



Memorandum

TO: HONORABLE MAYOR
AND CITY COUNCIL

FROM: Matt Loesch
Nanci Klein
Chris Burton

SUBJECT: SEE BELOW

DATE: January 12, 2024

Approved

Date

1/12/2024

SUPPLEMENTAL

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

REASON FOR SUPPLEMENTAL

To report out from additional stakeholder outreach and to provide a replacement recommendation and information to support City Council's deliberations for a Responsible Construction Ordinance.

RECOMMENDATION

Direct the City Manager to return to City Council with a Responsible Construction Ordinance that modifies the proposed ordinance, posted for the December 12, 2023¹ City Council meeting, that reflects the following modifications:

1. Limit the basis for violation to an unpaid wage theft judgment to employees and contractors who are working on the San José permitted project that is the subject of the certificate of occupancy.
2. Limit the unpaid final wage theft judgements to final judgments that can be confirmed by the contractor through the California Labor Commissioner's portal.
3. Exempt from the regulation projects that are subject to prevailing wage under state law, and projects that are under 10,000 sq. ft.

¹ <https://sanjose.legistar.com/View.ashx?M=F&ID=12498100&GUID=050F9024-097F-4D95-9507-AFC50FD508E8>

SUMMARY AND OUTCOME

If approved, staff would return to the City Council with a Responsible Construction Ordinance to add a new Part 8 to Chapter 24.02 to 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 when a valid complaint of unpaid final wage theft judgements is received for the owner, developer, contractor, or subcontractors on the San José construction project. 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, City Council approved revisions to the Wage Theft Prevention Policy (Item 3.3) and directed staff by November 2023 to coordinate with the South Bay Labor Council, the Santa Clara and San Benito Counties Building and Construction Trades Council, and the Wage Theft Coalition to develop and return to City Council with a Responsible Construction Ordinance.

In coordination with the South Bay Labor Council, Santa Clara and San Benito Building Trades Council, Santa Clara Wage Theft Coalition, and Working Partnerships USA, the Public Works Department (Public Works) identified the City of Sunnyvale's Responsible Construction Ordinance, effective July 1, 2022, as a framework for the City's Responsible Construction Ordinance. Public Works staff made minor edits to increase administrative and enforcement effectiveness.

On December 7, 2023, Public Works presented the draft Responsible Construction Ordinance at the Developers Roundtable meeting. Staff reviewed the details of the ordinance and responded to questions and comments. Staff received multiple questions, comments, and concerns from developers and their representatives.

On December 12, 2023, City Council continued item 3.7 - Amendment of Title 24 of the San José Municipal Code for a Proposed Responsible Construction Ordinance, and directed staff to conduct additional outreach with developers, contractors, financial institutions, and labor stakeholders to better understand concerns and potential impacts before returning to the City Council on January 23, 2024.

Outreach

Public Works, in coordination with the Planning, Building, and Code Enforcement Department and the Office of Economic Development and Cultural Affairs, conducted four meetings with stakeholders from the development, contractor, financial institutions, and labor community.

To increase attendance and opportunity for feedback, all meetings were conducted in-person and over Zoom video conference.

Developer/Contractor/Financial Stakeholders	Labor Stakeholders
<ul style="list-style-type: none">• Wednesday, December 20, 2023• Wednesday, January 3, 2024	<ul style="list-style-type: none">• Wednesday, December 20, 2023• Wednesday, January 3, 2024

The feedback received by the development, contractor, financial institutions, and labor stakeholders was collected during the outreach meetings and based on written responses submitted to the City. Staff conducted further research and analysis on the information, questions, and concerns collected from the stakeholders.

The primary concerns the development and contractor stakeholders expressed are summarized below:

1. The scope of the proposed ordinance is too broad because it holds the owners and general contractor liable for lower tier subcontractors and would include unpaid wage theft judgment from projects for different owners or general contractors. The basis for withholding the certificate of occupancy should be based on a violation on the specific project.
2. The proposed ordinance points to wage theft as a problem on large construction projects within San José and Santa Clara County. Most of the open/unpaid wage theft judgments have been assessed against individuals and small contractors on residential projects in San José and Santa Clara County.
3. Existing state law regulates wage theft through mechanic liens, and CA Labor Code sections 218.7 and 218.8 make general contractors already liable for subcontractors' and suppliers' failures to pay wages on a project.
4. Definitions as written in the proposed ordinance are too broad and require revisions.
5. The proposed regulation would discourage growth and development in San José, inadvertently hurt small and disadvantaged businesses, and is generally poorly drafted.
6. Wage theft on large construction projects is not a problem.

