



Memorandum

TO: HONORABLE MAYOR
AND CITY COUNCIL

FROM: Matt Loesch
Nanci Klein
Chris Burton

SUBJECT: SEE BELOW

DATE: May 28, 2024

Approved

Date

6/7/24

**SUBJECT: AMENDMENT TO TITLE 24 OF THE SAN JOSE MUNICIPAL CODE
TO REGULATE RESPONSIBLE PRIVATE CONSTRUCTION**

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 certain private development projects of more than 10,000 square feet by withholding the certificate of occupancy when an owner or contractor has unpaid final wage theft judgments issued by the State of California, Department of Industrial Relations.

SUMMARY AND OUTCOME

The proposed Responsible Construction Ordinance would require owners and contractors with permits on private construction projects of 10,000 square feet or more to review the State of California wage theft portal and attest that contractors and subcontractors performing work on the project have no unpaid, outstanding wage theft judgments. The proposed ordinance would require any complainants under the ordinance to submit proof of an unpaid final wage theft judgment and provide the owner and contractor with an opportunity to appeal or cure the alleged violation. If the owner, developer, contractor, or subcontractor have any unpaid final wage theft judgments, the permit holder and/or the contractor must satisfy the judgment in order to secure a final certificate of occupancy prior to issuance of the final certificate on the project.

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.

On December 12, 2023, staff presented a framework for a Responsible Construction Ordinance that was substantially similar to ordinances approved in the City of Sunnyvale and City of Mountain View with administrative and enforcement modifications specific to the City of San José. Staff received feedback regarding public outreach and were directed by City Council to return with a revised draft ordinance on January 23, 2024. Staff from the departments of Public Works and Planning, Building, and Code Enforcement along with staff from the City Manager's Office of Economic Development and Cultural Affairs, met with development and labor stakeholders in four scheduled meetings between December 20, 2023 and January 3, 2024.

On January 23, 2024, staff presented recommended modifications to the proposed ordinance based on stakeholder discussions and input¹. City Council considered and approved modifications in the memorandum² dated January 18, 2024 from City Councilmembers Davis, Jimenez, Torres, Ortiz, and Foley. City Council directed staff to return with a proposed Responsible Construction Ordinance that would address City Council recommendations outlined below.

1. Before receiving a building permit, applicants will attest that, to the best of their knowledge, all contractors and subcontractors hired or to be hired to provide labor on their project are either not listed on the outstanding unpaid wage theft judgment(s) list at the time of attestation or, if they are listed, will produce proof of satisfaction of the judgment(s) before work begins.
 - a. Applicant attestations will be based on checking California Department of Industrial Relations Judgment Search portal as of the date of the building permit application;
 - b. If a contractor or subcontractor is added to the project subsequent to building permit receipt, the project owner is responsible for checking each new company for outstanding wage theft judgment(s) or produce proof judgment has been satisfied prior to beginning work on the project;
 - c. Project owners are not responsible for contractors or subcontractors who are not on the outstanding judgments list at the time the building permit is applied for, but later receive an unpaid wage theft judgment and refuse to pay, unless the unpaid judgment is for work on the permitted project;
 - d. Project owners who hired contractor or subcontractor who was on the outstanding judgments list without producing proof of satisfaction of the judgment before beginning work would be required to pay the judgment or cause the contractor

¹ <https://sanjoseca.primegov.com/Portal/viewer?id=0&type=7&uid=81a08501-133e-45ef-96b7-2763f18ce42a>

² <https://sanjoseca.primegov.com/Portal/viewer?id=0&type=7&uid=780f06d7-859c-441c-8365-f26d11813f74>

- owing the money to pay the judgment, before receiving the final certificate of occupancy;
- e. Only contractors and subcontractors that meet the materiality threshold for the project are included.
2. All projects at or above 10,000 square feet are included, regardless of project labor agreements or prevailing wage requirements.

ANALYSIS

As directed by City Council, staff revised definitions, requirements, and exemptions to the proposed Responsible Construction Ordinance that would require owners and contractors with permits on private construction projects of 10,000 square feet or more to review the State of California wage theft portal and attest that contractors and subcontractors performing work on the project have no unpaid, outstanding wage theft judgments. The ordinance requires owners and developers to actively review contractor and subcontractor wage theft judgment history at time of building permit application and attest that no outstanding wage theft judgments exist, existing judgments have proof and verification of satisfaction prior to work performed on the project, and any wage theft judgment(s) entered against the owner, contractor, or subcontractor for labor on the project are satisfied prior to application for a certificate of occupancy on the project. The ordinance is only applicable to contractors and subcontractors who provide labor on the project and whose portion of the work exceeds \$100,000 or 1% of the total value of the project. The main revisions are outlined below.

