



# Memorandum

**TO:** HONORABLE MAYOR  
AND CITY COUNCIL

**FROM:** Matt Loesch

**SUBJECT:** SEE BELOW

**DATE:** November 20, 2023

Approved

Date

11/30/2023

**SUBJECT: AMENDMENT TO TITLE 24 OF THE SAN JOSE MUNICIPAL CODE  
FOR A PROPOSED RESPONSIBLE CONSTRUCTION ORDINANCE**

## **RECOMMENDATION**

Approve an ordinance of the City of San José Amending Title 24 of the San José Municipal Code to add a new Part 8 of Chapter 24.02 to regulate private development projects by withholding the certificate of occupancy when an owner or contractor have any unpaid final wage theft judgment; and exempt certain projects that consist of less than 15,000 square feet of new construction or remodeling, are subject to prevailing wage requirements under state law, or are subject to a project labor agreement or community workforce agreement.

## **SUMMARY AND OUTCOME**

If approved, the proposed Responsible Construction Ordinance to add a new Part 8 to Chapter 24.02 could encourage owners and contractors to comply with final wage theft judgments by requiring the City to withhold the certificate of occupancy for private construction projects with a City-issued building permit if the owner, developer, contractor, or subcontractor have any unpaid final wage theft judgments. The proposed ordinance would require the complaining party to submit documentation in support of the complaint that a final wage theft judgment has not been paid, and would provide the owner and contractor with an opportunity to appeal or cure the alleged violation.

## **BACKGROUND**

On April 11, 2023, the City Council approved changes to the Wage Theft Prevention Policy (0-44) and directed staff to develop a Responsible Construction Ordinance to address wage theft in private construction.

Ensuring prompt, accurate, and full wages paid to workers has been a priority for City of San José Public Works construction and City of San José service and maintenance agreements. In

April 2023, City Council approved revisions to the Wage Theft Prevention Policy that provided consistency and focused enforcement of mandatory disqualifications on repeat wage theft violators, while expanding the policy scope to include public works construction and utilization of Civil Wage and Penalty Assessments and Bureau of Field Enforcement decisions.

Staff analyzed ordinances that could be adopted to address unpaid wage theft judgements on private construction requiring City-issued permits. Staff identified three cities within the region that adopted ordinances that support workers with collection of unpaid wage theft judgements. Mountain View, Sunnyvale, and Milpitas adopted “Responsible Construction” ordinances that utilize their capacity to delay the issuance of certificates of occupancy to compel the prompt payment of outstanding wage theft judgments. The adopted ordinances in these cities vary slightly, however, the intent and procedures are consistent.

## **ANALYSIS**

### *City of San José - Responsible Construction Ordinance*

The primary objectives of the proposed ordinance are to (1) promote payment of unpaid wages to workers in the private construction sector and (2) mandate transparent wage practices for developers and contractors. The key mechanisms to promote these goals are as follows.

- 1) Acknowledgment of Responsibility required prior to approval of construction permits.
- 2) Pay Transparency Certification required prior to issuance of final certificate of occupancy.
- 3) Clear, objective criteria to assess complaints of unpaid final wage theft judgments.
- 4) Mandatory withholding of a certificate of occupancy until all unpaid final wage theft judgments are satisfied.
- 5) An appeal process for the owner, developer, and contractor with opportunities to cure.

Largely utilizing Sunnyvale’s Responsible Construction Ordinance, the proposed ordinance leverages the City’s ability to withhold the issuance of a building’s certificate of occupancy, an official certification under Section 24.02.630 of the San José Municipal Code, that the project complies with all applicable requirements for occupancy. Importantly, the certificate will not be issued if the Department of Public Works Office of Equality Assurance sustains a valid complaint. Proof to support a complaint must include copies of the final administrative judgements showing an unpaid wage theft violation has been issued, an order from a court of law, and a declaration under penalty of perjury that the judgment is unsatisfied. A valid complaint must be submitted prior to issuance of the final certificate of occupancy.

A final wage theft judgment is defined to include a judgment, decision, or order that was issued by any court of law or an investigatory government agency authorized to enforce applicable

federal, state, and local wage and hour laws, including, but not limited to the United States Department of Labor, the California Division of Labor Standards Enforcement, the City of San José, or any other governmental entity tasked with the investigation and enforcement of wage and hour laws. Any final wage theft judgment will be accepted as valid proof, regardless of when or where the violation occurred, or judgment was issued.

The proposed ordinance would prioritize enforcement on high-risk projects and limit oversight redundancy. Only new construction or remodeling that is greater than or equal to 15,000 square feet would be regulated. Projects that are exempt from regulation include construction projects under 15,000 square feet, projects which are subject to prevailing wage requirements under state law, as well as projects in which all contractors are legally bound by an agreement that establishes the terms and conditions of employment, commonly referred to as project labor agreements or community workforce agreements.

