

**FW: "Responsible" Construction Ordinance - Open Letter**

City Clerk <city.clerk@sanjoseca.gov>

Fri 1/12/2024 10:40 AM

To: Agendadesk <Agendadesk@sanjoseca.gov>

📎 1 attachments (862 KB)

An\_Open\_Letter\_to\_the\_City\_re\_Responsible\_Construction\_Ordinance\_1.5.pdf;

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**From:** Shawn Milligan [REDACTED]

**Sent:** Friday, January 12, 2024 10:15 AM

**To:** The Office of Mayor Matt Mahan <mayor@sanjoseca.gov>; Reed, Jim <Jim.Reed@sanjoseca.gov>; Klein, Nanci <Nanci.Klein@sanjoseca.gov>; City Clerk <city.clerk@sanjoseca.gov>

**Cc:** Mark Tersini [REDACTED], Todd Trekell <[REDACTED]> [REDACTED] Bill Baron

[REDACTED] James Salata [REDACTED]

**Subject:** FW: "Responsible" Construction Ordinance - Open Letter

[External Email]

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Dear Mayor Mahan, Councilmembers and City Staff,

I am writing to express my support for the letter provided to the City by Mr. Trekell and those who signed the open letter. There is nothing "responsible" about the draft ordinance being considered by the City. The draft ordinance is nothing more than an overt attempt by some trade unions to force private developers into Project Labor Agreements instead of engaging in open and fair competition.

San Jose is one of the most cost burdensome communities in the nation when it comes to building housing and commercial development. If adopted, this ordinance will make San Jose even less business friendly. The City's leadership and economic development department should be actively looking for ways to reduce project costs and regulatory burdens so more investment capital will flow into the City. Furthermore, the City's economic development efforts should be seeking regional advantage. Regional advantage means making San Jose the most desirable city for investment in the Bay Area ~ one that reduces project planning cycle times, reduces fees and exactions, and eliminates burdensome regulations.

I urge the City Council to reject this ordinance.

Sincerely,

Shawn Milligan  
Milligan Land Company, LLC  
[REDACTED]



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Begin forwarded message:

**From:** Todd Trekell [REDACTED]

**Date:** January 5, 2024 at 5:03:08 PM PST

**To:** [mayoremail@sanjoseca.gov](mailto:mayoremail@sanjoseca.gov), [District1@sanjoseca.gov](mailto:District1@sanjoseca.gov), [District2@sanjoseca.gov](mailto:District2@sanjoseca.gov), [District3@sanjoseca.gov](mailto:District3@sanjoseca.gov), [District4@sanjoseca.gov](mailto:District4@sanjoseca.gov), [District5@sanjoseca.gov](mailto:District5@sanjoseca.gov), [district6@sanjoseca.gov](mailto:district6@sanjoseca.gov), [District7@sanjoseca.gov](mailto:District7@sanjoseca.gov), [district8@sanjoseca.gov](mailto:district8@sanjoseca.gov), [district9@sanjoseca.gov](mailto:district9@sanjoseca.gov), [district10@sanjoseca.gov](mailto:district10@sanjoseca.gov)

**Cc:** "Loesch, Matthew" <[Matt.Loesch@sanjoseca.gov](mailto:Matt.Loesch@sanjoseca.gov)>, [nanci.klein@sanjoseca.gov](mailto:nanci.klein@sanjoseca.gov), [city.clerk@sanjoseca.gov](mailto:city.clerk@sanjoseca.gov), Brock Hill [REDACTED], Case Swenson <[REDACTED]>, "Dave Edgar" [REDACTED], "Gary Filizetti" <[REDACTED]>, "Jim Salata" <[REDACTED]>, "Jon W. Ball" [REDACTED], "Mark Tersini" ([REDACTED]), Toeniskoetter News [REDACTED], Mike Walsh [REDACTED], Bill Baron [REDACTED]

**Subject:** Responsible Construction Ordinance - Open Letter

Dear Mayor Mahan, Honorable Councilmembers, Director Loesch, and Director Klien,

On behalf of concerned contractors, developers, and business advocacy groups, please find attached an Open Letter to the City of San Jose Regarding the Proposed "Responsible Construction" Ordinance. For the past 2 1/2 weeks, we have spent a considerable amount of time trying to better understand the adverse impacts of the proposed ordinance. We have documented our findings in the attached letter which we hope will help educate staff and the community on the unintended consequences of the proposed ordinance.

We are available at any time to meet with you and City staff to further discuss our findings.

Sincerely,

**Todd C. Trekell**  
Development Manager

[REDACTED]

HUNTER PROPERTIES

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**AN OPEN LETTER TO THE CITY OF SAN JOSÉ REGARDING  
THE PROPOSED “RESPONSIBLE CONSTRUCTION” ORDINANCE:  
A MISLEADING NAME FOR A MISGUIDED POLICY**

January 5, 2024

The Honorable Matt Mahan  
Mayor, City of San José  
200 East Santa Clara St., 18<sup>th</sup> Floor  
San José, CA 95113-1905

San Jose City Councilmembers  
City of San José  
200 East Santa Clara St., 18<sup>th</sup> Floor  
San José, CA 95113-1905

Matt Loesch, P.E., Director  
Department of Public Works  
City of San José  
200 East Santa Clara St.  
San José, CA 95113-1905

Nanci Klein, Director  
Office of Economic Development  
City of San José  
200 East Santa Clara St.  
San José, CA 95113-1905

**Dear Mayor Mahan, Honorable Councilmembers, Director Loesch, and Director Klein:**

On December 12, 2023, the City Council directed Staff to consider revisions to a proposed Ordinance amending Title 24 of the San José Municipal Code to further regulate development in the City by requiring building officials to withhold a certificate of occupancy from private owners when any contractor, subcontractor, or supplier are subject to an unpaid final wage theft judgment. The only exceptions would be for projects less than 10,000 square feet, projects otherwise subject to prevailing wage requirements, and projects subject to a project labor agreement.

The name of this proposed regulation, which is being pushed by organized labor in a transparent attempt to force every new non-exempt private development in the City to hire only union labor, is the so-called “Responsible Construction Ordinance.” But the policy, if adopted, would be anything but responsible governance. As a group of concerned owners, developers, contractors, and subcontractors (many of which are signatory to collective bargaining agreements and whose workers are union members), we write collectively to urge the City to reject the Ordinance.

The reasons for our concern are numerous, but can be summarized as follows. Staff in the City’s Office of Equality Assurance are already working to diligently enforce the City’s wage policies, and recent changes in state law already criminalize wage theft and make contractors responsible for the unpaid wages of their subcontractors. The information retained by the Department of Industrial Relations confirms that unresolved wage theft claims in Santa Clara County are not a problem on the large construction projects that organized labor has targeted. Rather, almost all unresolved wage theft judgments occur on smaller residential projects, where day laborers and undocumented workers are hired without receiving minimum wage or the protection of worker’s compensation insurance. If organized labor and the City are honestly concerned about addressing wage theft from vulnerable workers, they would remove the exceptions in the proposed Ordinance for smaller construction projects and apply the new law equally to *all* construction projects, commercial and residential alike.