The primary concerns of the labor stakeholders are summarized below:

1. A reported 12,376 Santa Clara County construction workers have been the victims of wage theft for over \$46 million dollars between 2001-2024.
2. Multiple cities within the region have developed, passed, and implemented versions of a Responsible Construction Ordinance since 2019.

3. Any further revisions of the proposed ordinance should focus on third tier contractors, contractor/subcontractor bankruptcy, geographical limitations, and financing issues.
4. The intent of the ordinance is to incentivize payment of unpaid wage theft judgements of all contractors, regardless of tier.

ANALYSIS

Research

Public Works reviewed the California Labor Commissioner Wage Claim Adjudication (WCA)² and Judgement Search portals³. The Wage Claim Adjudication portal provides the total number of wage claims filed within California and the Judgement Search portal provides the total number judgements resulting from the wage claims that are unpaid/paid/partially paid. Choosing the most recent six-year period, preliminary research has found the following wage claims and unpaid judgements between January 1, 2018-December 31, 2023:

	Wage Claims	Final Judgements	Unpaid Judgements
Statewide	5000	1257	686
Santa Clara County*	939	97	59
San José Specific**	N/A	36	23

*San José WCA Office is the regional office for the County of Santa Clara

**San José Specific are the number business location or business owners with San José addresses

The wage claim and judgement information provided by the California Labor Commissioner portals provides company name, payment status, and total dollar amount owed, however, it does not provide the name or number of workers affected or the project in which the violation occurred. Additionally, staff is unable to determine if the payment status is accurate and up to date at time of search.

The Department of Labor (federal) does produce informational data on final judgements through a public search portal⁴. Between January 1, 2018- December 31, 2023, staff identified four Wage and Hour Division final judgements. The portal has similar deficiencies as the California Labor Commissioner portals (i.e., accuracy and up-to-date information) and more importantly, does not provide information on satisfaction of the judgement (e.g., open/unpaid, partial payment, etc.).

Staff has not been able to identify consistent sources of information regarding wage theft judgments in other states, counties, and cities.

² <https://cadir.my.site.com/wcsearch/s/>

³ <https://cadir.my.site.com/s>

⁴ <https://enforcedata.dol.gov/views/search.php>

Unpaid Wage Theft Judgements

In review of the Santa Clara County/San José specific claims and judgements between January 2018 through December 2023, 23 unpaid judgements were issued to 10 entities/individuals for a total of \$1,093,757.93 in back wages owed. Of note, 14 of 23 unpaid judgements were issued to a single company or individuals associated with the company for a total of \$324,655.57 in back wages owed.

Even though the California Labor Commissioner portal identifies 23 unpaid judgements, each with different judgement identifiers, multiple judgements found have identical issuance dates, judgement totals (i.e., total owed to employees), and were assessed to the same entity. Staff is unable to determine if identical issuance date and judgement totals to the same entity are duplicates and inaccurate, nor can staff identify if identical judgements are for one or multiple employees.

In review of entities and individuals found to have unpaid wage theft judgement with the California Labor Commissioner, staff finds that the size and capacity of the entities would not be utilized on large developments within the City, but more likely utilized on remodeling or maintenance projects for private, single-family, multi-family, or projects of less than 10,000 sq. ft.

Due to time and resources required, staff was unable to review statewide and Santa Clara County unpaid judgements for analysis and determination.

Project Labor Agreements/ Community Workforce Agreements

Exempting companies under PLA/CWA would exclude affected workers with unpaid wage theft judgements. Pre-hire collective bargaining agreements, referred to as Project Labor Agreements (PLA) or Community Workforce Agreements (CWA), provide worker rights and protections during the term of the agreement, however, these agreements only provide rights and protections for current workforces on current projects. PLA/CWA agreements require the utilization of local union workforces and provide companies with the opportunity to utilize existing employees so long as the employees meet specific training, certification, and experience requirements and register with the local union.

Clarifications

Stakeholders identified concerns regarding definitions and attestations and requested clarification and/or revision to the ordinance prepared for the December 12, 2023 City Council meeting.

Below are a sample of the concerns and clarifications requested:

Definitions of “Contractor”, “Subcontractor”, “Project construction employees” include material suppliers, office specialist, and other employee classifications who may not perform work on the San José project, with facilities or offices outside the State of California and/or

United States. Additionally, “Owner” does not account for multiple owners, non-participating owners/lessors, and other common relationships on large construction developments.