The proposed ordinance differs from the Sunnyvale regulation in that any person may file a complaint and provide proof of an unpaid final wage theft judgment, and not just the “aggrieved party.” In this way, there could be more opportunities for enforcement of unpaid final wage theft judgments. Additionally, the proposed ordinance delegates determining whether the complaint of unpaid wage theft is valid from the City’s Planning, Building, and Code Enforcement Department official to the Director of Public Works. The Department of Public Works Office of Equality Assurance will review the documentation submitted in support of the complaint.

The table below indicates the expected impact at several size thresholds based on the last four years of building permit data.

Threshold Comparison (sqft)	Count	% of Total Projects	Per year avg.
10,000	360	1.30%	113
15,000	278	1.00%	87
25,000	178	0.64%	56
50,000	98	0.35%	31

Upon confirmation of a valid complaint, the Director will notify the Planning, Building, and Code Enforcement Department, and the Building Official may not issue a certificate of occupancy until the complaint is resolved. The Director will then notify the project owner and contractor of the complaint, after which, either party may provide a written response alongside clarifying evidence. The Director will then make a final decision regarding the complaint. If the owner, developer, or contractor is not satisfied with the Director’s decision, they may submit a written appeal to the City Manager. At any time, the owner, developer, or contractor may submit proof of payment of the outstanding amount and immediately resolve the complaint.

### Implementation

The “Responsible Construction” ordinances require owners, developers, and contractors to file two attestations at critical moments in the project schedule, the first prior to approval of a building permit and the second prior to issuance of the final certificate of occupancy.

“Acknowledgement of Responsibility” requires the owner, developer, and contractors to attest the following prior to approval of the building permit:

- 1) California Labor Code employment requirements will be adhered to; and
- 2) No outstanding, unpaid wage theft judgements exist; and
- 3) Final certificate of occupancy issuance may be delayed if a valid complaint of unpaid wage judgement(s) is received by the City.

“Pay Transparency Certification” requires the owner, developer, and contractors to attest the following prior to issuance of the certificate of occupancy:

- 1) A statement that the owner, developer, contractors, and any subcontractor have no unpaid wage theft judgements; and
- 2) A statement that:
  - a. Project construction employees of the contractors and any subcontractor have received written notice pursuant to California Labor Code Section 2810.5 and Section 226(a); or
  - b. Project construction employees of the contractors and/or any subcontractors are covered by a valid collective bargaining agreement or project labor agreement.

After City Council approves the ordinance, staff will finalize internal mechanisms, processes, and responsibilities. Acknowledgement of Responsibility and Pay Transparency Certifications forms will be created and required for all permits over the determined threshold with the goal of utilizing Planning, Building, and Code Enforcement Department’s Amanda software. The Department of Public Works Office of Equality Assurance will develop a process for complaints to be received and reviewed.

Staff will prioritize developing a consistent, expedient methodology to enforce wage theft prevention under this policy. Current staff and resources will implement, administer, and enforce the policy, but the Administration may request necessary staffing resources to support this effort in the future, if appropriate.

### EVALUATION AND FOLLOW-UP

No further follow-up with City Council related to this action is anticipated at this time.

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## **COORDINATION**

This memorandum was developed in coordination with the City Attorney's Office, the City Manager's Budget Office, and the Department of Planning, Building, and Code Enforcement.

## **PUBLIC OUTREACH**

During the development of this recommendation, City staff met with representatives from the South Bay Labor Council, Santa Clara County Wage Theft Coalition, Working Partnerships USA, and the Santa Clara and San Benito Counties Building Trades Council.

Prior to bringing the item forward for discussion at City Council, staff will bring the recommendation forward to the Developer and Construction Roundtable Group on December 7, 2023.

This memorandum will be posted on the City's Council Agenda website for the December 12, 2023, City Council meeting.

## **COMMISSION RECOMMENDATION AND INPUT**

No commission recommendation or input is associated with this action.

## **CEQA**

Not a Project, File No. PP17-008, General Procedure and Policy Making resulting in no changes to the physical environment.

## **PUBLIC SUBSIDY REPORTING**

This item does not include a public subsidy as defined in section 53083 or 53083.1 of the California Government Code or the City's Open Government Resolution.

/s/

MATT LOESCH

Director, Public Works

For questions, please contact Christopher Hickey, Division Manager, at [christopher.hickey@sanjoseca.gov](mailto:christopher.hickey@sanjoseca.gov) or (408) 535-8481.