To: City of San José  
Re: “Responsible Construction” Ordinance  
January 5, 2024  
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Put simply, unpaid wage theft judgments on large construction projects in San Jose are not the crisis that local trade councils falsely represent it to be. The real economic crises facing San Jose are the high costs of construction and the ever-expanding set of regulations that disincentive development and stifle attempts to address homelessness by making our City the most expensive in Northern California to build affordable housing. The City is aware of these problems, and developers and contractors are already on record regarding the impact that rising construction costs and the slow-down in development has already had on labor. As recently reported in the Mercury News, “The fewer projects, the less labor there is . . . The less labor there is, the fewer projects there are. That death spiral is going on.”<sup>1</sup>

Given these existing economic challenges, allowing organized labor to use the City to impose more regulation on development is the wrong approach and threatening owners and contractors with withholding certificates of occupancy will have negative and unintended consequences on the workers that organized labor claims it wants to protect:

- **The Ordinance will further disincentivize growth and development in the City.** As written, the proposal makes every owner and their general contractors on non-exempt projects strictly liable for paying the wage theft judgments of any lower-tier subcontractor or supplier on their projects – even when the wage theft occurred on previous projects for different owners or different general contractors on projects located outside of the City, or even out of the state. In fact, the Ordinance imposes new fines and penalties. This result is not only unfair, and but when presented with this additional liability, developers may simply choose to build their projects elsewhere.
- **The Ordinance will inadvertently hurt small and Disadvantaged Business Enterprises.** Faced with the requirement of having to pay for the wage judgments of the subcontractors and suppliers on prior projects, general contractors will avoid hiring small and Disadvantage Business Enterprises (*i.e.*, women, minority, and veteran owned businesses), who cannot demonstrate a long track record of financial stability.
- **Wage theft on large construction projects is not the problem.** Proponents of the Ordinance will point to the egregious events at the Silvery Towers project and statewide statistics about wage theft as the justification for additional regulation. But these claims are disingenuous. The perpetrator of the atrocities at Silvery Towers, which occurred more than four years ago, is now in jail. And we challenge proponents of the Ordinance to provide support for their claim that wage theft is a continuing problem on large construction projects in San Jose. In fact, the data collected by the Department of Industrial Relations, which we have included as Attachment A, shows that the opposite is true. Of the 89 total wage judgments in all of Santa Clara County, most are wage misclassification issues, not wage theft cases such as the Silvery Towers project. Even so, the majority of these claims are resolved, and almost all of the remaining open cases are against individuals and small contractors on residential projects. Again, if the City and

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<sup>1</sup> Greshler, Gabriel. “‘Death Spiral’: It’s getting obscenely expensive to build housing in San Jose.” *The Mercury News*, 26 October 2023, <https://www.mercurynews.com/2023/10/26/death-spiral-its-getting-obscenely-expensive-to-build-housing-in-san-jose/>.

To: City of San José  
Re: “Responsible Construction” Ordinance  
January 5, 2024  
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organized labor are honest about their claims of wanting to address wage theft, the Ordinance should not exempt small, residential projects, where most labor law violations occur.

- **State law already addresses wage theft.** California’s mechanic’s lien laws already make owners liable for the wage claims of unpaid workers. Similarly, Labor Code sections 218.7 and 218.8 make general contractors liable for their subcontractor’s and supplier’s failure to pay wages on their projects. And Penal Code section 487m already makes wage theft, including minimum wage violations, failing to pay overtime, and failing to provide accurate and itemized wage statements, a crime. This proposed Ordinance is not only unneeded, but goes too far. It makes owners and contractors in San Jose liable for wage violations of subcontractors and suppliers on previous projects done for different owners and general contractors in other cities and other states. Those intent on committing these wage crimes will not be deterred by the Ordinance, and making innocent owners and contractors pay for these crimes committed by others raises serious constitutional and other due process concerns. If adopted, the City should expect years of litigation regarding enforcement of this new regulation, and the City and Staff should pause to consider the legal challenges outlined in the letter from counsel included as Attachment B.
- **The Ordinance itself is poorly drafted and would need to be substantially revised.** The problems with the proposed Ordinance are simply too numerous to list here. But we have included as Attachment C a lengthy copy of the Ordinance with detailed annotations of all of the issues that the City and Staff should consider. The definitions of “contractor” and “subcontractor” will make developers strictly and vicariously liable for the wage claims of suppliers and their office staff, including people who never set foot on the project or perform any work in San Jose. Even the term “wage theft judgment” is not a uniformly accepted or defined term. Owners, contractors, and City Staff have no way to protect themselves or to find “wage theft judgments” in other jurisdictions. Wage theft is also a different concern than wage misclassification cases—but the Ordinance ignores Developers and contractors in San Jose will become the target of unscrupulous plaintiff class-action attorneys, who will use the threat of the City withholding certificates of occupancy to force the payment of disputed or otherwise frivolous wage claims.
- **Even union contractors oppose the Ordinance.** Many of the largest general contractors building in the City are signatory to collective bargaining agreements and their workers are union members. Although they recognize and applaud efforts to protect laborers from wage theft, they oppose this proposed Ordinance because they recognize the unintended consequences that it will have on further disincentivizing development and growth in the City.

The “Responsible Construction” Ordinance is a misleading name for bad governance. With all of the economic challenges facing development in San Jose, the City should reject this unnecessary and misguided regulation.

cc: Nora Frimann, City Attorney

To: City of San José  
Re: “Responsible Construction” Ordinance  
January 5, 2024  
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**We oppose the City’s adoption of the proposed Responsible Construction Ordinance.**



Gary Filizetti, President  
Justine Pereira, Secretary  
DEVCON CONSTRUCTION, INC.

Mark Tersini, Principal  
KT URBAN



Brock Hill, Vice President  
PREMIER RECYCLE COMPANY

Case Swenson, President/CEO  
SWENSON



William B. Baron, Managing Partner  
BRANDENBURG PROPERTIES

Todd Trezell, Development Manager  
HUNTER PROPERTIES, INC.



Megan Toeniskoetter, CEO  
TOENISKOETTER CONSTRUCTION, INC.

John Ball, Commercial Builder, Retired



Patricia Saucedo  
BIA|BAY AREA

James Salata, President  
GARDEN CITY CONSTRUCTION



Mike Walsh, Projects Director  
URBAN CATALYST

Dave Edgar, President & CEO  
IRON CONSTRUCTION, INC.

# **Attachment A**

# **Attachment A**

**Total Records:** 89**Search Date:** 1/4/2024

**\*Disclaimer:** Once the judgment is issued, the judgment balance is shown as due in the Labor Commissioner's records. This amount does not reflect post-judgment interest, costs or other amounts that may be added to the judgment after issuance. Furthermore this does not reflect any payments that may have been made since the judgment was issued. Defendants often make payments to claimants directly without the knowledge of the Labor Commissioner's Office. Thus judgments shown as open/unpaid may have been paid in whole or in part.

**Filter Applied:**

<b>County :</b> Santa Clara	<b>Naics Code :</b> 23	<b>Judgment Entry Date :</b> <b>judgmentEntryFromDate :</b> 5 / 1 / 2019 <b>judgmentEntryToDate :</b> 1 / 4 / 2024
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<b>Labor Code § 2810.4</b>	<b>Judgment Name</b>	<b>Judgment Status</b>	<b>Court</b>	<b>Defendant/Employer Name</b>	<b>Primary Address</b>	<b>Judgment Total*</b>
	J-90854	Open/Unpaid	California Superior Court, County of Santa Clara, Downtown Superior Court	Ricardo Rodriguez, an Individual	305 88TH ST APT 4 DALY CITY CA 94015-1720	\$ 31,672.73
	J-90850	Open/Unpaid	California Superior Court, County of Santa Clara, Downtown Superior Court	Quartz Construction, a California Corporation	2909 NIEMAN BLVD SAN JOSE CA 95148	\$ 31,380.23
	J-90468	Open/Unpaid	California Superior Court, County of Santa Clara, Downtown Superior Court	Francisco Javier Morales Marques,	9252 SEVERANCE ST GILROY CA 95020-7267	\$ 11,378.90