Definitions

“Unpaid Wage Theft Judgment”

- Revised to include only California Department of Industrial Relations judgments that can be publicly verified by reference to the California Department of Industrial Relations Judgment Search database, or any succeeding database.

“Subcontractor”

- Revised to clarify any business or person that carries out work of the prime contractor or another contractor for the project, provides labor to the project, and whose portion of the work exceeds \$100,000 or 1% of the value of the construction cost of the project, whichever is greater.

“Outstanding Judgment List”

- Added to clarify and used in reference throughout the ordinance, the list of contractors who have any unpaid wage theft judgment(s) against them generated from the California Department of Industrial Relations Judgment Search database, or any succeeding database, as of the date of the building permit application.

Requirements

Acknowledgment of Responsibility:

- Applicant is required to sign as a condition of approval for a building permit, that the owner/developer has verified that all contractors and subcontractors hired on the project, as of the date of the building permit application, are not listed on the California Department of Industrial Relations database as having any wage theft judgement(s) entered against them.
- Owner and contractor are responsible for verifying, prior to hiring any new contractor or subcontractor, that the contractor or subcontractor does not appear on the outstanding judgments list, as of date of the building permit application.
- Owner is responsible for ensuring that contractor and or subcontractors who are listed on the California Department of Industrial Relations database, as of the date of the building permit application, have provided proof demonstrating that unpaid wage theft judgment(s) have been satisfied prior to being hired onto the project.
- Owner is responsible for ensuring that any unpaid wage theft judgment(s) entered against the owner, contractor, or subcontractor for labor provided to the project are satisfied prior to application for a certificate of occupancy on the project.

Pay Transparency Certification- Applicants will attest that:

- Owner/developer do not have unpaid judgment(s) entered against them as of the date of the building permit application; and
- No contractor or subcontractor on the project have any unpaid judgment(s) entered against them as of the date of the building permit application; and
- No contractor or subcontractor have any unpaid wage theft judgment(s) entered against them for labor provided to the project.

Exemptions

- Removal of exemption for projects subject to prevailing wage and projects subject to a Project Labor Agreement.
- Reduced the size threshold from 15,000 square feet to 10,000 square feet.

The **table** below indicates the expected impact at several size thresholds based on building permit data from 2019-2023.

Building Permit Data 2019-2023: Total Issued by Square Feet

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

Administration/Implementation

Implementation and enforcement of the Responsible Construction Ordinance will commence December 1, 2024. Prior to implementation and enforcement, staff will finalize internal systems, mechanisms, processes, and responsibilities through written guidelines.

Staff identified the following processes and procedures that will be developed through administrative guidelines:

- Clarify authority between an applicant of a building permit and owner of the project, submittal of attestations;
- Development of Acknowledgement of Responsibility and Pay Transparency Certification through City's AMANDA system;
- "Valuation" of contractors and subcontractors through the creation of Acknowledgement of Responsibility and Pay Transparency Certifications forms; and
- Development of process, standards, and requirements of complaints received and reviewed by the Office of Equality Assurance.

Additionally, the Office of Equality Assurance in the Public Works Department will coordinate with the State of California Department of Industrial Relations and the California Labor Commissioner to ensure access, ongoing updates, and maintenance of the wage theft judgment portal and identify and define proof of satisfaction of outstanding, unpaid judgments.

EVALUATION AND FOLLOW-UP

The Public Works Department's Office of Equality Assurance will develop, implement, and monitor the administration of the Responsible Construction Ordinance, working closely with the Planning, Building, and Code Enforcement Department.

COORDINATION

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

PUBLIC OUTREACH

City staff met with representatives from the South Bay Labor Council, County of Santa Clara Wage Theft Coalition, Working Partnerships USA, the Santa Clara and San Benito Counties Building Trades Council, San Jose Chamber of Commerce, and Developer and Construction Roundtable Group.

HONORABLE MAYOR AND CITY COUNCIL

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This memorandum will be posted on the City's Council Agenda website for the June 18, 2024 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

/s/
NANCI KLEIN
Director, Office of Economic Development and
Cultural Affairs

/s/
CHRIS BURTON
Director, Planning, Building, and Code Enforcement

For questions, please contact Christopher Hickey, Division Manager, Public Works Department, at christopher.hickey@sanjoseca.gov or (408) 535-8481.