure, there's probably a gazillion ways. We could probably look at many other localities to do it. But to say that the only thing we could do is give one or two people discretion that will wreak havoc. Or that we won't have the conversation is very short sighted. What Rose just said, we do have a policy that assigns blame and punishes people and we're seeing it with this and others. If you don't think triple damages is a punishment, I would venture to say, people don't make the same mistake twice, they leave the system I've heard that from people because they make a simple mistake. We've had our own staff say that perhaps when they give the first notice, that they may have made a mistake and that's why we have and opportunity for due process for the contractors to help us fix our mistake in assessing their potential damages. But we don't give the same thing any other way. I -- smart enough to read tea leaves, I know where this is going to go, I just don't agree.

>> Councilmember Nguyen: We have a couple of folks who wanted to speak on this item. Daisy Casados.

>> My name is Stacy Casados and I work for the joint electrical industry funds and I'm here today to discuss Rand electric and disprove their statement that this was merely a mistake. Rand electric is a repeat offender of violations against prevailing wage laws and apprenticeship standards for the State of California. They have been you'll see in the document that she is passing out a clear history of constant violations. A clear history of knowledge of the rules. And time again -- and time again they have continued to break the laws of the state of California. There have been lawsuits again them. IRS liens. Several civil wage and penalty assessments by the state of California. For not paying prevailing wage. For not paying and misclassifying workers, part of the reason they're getting this fine today is misclassifying their work field. They have not stopped breaking the law. The front form is a current investigation against them in the state of California. And I just want you to know that they are knowledgeable. They are knowledgeable about the rules and by having this fine, I think that it shouldn't be waived. I think that repeat offenders should be deterred from, you know, breaking the rules and the laws in your district. As well as the apprenticeship rules that they did state that they were confused upon. Since they have been repeat offenders of the apprenticeship violations for the State of California, they have been in receipt of the complaint and warning letter from the districts of apprenticeship standards telling them the rules, regulations, numbers to contact, Websites for them to take a look at and be knowledgeable about the work that they do.

>> Mayor Reed: Thank you. David Wall. Okay. Ben Field.

>> Madam Vice Mayor, members of the committee my name is Ben Field I work for the South Bay labor council. The contractor's letter says his prevailing wage violations were not intentional but unless you want to take on the judicial function of weighing the evidence of intentionality you can't know whether the violation was in fact intentional. The council has a strong interest in not becoming judicial decision makers in cases of city fines. That is one of the reasons that there are liquidated damages for violations. Without any evidence, of intentionality. Liquidated damages like the one we have here keep the system from bog down. They are not a statement about the contractor's intentions, ethics, or character. And without these liquidated damages the council will end up wading into the contractor's past. The past record, to determine whether the contractor has been a good actor or a bad actor. Ultimately that would be a very political decision. As a matter of good government, the

city should move, should not move toward a more politicized system. Doing so ultimately makes San José a less business friendly city, and so I ask you to support Councilmember Herrera's motion. Thank you.

>> Councilmember Nguyen: Bob Triny.

>> Good afternoon, my name is Bob Triny, I'm the business managers of electricians in Santa Clara County. I've worked many times with Nina's office and also the City Attorney, with my own contractors that have violated the law, and what is set, the triple damages they had to pay also. Just to let you know the state has triple damages also. For any contractor that violates law. And this contractor is presently being investigated by the state licensing board for that. This is so great, and so many contractors do this over and over, and try to get away with it, to cheat their own people that are working for them to pay them a lesser wage or misclassify them. If you back off this you're going to hurt the city and you'll have a line out the door of contractors wanting to come in here to get this changed so they can have come before you and try to get that amount reduced. This is just totally wrong. They know the laws. The state puts on many seminars for contractors that are dealing in the Public Works about apprenticeship and everything else. This is the law. They should know it. If they're going to deal in the public sector. Thank you.

>> Councilmember Nguyen: Neil Struthers.