<b>Labor Code § 2810.4</b>	<b>Judgment Name</b>	<b>Judgment Status</b>	<b>Court</b>	<b>Defendant/Employer Name</b>	<b>Primary Address</b>	<b>Judgment Total*</b>
	J-90527	Open/Unpaid	California Superior Court, County of Santa Clara, Downtown Superior Court	DARL WATSON, an individual dba CBS Electrical,	8162 POWER INN RD UNIT 101 SACRAMENTO CA 95828-6731	\$ 24,683.10
	J-90529	Open/Unpaid	Santa Clara County Recorder	Garzon Leovardo Garcia, an Individual	1900 CALIFORNIA ST APT 3 MOUNTAIN VIEW CA 94040	\$ 8,719.28
	J-88826	Open/Unpaid	California Superior Court, County of Santa Clara, Downtown Superior Court	JOHNNY TRUNG HUA, an individual	6242 NAVAJO RD WESTMINSTER CA 92688	\$ 10,121.52
	J-88825	Open/Unpaid	California Superior Court, County of Santa Clara, Downtown Superior Court	FM Builders, Inc., a California Corporation	6242 NAVAJO RD WESTMINSTER CA 92683	\$ 11,511.78
	J-88527	Open/Unpaid	California Superior Court, County of Santa Clara, Downtown Superior Court	Elite Rooter Peninsula, Inc., a California Corporation	3000 BUNSEN AVE STE B VENTURA CA 93003-7639	\$ 2,195.50
	J-88450	Open/Unpaid	California Superior Court, County of Santa Clara, Downtown Superior Court	ELITE ROOTER SAN JOSE, INC., a California Corporation	20 N AVIADOR ST STE C CAMARILLO CA 93010-8398	\$ 4,290.21

<b>Labor Code § 2810.4</b>	<b>Judgment Name</b>	<b>Judgment Status</b>	<b>Court</b>	<b>Defendant/Employer Name</b>	<b>Primary Address</b>	<b>Judgment Total*</b>
	J-87631	Closed-Claimant Judgment	California Superior Court, County of Santa Clara, Downtown Superior Court	Anthem Green Developers, Inc., a California Corporation	13605 SURREY LN SARATOGA CA 95070	\$ 14,014.64
	J-87593	Open/Unpaid	California Superior Court, County of Santa Clara, Downtown Superior Court	Advantage Asphalt, a General Partnership	PO BOX 1393 SAN MARTIN CA 95046	\$ 4,500.00
	J-87593	Open/Unpaid	California Superior Court, County of Santa Clara, Downtown Superior Court	Reggie Jeffery Stanley, an Individual dba Advantage Asphalt	15200 Monterey Road San Martin CA 95046	\$ 4,500.00
	J-87593	Open/Unpaid	California Superior Court, County of Santa Clara, Downtown Superior Court	Richard Harry Wasso, dba Advantage Asphalt	15200 Monterey Road San Martin CA 95046	\$ 4,500.00
	J-86937	Open/Unpaid	California Superior Court, County of Santa Clara, Downtown Superior Court	Gabriel Huitron,	10981 EDGEMONT DR SAN JOSE CA 95127	\$ 24,412.74

<b>Labor Code § 2810.4</b>	<b>Judgment Name</b>	<b>Judgment Status</b>	<b>Court</b>	<b>Defendant/Employer Name</b>	<b>Primary Address</b>	<b>Judgment Total*</b>
	J-86866	Open/Unpaid	California Superior Court, County of Santa Clara, Downtown Superior Court	Rosendo Villareal, an individual,	13 San Felipe So. San Francisco CA 94080	\$ 10,701.25
	J-86309	Closed-Claimant Judgment	California Superior Court, County of Santa Clara, Downtown Superior Court	UNITED STATES CONTRACTORS CORPORATION, a California Corporation	1276 AUTO PARK WAY #305D ESCONDIDO CA 92029	\$ 7,508.06
	J-86311	Closed-Claimant Judgment	California Superior Court, County of Santa Clara, Downtown Superior Court	LEONARDO CONTRERAS, an Individual	1650 LINDA VISTA DR, SUITE 211 SAN MARCOS CA 92078	\$ 7,187.29
	J-85694	Closed-Claimant Judgment	California Superior Court, County of Santa Clara, Downtown Superior Court	DAVID FORKOSH, an Individual	14151 CHANDLER BLVD SHERMAN OAKS CA 91401	\$ 15,118.65
	J-85472	Closed-Claimant Judgment	California Superior Court, County of Santa Clara, Downtown Superior Court	HELPIE KITCHEN & BATH SUPPLIER LLC, a Limited Liability Company	14151 CHANDLER BLVD SHERMAN OAKS CA 91401	\$ 15,118.66

<b>Labor Code § 2810.4</b>	<b>Judgment Name</b>	<b>Judgment Status</b>	<b>Court</b>	<b>Defendant/Employer Name</b>	<b>Primary Address</b>	<b>Judgment Total*</b>
	J-85834	Open/Unpaid	California Superior Court, County of Santa Clara, Downtown Superior Court	Tim Michael Facciolla, an Individual	20638 CLEO AVE CUPERTINO CA 94014	\$ 17,221.59
	J-85830	Open/Unpaid	California Superior Court, County of Santa Clara, Downtown Superior Court	Tim Michael Facciolla, an Individual	20638 CLEO AVE CUPERTINO CA 94014	\$ 17,302.38
	J-85829	Open/Unpaid	California Superior Court, County of Santa Clara, Downtown Superior Court	Tim Michael Facciolla, an Individual	20638 CLEO AVE CUPERTINO CA 94014	\$ 18,113.90
	J-85826	Open/Unpaid	California Superior Court, County of Santa Clara, Downtown Superior Court	Tim Michael Facciolla, an Individual	20638 CLEO AVE CUPERTINO CA 94014	\$ 22,050.78
	J-85810	Open/Unpaid	California Superior Court, County of Santa Clara, Downtown Superior Court	Tim Michael Facciolla, an Individual	20638 CLEO AVE CUPERTINO CA 94014	\$ 14,684.31

<b>Labor Code § 2810.4</b>	<b>Judgment Name</b>	<b>Judgment Status</b>	<b>Court</b>	<b>Defendant/Employer Name</b>	<b>Primary Address</b>	<b>Judgment Total*</b>
	J-85836	Open/Unpaid	California Superior Court, County of Santa Clara, Downtown Superior Court	Tim Michael Facciolla, an Individual dba Whitehorse Builders	20638 CLEO AVE CUPERTINO CA 94014	\$ 22,702.92
	J-85577	Closed-Claimant Judgment	California Superior Court, County of Santa Clara, Downtown Superior Court	Garzon Leovardo Garcia, an Individual	1900 CALIFORNIA ST APT 3 MOUNTAIN VIEW CA 94040	\$ 15,036.32
	J-85456	Closed-Claimant Judgment	California Superior Court, County of Santa Clara, Downtown Superior Court	The Assemblers, LLC, a California limited liability company	407A PARADISE RD PRUNEDALE CA 93907	\$ 6,007.50
	J-84950	Open/Unpaid	California Superior Court, County of Santa Clara, Downtown Superior Court	Magdonal Antonio Palacios, an Individual	1639 E 88th ST LOS ANGELES CA 90002-1315	\$ 41,931.31
	J-84948	Open/Unpaid	California Superior Court, County of Santa Clara, Downtown Superior Court	CSI Building, Inc., a California Corporation	261 E COLORADO BLVD # 212 PASADENA CA 91101-6131	\$ 34,431.31