Owners are required to sign an attestation that all project construction employees, for all contractors and subcontractors, have meet or will meet California Labor Code section 2810.5 and 226(a). California Labor Code section 2810.5(a)(1)⁵ requires “*At the time of hiring*, an employer shall provide to each employee a written notice,...” of rate or rates of pay, allowances including meal or lodging, regular payday, name of the employer, physical address of employer’s main office, telephone number of employer, workers’ compensation insurance carrier, and accrual and use of paid sick leave. Concerns were raised regarding multiple tiers of contractors and subcontractors, documentation of thousands of workers, most of which have been under employment prior to the San José project or prior to California Labor Code 2810.5 taking effect.

Why is San José More Difficult to Finance

Rents in San José are lower, by a considerable dollar amount per month than rents achieved in surrounding cities like Mountain View and Sunnyvale. The comparatively low revenue generation from a project makes San José less desirable to develop in, given that the costs to develop in San José are at least as high as those of neighboring cities. Financiers are quite concerned that the time delays to the project would increase project costs including carry costs.

Staff Recommendation Modification Details

Staff recommends returning with a Responsible Construction Ordinance with the following modifications based on the concerns discussed below.:

Modification #1 - San José permitted project only, contractors and employees that worked on the specific project site.

While all unpaid wage theft judgements should be satisfied, wage theft judgements that occur on projects outside the City of San José and not on the specific project being built in San José may be difficult to confirm and enforce.

Construction contractors and subcontractors perform work on multiple projects, in multiple locations simultaneously. Similarly, construction employees may perform different scopes of work on the same project or multiple projects in the same day, week, or month.

Owners and developers have contractual agreements, that require worker protections and fair pay practices, with contractors and subcontractors that perform specific scopes of work on specific

⁵ <https://law.justia.com/codes/california/2022/code-lab/division-3/chapter-2/article-2/section-2810-5/>

project(s). Owners and developers purview of contractors and subcontractors business activities is limited to only the project in which they control and have contractual agreements.

Modification #2 - Only unpaid final judgements found on California Labor Commissioner's portal considered for violation.

The California Labor Commissioner's Wage Claim Adjudication and Wage Judgement portals are publicly available and allow all parties (e.g., Developers, Contractors, etc.) the ability to actively review all contractors, including subcontractors, for unpaid wage theft judgements prior to contracting for work. Focusing on California final judgements gives control to Developers and Contractors in who is allowed to work on the project; either removing specific contractors from consideration or the knowledge of existing unpaid wage theft judgements that will affect issuance of a final Certificate of Occupancy.

By limiting violations of the proposed ordinance to California Labor Commissioner final judgements, both the development community and the City would be relying on the same database for compliance and enforcement, respectively.

Modification #3 - Exemptions from policy projects subject to prevailing wage under state law and less than 10,000 sq. ft.

Exemptions - Prevailing wages required under state law

Projects requiring prevailing wages under state law have mechanisms in place to address and incentivize payment of unpaid wage theft judgement, and exempting prevailing wage projects does not decrease the effectiveness or intent of the ordinance.

Prevailing Wage is the basic hourly rate paid on public works projects to a majority of workers engaged in a particular craft, classification or type of work within the locality and in the nearest labor market area. "Public works" in general means: Construction, alteration, demolition, installation, or repair work done under contract and paid in whole or in part out of public funds. The "Awarding Body" is the entity that awards a contract for public work and is sometimes known as the project owner. The awarding body can be any kind of public agency or official (state, county, city, school board, water district, etc.) or a private entity using public funds.

Since 2015, the California Department of Industrial Relations has required all contractors and subcontractors to register with the Department to be eligible to perform work. Contractor must meet the following requirements for eligibility:

1. Have workers' compensation coverage,
2. Have Contractors State License,
3. Not have any delinquent unpaid wage or penalty assessment owed to an employee or enforcement agency,

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4. Not be under federal or state debarment, and
5. No prior violations of registration requirements

Exemption - Projects less than 10,000 sq ft

Exemptions from an ordinance should be adopted to prevent or limit unintended distress or when other mechanisms are in place that support the intent of the ordinance.

Projects requiring permits for less than 10,000 sq ft of construction, remodeling or repair include single and multi-family homes, as well as small businesses with one location. The impact and liability to these types of permit holder could be exorbitant. Exempting projects of less than 10,000 sq ft of construction, remodeling, or repair would limit the impact to homeowners and small businesses.

EVALUATION AND FOLLOW-UP

Staff will return to City Council with a revised ordinance to incorporate City Council direction.

COORDINATION

This memorandum was developed in coordination with the City Attorney's Office and the City Manager's Budget Office.

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, the Santa Clara and San Benito Counties Building Trades Council, and Developer and Construction Roundtable Group.

This memorandum will be posted on the City's Council Agenda website for the January 23, 2024, City Council meeting.

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COMMISSION RECOMMENDATION AND INPUT

No commission recommendation or input is associated with this action.

/s/
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