>> Good afternoon. Madam Vice Mayor honorable councilmembers, Neil Struthers head of the building trades council. I think you heard from the previous speaker Ms. Casada and Nina Grayson that this contractor is neither naive as far as the requirements, there is a whole dossier on this particular contractor, it is a very common practice to misclassify workers in prevailing wage. Ms. Grayson stated earlier that since the institution of this policy we seen the repeated offenders pretty much banish right now there is only a handful of contractors who even appeal these decisions less than 40 or 50 a year and you're putting out hundreds if not thousands of contracts a year. I think this policy is working based on the sheer number of appeals based open the number of contracts. And Councilmember Oliverio's right. If you bring this back for waivers you essentially make staff the prosecutors and the council the jury. And contractors will be lined out the door to take your time on these issues

that you don't really have a time for. You have many other pressing issues to deal with. Staff doesn't have the time. Staff is being reduced and now you're going to ask them to be -- to provide a burden of proof. So I think it's misguided to change the policy and I would encourage you to support Councilmember Herrera's motion. Also in this economy, we see hundreds of nonlocal contractors participating for Public Works contracts particularly in the City of San José. So there's no lack of -- we're not scaring anybody away. Nonlocal across Central Valley and other parts of the state, displacing, undermined by someone who can get away with paying less. It's the analogy I like to use, if it costs a dollar to park there and the meter is a dollar, if you don't pay the dollar the fine is a dollar. Why would you ever put a dollar in the meter? If the fine was \$3 you'd think twice about whether you should take that chance to put the dollar in the meter or not. And I think although a simple analogy is what's happening in the industry, if you don't have some penalty some way to disincentivize cheating you're going to foster cheating and I think by making it nebulous and subjective as to whether you have to pay the fine, pretty much invalidates the whole idea and the whole policy to begin with so I would urge you to support Councilmember Herrera's motion. Thank you.

>> Councilmember Nguyen: David Wall.

>> David Wall: First of all your prevailing wage policy is basically a mistake of administrative nature. You all abrogate this policy immediately if southwest Airlines decides to holds this policy as a condition to operate out of San José airport. They decide to leave, as a condition of this policy, you will get rid of it because your airport will collapse. This operates as an additional tamp, not only onto every function of the city but in reference to the sewer service and use charge. We see here today the union folks coming out en masse but these same folks that spoke eloquently before me have failed to reduce their union dues to the members who have to pay and have suffered pay cuts such as city employees and elsewhere. The prevailing wage program as it is ministered couldn't even provide you with simple answers to very simple questions in my opinion. I consider with the budget deficit that this whole program be eliminated, the office of equality assurance the funding or the responsibility is transferred to the attorneys. Also at this time period the city attorney's are taking on more and more responsibilities receiving compensation to their budget. They should be given their base budget out of their funding and special funding for

all these ancillary problems that they have to solve due to administrative incompetence and public utility intermeddling with the marketplace. Thank you.

>> Councilmember Nguyen: We have a motion by Councilmember Herrera to approve the memorandum. All those in favor? Opposed, Councilmember Constant opposed that motion passes 3 to one. Thank you. We'll move down to item 4, approve memorandum from Dennis Hawkins dated January 18th, 2011, recommending the approval of district 7 Vice Mayor oath of office as a city sponsored special event.

>> Councilmember Constant: Motion to approve.

>> Councilmember Herrera: Second.

>> Councilmember Nguyen: We have a motion and second to approve the item, all those in favor, opposed, motion carries. Item I, review of decisions to council committee agendas work plans. I don't think we have any. Very good. J open government appeals of public records act request. None. Open forum. Nobody wants to speak with us. All right, meeting's adjourned. Thank you very much.

>> Councilmember Constant: David has his card, standing appointment.

>> Councilmember Herrera: Standing open forum appointment.

>> David Wall: This bill deals with a contradiction in terms. Of late, you folks have been given a lot of impetus towards high speed rail, the BART, doing the Diridon station thing. In relation to selling off properties to build up what revenues you can for this baseball stadium. Now, first of all, these are significant material steps for a stadium. That could be argued that someone somewhere is violating municipal code concerning stadiums. But above so, you know what if baseball says unless you have the inside track and you already know that Mr. Selig has said, okay San José we're going to give you the okay, we haven't come out publicly and therefore you're going down this path. I know he is good people, I go to bat for you all the time out on the streets. But if the

baseball folks vote against you the decision to spend all this money and time you will not appear to be stupid, you will appear to be mentally retarded. I stand up for you like I stand up today. You are good citizens, glad to be here. But there has to be accountability with reference to cutting back the firefighters, the police officers, the attorneys everybody else when you have this extra money to go for something that is completely from my position illusory. And thank you, that's enough for today.

>> Councilmember Nguyen: Thank you. I believe our meeting's adjourned. Thank you very much, everyone.