<b>Labor Code § 2810.4</b>	<b>Judgment Name</b>	<b>Judgment Status</b>	<b>Court</b>	<b>Defendant/Employer Name</b>	<b>Primary Address</b>	<b>Judgment Total*</b>
	J-84944	Open/Unpaid	California Superior Court, County of Santa Clara, Downtown Superior Court	CAL Structure, Inc., a California Corporation	3579 E. Foothill Blvd., Suite 426 Pasadena CA 91107	\$ 34,431.31
	J-84945	Open/Unpaid	California Superior Court, County of Santa Clara, Downtown Superior Court	Adrien Vincent Severo, an Individual / Agent CAL Structure, Inc., a California Corporation	261 E COLORADO BLVD # 212 PASADENA CA 91101-6131	\$ 32,315.45
	J-84876	Closed-Claimant Judgment	California Superior Court, County of Santa Clara, Downtown Superior Court	Hector Rodriguez, an Individual / Agent, H&R Cable Contractors LLC, a Florida Limited Liability Company	3766 METRO PKWY # 533 FT MYERS FL 33916-7493	\$ 14,496.43
	J-84875	Closed-Claimant Judgment	California Superior Court, County of Santa Clara, Downtown Superior Court	H&R Cable Contractors LLC, a Florida Limited Liability Company	3766 METRO PKWY APT 533 FT MYERS FL 33916-7493	\$ 14,645.37
	J-83136	Open/Unpaid	California Superior Court, County of Santa Clara, Downtown Superior Court	Sergio Arturo Aguilar Castillo, an Individual	844 CHARCOT AVE SAN JOSE CA 95131-2210	\$ 25,323.65

<b>Labor Code § 2810.4</b>	<b>Judgment Name</b>	<b>Judgment Status</b>	<b>Court</b>	<b>Defendant/Employer Name</b>	<b>Primary Address</b>	<b>Judgment Total*</b>
	J-83137	Open/Unpaid	California Superior Court, County of Santa Clara, Downtown Superior Court	Plumbing Tech Repipe Specialists, Inc., a California Corporation	844 CHARCOT AVE SAN JOSE CA 95131-2210	\$ 33,731.70
	J-83135	Open/Unpaid	California Superior Court, County of Santa Clara, Downtown Superior Court	Laura Yamila Valdez Miranda, an Individual	3679 El Grande Dr. San Jose CA 95132	\$ 17,530.67
	J-83132	Open/Unpaid	California Superior Court, County of Santa Clara, Downtown Superior Court	Plumbing Tech Repipe Specialists, Inc., a California Corporation	844 CHARCOT AVE SAN JOSE CA 95131-2210	\$ 25,323.65
	J-83138	Open/Unpaid	California Superior Court, County of Santa Clara, Downtown Superior Court	Sergio Arturo Aguilar Castillo, an Individual	844 CHARCOT AVE SAN JOSE CA 95131-2210	\$ 33,731.70
	J-83139	Open/Unpaid	California Superior Court, County of Santa Clara, Downtown Superior Court	Laura Yamila Valdez Miranda, an Individual	3679 El Grande Dr. San Jose CA 95132	\$ 22,710.73

<b>Labor Code § 2810.4</b>	<b>Judgment Name</b>	<b>Judgment Status</b>	<b>Court</b>	<b>Defendant/Employer Name</b>	<b>Primary Address</b>	<b>Judgment Total*</b>
	J-83128	Open/Unpaid	California Superior Court, County of Santa Clara, Downtown Superior Court	Plumbing Tech Repipe Specialists, Inc., a California Corporation	844 CHARCOT AVE SAN JOSE CA 95131-2210	\$ 22,425.79
	J-83152	Closed-Claimant Judgment	California Superior Court, County of Santa Clara, Downtown Superior Court	Laura Yamila Valdez Miranda, an Individual	3679 EL GRANDE DR SAN JOSE CA 95132-3117	\$ 51,489.55
	J-83151	Closed-Claimant Judgment	California Superior Court, County of Santa Clara, Downtown Superior Court	Sergio Arturo Aguilar Castillo, an Individual	844 CHARCOT AVE SAN JOSE CA 95131-2210	\$ 63,130.52
	J-83150	Closed-Claimant Judgment	California Superior Court, County of Santa Clara, Downtown Superior Court	Plumbing Tech Repipe Specialists, Inc., a California Corporation	844 CHARCOT AVE SAN JOSE CA 95131-2210	\$ 63,130.52
	J-83131	Open/Unpaid	California Superior Court, County of Santa Clara, Downtown Superior Court	Anthoni Castillo,	844 CHARCOT AVE SAN JOSE CA 95131-2210	\$ 19,521.94

<b>Labor Code § 2810.4</b>	<b>Judgment Name</b>	<b>Judgment Status</b>	<b>Court</b>	<b>Defendant/Employer Name</b>	<b>Primary Address</b>	<b>Judgment Total*</b>
	J-83130	Open/Unpaid	California Superior Court, County of Santa Clara, Downtown Superior Court	Adrian Alfaro Ortiz, an Individual	1540 HAVANA DR SAN JOSE CA 95122	\$ 19,521.94
	J-83129	Open/Unpaid	California Superior Court, County of Santa Clara, Downtown Superior Court	Laura Yamila Valdez Miranda, an Individual	3679 El Grande Dr. San Jose CA 95132	\$ 19,521.94
	J-78467	Closed-Claimant Judgment	California Superior Court, County of Santa Clara, Downtown Superior Court	DISTINCTIVE CONTRACTORS CORPORATION, a California Corporation	4170 S DECATUR BLVD STE C4 LAS VEGAS NV 89103-5863	\$ 31,838.45
	J-78465	Open/Unpaid	California Superior Court, County of Santa Clara, Downtown Superior Court	DISTINCTIVE CONTRACTORS CORPORATION, a California Corporation	4170 S DECATUR BLVD STE C4 LAS VEGAS NV 89103-5863	\$ 21,498.66
	J-78463	Open/Unpaid	California Superior Court, County of Santa Clara, Downtown Superior Court	DISTINCTIVE CONTRACTORS CORPORATION, a California Corporation	4170 S DECATUR BLVD STE C4 LAS VEGAS NV 89103-5863	\$ 32,645.57

<b>Labor Code § 2810.4</b>	<b>Judgment Name</b>	<b>Judgment Status</b>	<b>Court</b>	<b>Defendant/Employer Name</b>	<b>Primary Address</b>	<b>Judgment Total*</b>
	J-79919	Open/Unpaid	California Superior Court, County of Santa Clara, Downtown Superior Court	Delucchi Electric Inc., a California Corporation	1884 PANDORA DR SAN JOSE CA 95124-1647	\$ 127,360.32
	J-79904	Closed-Claimant Judgment	California Superior Court, County of Santa Clara, Downtown Superior Court	Juan Carlos Jimenez, an Individual	130 LEWIS RD STE 8 SAN JOSE CA 95111	\$ 56,557.16
	J-79903	Closed-Claimant Judgment	California Superior Court, County of Santa Clara, Downtown Superior Court	Ameca Electric & Network Inc, a California Corporation	130 LEWIS RD STE 8 SAN JOSE CA 95111	\$ 133,459.37
	J-79456	Closed-Claimant Judgment	California Superior Court, County of Santa Clara, Downtown Superior Court	Darl Watson, an Individual dba CBS Electrical	8162 POWER INN RD APT 101 SACRAMENTO CA 95037	\$ 5,148.52
	J-79405	Open - Partial Payment/Satisfaction	California Superior Court, County of Santa Clara, Downtown Superior Court	Richard De Jesus, an Individual	212 DALE DR SAN JOSE CA 95127	\$ 8,057.94

<b>Labor Code § 2810.4</b>	<b>Judgment Name</b>	<b>Judgment Status</b>	<b>Court</b>	<b>Defendant/Employer Name</b>	<b>Primary Address</b>	<b>Judgment Total*</b>
	J-79201	Stayed - Bankruptcy	California Superior Court, County of Santa Clara, Downtown Superior Court	RICHARD ALAN PIERCE, an Individual	18630 WITHEY RD MONTE SERENO CA United States 95030-4148	\$ 15,851.40
	J-78808	Closed-Claimant Judgment	California Superior Court, County of Santa Clara, Downtown Superior Court	Hector Javier Flores-Napoles, an Individual	1864 SUMATRA AVE SAN JOSE CA 95122	\$ 11,468.23
	J-79188	Closed-Claimant Judgment	California Superior Court, County of Santa Clara, Downtown Superior Court	Reza Tabdili, an Individual / Agent, RST Installations, a California Corporation	22351 PINEGLEN MISSION VIEJO CA 92692	\$ 6,830.95
	J-79187	Closed-Claimant Judgment	California Superior Court, County of Santa Clara, Downtown Superior Court	RST Installations, a California Corporation	22351 PINEGLEN MISSION VIEJO CA 92692	\$ 7,147.16
	J-78757	Open/Unpaid	California Superior Court, County of Santa Clara, Downtown Superior Court	Plumbing Tech Repipe Specialists, Inc., a California Corporation	844 CHARCOT AVE SAN JOSE CA 95131-2210	\$ 29,808.23

<b>Labor Code § 2810.4</b>	<b>Judgment Name</b>	<b>Judgment Status</b>	<b>Court</b>	<b>Defendant/Employer Name</b>	<b>Primary Address</b>	<b>Judgment Total*</b>
	J-78758	Open/Unpaid	California Superior Court, County of Santa Clara, Downtown Superior Court	Laura Yamila Valdez Miranda, an Individual	3679 El Grande Dr. San Jose CA 95132	\$ 18,501.21
	J-78759	Open/Unpaid	California Superior Court, County of Santa Clara, Downtown Superior Court	Adrian Alfaro Ortiz, an Individual	1540 HAVANA DR SAN JOSE CA 95122	\$ 18,501.21
	J-78805	Open/Unpaid	California Superior Court, County of Santa Clara, Downtown Superior Court	Gabriel Macedo Castillo, an Individual	2086 LUCRETIA AVE APT 306 SAN JOSE CA 95122	\$ 9,910.87
	J-78760	Open/Unpaid	California Superior Court, County of Santa Clara, Downtown Superior Court	Anthoni Castillo,	844 CHARCOT AVE SAN JOSE CA 95131-2210	\$ 18,501.21
	J-78464	Open/Unpaid	California Superior Court, County of Santa Clara, Downtown Superior Court	GERARDO PADILLA, an Individual	1345 MORNING SUN WAY LAS VEGAS NV 89110-2020	\$ 21,498.66

<b>Labor Code § 2810.4</b>	<b>Judgment Name</b>	<b>Judgment Status</b>	<b>Court</b>	<b>Defendant/Employer Name</b>	<b>Primary Address</b>	<b>Judgment Total*</b>
	J-78462	Open/Unpaid	California Superior Court, County of Santa Clara, Downtown Superior Court	GERARDO PADILLA, an Individual	1345 MORNING SUN WAY LAS VEGAS NV 89110-2020	\$ 32,645.57
	J-78466	Closed-Claimant Judgment	California Superior Court, County of Santa Clara, Downtown Superior Court	GERARDO PADILLA, an Individual	1345 MORNING SUN WAY LAS VEGAS NV 89110-2020	\$ 31,838.45
	J-78470	Closed-Claimant Judgment	California Superior Court, County of Santa Clara, Downtown Superior Court	Benjamin Orejel, an Individual	530 Neil Dr. Yuba City CA 95993	\$ 19,579.24
	J-78482	Closed-Claimant Judgment	California Superior Court, County of Santa Clara, Downtown Superior Court	Modern Developers, Inc., a California Corporation	530 Neil Dr Yuba city CA 95993	\$ 62,421.19
	J-78483	Closed-Claimant Judgment	California Superior Court, County of Santa Clara, Downtown Superior Court	Benjamin Orejel, an Individual	530 Neil Dr. Yuba City CA 95993	\$ 46,808.24

<b>Labor Code § 2810.4</b>	<b>Judgment Name</b>	<b>Judgment Status</b>	<b>Court</b>	<b>Defendant/Employer Name</b>	<b>Primary Address</b>	<b>Judgment Total*</b>
	J-78469	Closed-Claimant Judgment	California Superior Court, County of Santa Clara, Downtown Superior Court	Modern Developers, Inc., a California Corporation	530 Neil Dr Yuba city CA 95993	\$ 20,702.13
	J-63520	Closed-Claimant Judgment	California Superior Court, County of Santa Clara, Downtown Superior Court	Spectrum Painting & Decorating, Inc., a California Corporation	1325 HOWARD AVENUE, #336 BURLINGAME CA United States 94010-4212	\$ 9,184.98
	J-78111	Open/Unpaid	California Superior Court, County of Santa Clara, Downtown Superior Court	L.A.R. Builders Inc., a California Corporation	4655 Bolero Dr. SAN JOSE CA 95111	\$ 20,995.55
	J-77662	Closed-Claimant Judgment	California Superior Court, County of Santa Clara, Downtown Superior Court	Jesus Gomez, an Individual	1045 S 11TH ST SAN JOSE CA 95112	\$ 7,027.03
	J-76430	Open - Partial Payment/Satisfaction	California Superior Court, County of Santa Clara, Downtown Superior Court	Shad Joseph Gibson,	860 Airport Blvd Ste F Moss Beach CA 94038	\$ 4,162.60

<b>Labor Code § 2810.4</b>	<b>Judgment Name</b>	<b>Judgment Status</b>	<b>Court</b>	<b>Defendant/Employer Name</b>	<b>Primary Address</b>	<b>Judgment Total*</b>
	J-75943	Open/Unpaid	California Superior Court, County of Santa Clara, Downtown Superior Court	Gabriel Macedo Castillo, an Individual	2086 LUCRETIA AVE APT 306 SAN JOSE CA 95122	\$ 12,988.85
	J-74812	Closed - Satisfied	California Superior Court, County of Santa Clara, Downtown Superior Court	Aria Build & Construction, Inc., a California Corporation	1245 S. WINCHESTER BLVD., SUITE 313 SAN JOSE CA 95128	\$ 2,272.76
	J-74808	Open/Unpaid	California Superior Court, County of Santa Clara, Downtown Superior Court	Jesus Fong, an Individual	755 BOGETTI LN TRACY CA 95376-7920	\$ 9,859.73
	J-74392	Closed - Satisfied	California Superior Court, County of Santa Clara, Downtown Superior Court	Sunternal Construction Inc, formerly known as Bay Sun Energy Inc, a ., a California Corporation	5671 SANTA TERESA BLVD STE 105 SAN JOSE CA 95123	\$ 5,969.08
	J-74056	Closed-Claimant Judgment	California Superior Court, County of Santa Clara, Downtown Superior Court	David Tinsley, an Individual	886 RUBICON TRAIL S LAKE TAHOE CA 96150-2829	\$ 12,767.81

<b>Labor Code § 2810.4</b>	<b>Judgment Name</b>	<b>Judgment Status</b>	<b>Court</b>	<b>Defendant/Employer Name</b>	<b>Primary Address</b>	<b>Judgment Total*</b>
	J-72786	Open - Partial Payment/Satisfaction	California Superior Court, County of Santa Clara, Downtown Superior Court	Chun Ki Kim, an Individual	360 Meridian St. #221 San Jose CA 65126	\$ 5,225.00
	J-73741	Closed-Claimant Judgment	California Superior Court, County of Santa Clara, Downtown Superior Court	S & L BUILDING DESIGNS, a California Corporation	2512 TOCANTINS ST BAKERSFIELD CA 93313	\$ 13,221.47
	J-72920	Open/Unpaid	California Superior Court, County of Santa Clara, Downtown Superior Court	Next Level Data, Telephone & Electrical Systems, Inc., a California Corporation	4000 PIMLICO DR STE 114-115 PLEASANTON CA 94588	\$ 11,897.61
	J-72922	Open/Unpaid	California Superior Court, County of Santa Clara, Downtown Superior Court	Leo Jimenez, an Individual	4000 PIMLICO DR # 114-115 PLEASANTON CA 94588	\$ 10,243.33
	J-70376	Open/Unpaid	California Superior Court, County of Santa Clara, Downtown Superior Court	William Adair Hurt, an Individual, a.k.a. Veh plate # 926959	140 ASTER WAY E PALO ALTO CA 94303	\$ 7,271.24

<b>Labor Code § 2810.4</b>	<b>Judgment Name</b>	<b>Judgment Status</b>	<b>Court</b>	<b>Defendant/Employer Name</b>	<b>Primary Address</b>	<b>Judgment Total*</b>
	J-70946	Closed-Claimant Judgment	California Superior Court, County of Santa Clara, Downtown Superior Court	Sergio Arturo Aguilar Castillo, an Individual Anthoni Castillo,	844 CHARCOT AVE SAN JOSE CA 95131-2210	\$ 47,536.09
	J-70944	Closed-Claimant Judgment	California Superior Court, County of Santa Clara, Downtown Superior Court	Plumbing Tech Repipe Specialists, Inc., a California Corporation	844 CHARCOT AVE SAN JOSE CA 95131-2210	\$ 47,536.09
	J-68999	Closed-Claimant Judgment	California Superior Court, County of Santa Clara, Downtown Superior Court	Daniel K Castillo, an Individual Agent of Castillo's Plumbing & Design Inc, a California Corporation	1720 Hester Ave San Jose CA 95128	\$ 12,078.88
	J-68999	Closed-Claimant Judgment	California Superior Court, County of Santa Clara, Downtown Superior Court	Castillo's Plumbing & Design Inc, a California Corporation	1720 Hester Ave. San Jose CA 95128	\$ 12,078.88
	J-66078	Closed-Claimant Judgment	California Superior Court, County of Santa Clara, Downtown Superior Court	Five Star Windows, Inc., a California Corporation	1450 DELL AVE STE C CAMPBELL CA 95008	\$ 10,917.23

# **Attachment B**

# **Attachment B**



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January 5, 2024

**VIA EMAIL AND U.S. MAIL**

Mayor Mahan and Council Members  
City of San Jose  
200 E. Santa Clara St.  
San José, CA 95113

Re: Draft Responsible Construction Ordinance

Dear Mayor Mahan and Council Members:

We have been asked by KT Urban, a developer with a long history of successful development in the City of San Jose, to review the proposed “Responsible Construction Ordinance” (the “Ordinance”) and to share with you our legal concerns about the Ordinance. This letter will focus primarily on the impact to owners who may be denied a Certificate of Occupancy under the Ordinance in violation of their Constitutionally-protected property rights.

While the City’s concern over wage theft in the general economy is understandable, attacking that problem by regulating the issuance of Certificates of Occupancy for construction projects is fundamentally misguided and of questionable validity. We urge the City not to adopt the Ordinance.

It has been established for many years in California that an owner has a vested right to obtain a Certificate of Occupancy if the project has been built properly and in accordance with plans. *See Avco Comm. Developers v. South Coast Regional Com.* (1976) 17 C.3d 785; *Anderson v. La Mesa* (1981) 118 C.A.3d 657. Thus, in *Thompson v. City of Lake Elsinore* (1993) 18 C.A.4<sup>th</sup> 49, the court held both that the issuance of a Certificate of Occupancy was a

Mayor Mahan and Council Members  
January 5, 2024

mandatory duty of the city and that the city could be held liable for its failure to issue a Certificate of Occupancy.

The Ordinance would conflict with this property right by allowing a single wage complaint (which may have originated years ago in another city or state) to delay or prevent the issuance of a Certificate of Occupancy, thereby depriving the owner of this fundamental property right without due process of law. The Takings protection of the California and U.S. Constitution focuses on whether the government has in effect appropriated private property without either due process of law or just compensation. *See, e.g., Koontz v. St. Johns River Water Mgmt. Dist.* (2013) 570 U.S. 595; *Ehrlich v. City of Culver City*, (1996) 12 Cal. 4th 854.

Even a temporary denial or delay of a Certificate of Occupancy would deprive a San Jose property owner of the use of their land because the Certificate of Occupancy enables a property owner to obtain tenants and otherwise legally occupy the structures on their site. Such a temporary taking, which could occur under the Ordinance through the delay of issuance of a Certificate of Occupancy, would require compensation. *See First English Evangelical Lutheran Church v. County of Los Angeles* (1987) 482 U.S. 304 (City must compensate property owner for temporary loss of use of land due to regulatory taking). Furthermore, this taking of property would occur without prior due process. And the “post-deprivation” due process in the Ordinance, through an ill-defined appeal process, could take many months. In practice, the owner would be forced to satisfy any unpaid claims in order to get their Certificate of Occupancy.

The Ordinance is clearly designed so that its complexity and possible draconian consequences will induce owners to enter into Project Labor Agreements. For example, the Ordinance requires the owner to affirm under penalty of perjury that neither they nor any contractor or subcontractor have any unpaid wage theft judgments or have committed certain Labor Code violations. This is knowledge a typical owner would have no way of obtaining. In fact for a large corporate owner, it would be unlikely that the owner itself has no such claimed violations. The unreasonableness of requiring such information is shown by the City’s treatment of its own contracting practices. In that regard, we note that less than a year ago the City weakened its own Wage Theft Prevention Policy because the old Policy’s mandatory disqualification criteria were unworkable. As stated in a Staff memo to the Mayor and City Council dated March 6, 2023: “Staff has identified a low probability that a new request for proposals [for banking services] will identify a competitive pool of respondents where all would have clean wage theft records.”

The City cannot directly mandate Project Labor Agreements on private construction projects. Such direct interference in the private labor market is forbidden by the National Labor Relations Act. *See, e.g., Chamber of Commerce v. Brown* (2008) 554 U.S. 60; *Machinists v. Wisconsin Emp. Rel. Comm’n* (1976) 427 U.S.132. Following this authority, for example, a Federal Court held that a city cannot require implementation of a Project Labor Agreement as condition to a project’s receipt of favorable tax treatment. *Associated Builders & Contractors v. City* (2000) 108 F.Supp.2d 73. And it is well-established law that a city cannot do indirectly what it is forbidden to do directly. *See Elrod v. Burns* (1976) 427 U.S.

Mayor Mahan and Council Members  
January 5, 2024

347 (“The denial of a public benefit may not be used by the government for the purpose of creating an incentive enabling it to achieve what it may not command directly.”)

In addition, there are substantive limitations on legislative measures that prevent government from enacting legislation that is arbitrary or lacks a reasonable relation to a proper legislative purpose. For this Ordinance, there is an insufficient nexus between a San Jose property owner’s development and a wage claim that could have arisen years ago in another locality outside the City or State on a completely different project. There is no reasonable relationship between the wage claim payment and the public impact of the development in San Jose. Denying a Certificate of Occupancy to an owner because of a totally unrelated wage claim certainly would be an arbitrary and capricious action, which could also be held to be a violation of the owner’s Equal Protection rights under the Federal and State Constitutions. *See, e.g., Village of Willowbrook v. Olech* (2000) 528 U.S. 562; *Fowler Packing Co. v. Lanier* (9<sup>th</sup> Cir. 2016) 844 F.3d 809 (Violation of Equal Protection to include provisions in wage liability law solely to obtain union support); *Gerhart v. Lake County* (2011) 637 F.3d 1013.

Your consideration of the legal implications of adopting the Ordinance is appreciated. San Jose cannot continue to develop without owners willing to participate in the process. This Ordinance would be an unnecessary and legally questionable barrier to development and should not be adopted.

Please enter this letter into the official record of proceedings on this item.

Very truly yours,

BERLINER COHEN, LLP



E-Mail: [andrew.faber@berliner.com](mailto:andrew.faber@berliner.com)

ALF  
CC: City Clerk  
City Attorney  
Director, Public Works  
Director, Economic Development  
Mark Tersini

# **Attachment C**

# **Attachment C**

NVF:OTE:JMD  
11/6/2023

**DRAFT**

ORDINANCE NO. \_\_\_\_\_

**AN ORDINANCE OF THE CITY OF SAN JOSE AMENDING  
TITLE 24 OF THE SAN JOSE MUNICIPAL CODE TO ADD  
A NEW PART 8 OF CHAPTER 24.02 TO REGULATE  
CERTAIN PRIVATE DEVELOPMENT PROJECTS BY  
WITHHOLDING THE CERTIFICATE OF OCCUPANCY  
WHEN AN OWNER OR CONTRACTOR HAS UNPAID  
FINAL WAGE THEFT JUDGMENTS**

**IDENTIFIED IN RED ARE THE PORTIONS OF THE PROPOSED ORDINANCE  
THAT SHOULD BE DELETED OR SUBSTANTIALLY REVISED. COMMENTS  
AND ALTERNATIVE LANGUAGE IS CONTAINED IN THE FOOTNOTES.**

BE IT ORDAINED BY THE COUNCIL OF THE CITY OF SAN JOSE:

A new Part 8 is added to Chapter 24.02 of Title 24 of the San José Municipal Code to be numbered, entitled and to read as follows:

**Part 8**

**Responsible Construction**

**24.02.810 Definitions**

The following words and phrases, whenever used in this Part, shall be construed as defined in this section:

- A. **“Certificate of occupancy”** means the building official’s certification under **Chapter 24.02.630 of this code<sup>1</sup>** that the project complies with all applicable requirements for occupancy. The building official’s signature on the final inspection card may serve as the certificate of occupancy.

<sup>1</sup> The Ordinance should clarify that a “certificate of occupancy” as provided in 24.02.630 does not include the building official’s approval of a “temporary certificate of occupancy” as defined in Chapter 24.02.640. Per Chapter 24.02.640, a temporary certificate of occupancy may be issued prior to the final completion of the entire building or structure. See also the comments to proposed Chapter 24.02.830 below.

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11/6/2023

B. “Contractor” means the prime contractor for the project.<sup>2</sup>

<sup>2</sup> The Ordinance’s use of “the prime contractor for the project” is insufficient and mistakenly assumes that a project will not, or cannot, have more than one contractor in a direct contractual relationship with the owner. But owners may, and oftentimes do, elect to hire separate prime contractors to install different portions of the work, the entirety of which may be part of a single project covered by a single permit. Each separate contractor may itself have multiple subcontractors and material suppliers. The City’s approval of the Solar4America Sharks Ice Expansion project is an example of one such multi-prime arrangement, where separate trade contractors were hired to perform distinct scopes of work for the project owner and the owner’s authorized contracting agent. Similarly, in almost all construction contracts for private works of improvement, owners reserve the right to have portions of the project performed by separate contractors, who are not subcontracted to or working under the direction of the project’s general contractor. The American Institute of Architects (“AIA”) suite of construction documents is generally considered to be the standard and most widely-used set of contracts in the construction industry. Sections 1.1.3 and 1.1.4 of the AIA A201™–2017 General Conditions of the Contract for Construction highlight the distinction between the “Work” performed by one contractor, and the entire “Project”, which may include the work of multiple “Separate Contractors”:

**§ 1.1.3 The Work**

The term “Work” means the construction and services required by the Contract Documents, whether completed or partially completed, and includes all other labor, materials, equipment, and services provided or to be provided by the Contractor to fulfill the Contractor’s obligations. The Work may constitute the whole or a part of the Project.

**§ 1.1.4 The Project**

The Project is the total construction of which the Work performed under the Contract Documents may be the whole or a part and which may include construction by the Owner and by Separate Contractors.

By definition, Separate Contractors are not under the control of the project’s general contractor. Section 6.1.1. of the AIA A201™–2017 General Conditions explains:

**§ 6.1 Owner’s Right to Perform Construction and to Award Separate Contracts**

**§ 6.1.1** The term “Separate Contractor(s)” shall mean other contractors retained by the Owner under separate agreements. The Owner reserves the right to perform construction or operations related to the Project with the Owner’s own forces, and with Separate Contractors retained under Conditions of the Contract substantially similar to those of this Contract, including those provisions of the Conditions of the Contract related to insurance and waiver of subrogation.

There are obvious due process and constitutional concerns with making each prime contractor strictly liable for the unlawful conduct of the owner’s separate contractors. These concerns are discussed further below. For purposes of the definition however, a more appropriate approach would be to encompass the possibility of multi-prime projects by changing the language of this subsection to state: “Contractor’ means any direct

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11/6/2023

- C. “Subcontractor” means any business or person that carries out work of the prime contractor or another contractor for the project.<sup>3</sup>

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contractor as such term is used in Section 8018 of the California Civil Code.”

<sup>3</sup> Two distinct concerns are created by the Ordinance’s ambiguous and over-inclusive definition of the term “Subcontractor.” First, the clause defining Subcontractor to mean “any business or person that carries out work of the prime contractor” includes, on its face, all lower-tier subcontractors and other material and equipment suppliers. The inclusion of lower-tier subcontractors and material suppliers itself raises two problems. Project owners and prime contractors may be unaware of such lower-tier subcontractors and suppliers, and thus unable to protect themselves from vicarious liability. An electrical subcontractor with a \$5 million scope of work on a project, for example, may hire a lower-tier fire-alarm subcontractor and purchase significant amounts of materials and electrical equipment from various manufacturers. These lower-tier subcontractors, suppliers, and manufacturers are not in privity with the owner or general contractor, and unless they serve preliminary notices (see, Civil Code Section 8034) may remain unknown until a complaint for an unpaid wage theft judgment is filed with the City. Moreover, by including material and equipment suppliers in the definition of “Subcontractor,” the City is making owners, prime contractors, and subcontractors vicariously liable for unpaid wage and hour violations committed by businesses and persons who perform no actual work at the project site, and whose offsite workers may not even be subject to California labor laws. The protection of manufacturer’s home-office employees in other states is clearly not the intent of the Ordinance. But based on the definition of Subcontractor and the Ordinance’s applicability to any and all violations of the federal Fair Labor Standards Act, which covers claims for unpaid overtime, technical recordkeeping violations, and sex- and race-based discrimination and retaliation claims (see, comments to Chapter 24.02.810, subsection N, below), all owners and general contractors building private works of improvement in San Jose will become strictly and vicariously liable for the wage and hour claims of office and factory workers in other states.

Second, the definition of “Subcontractor” inappropriately includes the subcontractors and suppliers of *other* contractors on the project. As discussed in the comments to the previous section, strict liability would therefore attach to one prime contractor for the unpaid wages of a Subcontractor or supplier working for the Owner’s separate contractor(s). Because of the potentially unfettered liability, no contractor will want to work for any owner on any project in San Jose where the owner has any other separate contractors performing a portion of the work.

To address these concerns, the definition of “Subcontractor” should be limited in three material respects. A “Subcontractor” should only include a business or person that (i) has served a preliminary notice if required by California Civil Code Section § 8200; and (ii) that carries out the work of the prime contractor (iii) at the project site. Liability of one prime contractor for the lower-tier subcontractors and suppliers of other separate contractors, or for manufacturers who do not perform any work at the project site, should

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11/6/2023

D. "Hearing officer" means the City Manager or designee.

E. "Labor Code Section 226(a)"<sup>4</sup> is a provision of the California Labor Code that

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be removed.

<sup>4</sup> Compliance with California Labor Code provisions is already mandated and violations are already punishable by law. Requiring owners and prime contractors to verify compliance by every lower-tier Subcontractor and supplier is impracticable. Suppliers subject to the Ordinance may not be located in California or subject to California labor laws. The execution of a pay transparency certification under penalty of perjury would require both the owner and prime contractor to independently audit the bimonthly wage statements of all lower-tier Subcontractors and suppliers. In the event that even a single violation were revealed, the owner could not sign and submit the required certification and the Ordinance would prohibit the building official from issuing a certificate of occupancy. The information required by Labor Code § 226(a) that would need to be independently verified for all lower-tier Subcontractor and suppliers includes:

"An employer, semimonthly or at the time of each payment of wages, shall furnish to their employee, either as a detachable part of the check, draft, or voucher paying the employee's wages, or separately if wages are paid by personal check or cash, an accurate itemized statement in writing showing (1) gross wages earned, (2) total hours worked by the employee, except as provided in subdivision (j), (3) the number of piece-rate units earned and any applicable piece rate if the employee is paid on a piece-rate basis, (4) all deductions, provided that all deductions made on written orders of the employee may be aggregated and shown as one item, (5) net wages earned, (6) the inclusive dates of the period for which the employee is paid, (7) the name of the employee and only the last four digits of their social security number or an employee identification number other than a social security number, (8) the name and address of the legal entity that is the employer and, if the employer is a farm labor contractor, as defined in subdivision (b) of Section 1682, the name and address of the legal entity that secured the services of the employer, and (9) all applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate by the employee and, beginning July 1, 2013, if the employer is a temporary services employer as defined in Section 201.3, the rate of pay and the total hours worked for each temporary services assignment. The deductions made from payment of wages shall be recorded in ink or other indelible form, properly dated, showing the month, day, and year, and a copy of the statement and the record of the deductions shall be kept on file by the employer for at least three years at the place of employment or at a central location within the State of California. For purposes of this subdivision, 'copy' includes a duplicate of the itemized statement provided

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11/6/2023

requires the employer to provide each employee, either bimonthly or at the time of payment of wages, an itemized wage statement that contains certain specified information concerning the employee’s wages and deductions.

F. “Labor Code Section 2810.5”<sup>5</sup> is a provision of the California Labor Code that

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to an employee or a computer-generated record that accurately shows all of the information required by this subdivision.” Cal. Labor Code § 226(a).

<sup>5</sup> Compliance with California Labor Code provisions is already mandated and violations are already punishable by law. Requiring owners and prime contractors to verify compliance by every lower-tier Subcontractor and supplier is impracticable. Suppliers subject to the Ordinance may not be located in California or subject to California labor laws. The written notice required by Labor Code § 2810.5 must be provided *at the time of hiring*. How is this to be verified for legacy employees hired five, ten, fifteen, or twenty years ago? The Ordinance includes no cure provision. If it were revealed that even a single Subcontractor or supplier failed to provide the required notice at the time of hiring, the owner could not sign and submit the required pay transparency certification and the Ordinance would prohibit the building official from issuing a certificate of occupancy for the entire project. The information required by Labor Code § 2810.5(a) that would need to be independently verified prior to hiring any subcontractor or supplier would include:

“(a) (1) At the time of hiring, an employer shall provide to each employee a written notice, in the language the employer normally uses to communicate employment-related information to the employee, containing the following information:

- (A) The rate or rates of pay and basis thereof, whether paid by the hour, shift, day, week, salary, piece, commission, or otherwise, including any rates for overtime, as applicable.
- (B) Allowances, if any, claimed as part of the minimum wage, including meal or lodging allowances.
- (C) The regular payday designated by the employer in accordance with the requirements of this code.
- (D) The name of the employer, including any “doing business as” names used by the employer.
- (E) The physical address of the employer’s main office or principal place of business, and a mailing address, if different.
- (F) The telephone number of the employer.
- (G) The name, address, and telephone number of the employer’s workers’ compensation insurance carrier.
- (H) That an employee: may accrue and use sick leave; has a right to request and use accrued paid sick leave; may not be terminated or retaliated against for using or requesting the use of accrued paid sick leave; and has the right to file a complaint against an employer who

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requires the employer, **at the time of hiring**, to provide each employee a written notice containing certain specified information about the employer, the employee's rate of pay, worker's compensation insurance, and sick leave.

- G. "Mail" means to deposit in United States mail, postage prepaid, unless the parties have agreed in writing to receive notifications by email in lieu of United States mail.
- H. "New construction" means construction of new buildings or structures including additions to existing buildings and structures.
- I. "**Owner**" means the person or persons, firm, corporation, partnership or other legal entity **exercising ownership of the project.**<sup>6</sup>

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retaliates.

(1) Any other information the Labor Commissioner deems material and necessary.

(2) The Labor Commissioner shall prepare a template that complies with the requirements of paragraph (1). The template shall be made available to employers in such manner as determined by the Labor Commissioner.

(3) If the employer is a temporary services employer, as defined in Section 201.3, the notice described in paragraph (1) must also include the name, the physical address of the main office, the mailing address if different from the physical address of the main office, and the telephone number of the legal entity for whom the employee will perform work, and any other information the Labor Commissioner deems material and necessary. The requirements of this paragraph do not apply to a security services company that is licensed by the Department of Consumer Affairs and that solely provides security services." Cal. Labor Code § 2810.5(a).

<sup>6</sup> The Ordinance's use of the term "Owner" is ambiguous and fails to distinguish between tenants/lessees and fee simple owners/lessors. Defining "owners" to mean persons or entities that exercise ownership of the project is insufficient. Improvements may pass to the fee simple owner/lessor upon termination of a tenant's lease, even if the fee simple owner/lessor does not directly participate in or exercise control over the actual construction project. Under California law, such non-participating owners/lessors are currently entitled to protect themselves from mechanic's liens and liability for unpaid labor by conspicuously posting a notice of non-responsibility pursuant to California Civil Code § 8444 *et seq.* To the extent that the Ordinance is inconsistent with the statutory

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- J. “Remodeling” means internal or external reconstruction, renovation, or improvements to an existing building or structure that does not constitute complete replacement of the existing building or structure.
  
- K. “Project” means a construction project that requires a building permit from the City of San José.<sup>7</sup>

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protections for non-participating owners in the Civil Code, the Ordinance may subject to legal challenge. More importantly, the Ordinance will discourage leasing, tenant improvements, and will drive-up rental costs as lessors will be reluctant to expose themselves to strict liability for the potential wage and hour violations of their tenants, contractors, subcontractors and suppliers.

<sup>7</sup> The Ordinance punishes owners and contactors and will discourage development in the City of San Jose for wage and hour violations that occurred on projects in other jurisdictions where labor laws are not diligently enforced. Specifically, the Ordinance prohibits the building official from issuing a certificate of occupancy for a project located in San Jose. But there is no requirement that the underlying wage theft violation also have occurred in the City (or even in California).

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- L. “Project construction employees” means employees<sup>8</sup> of the contractor or subcontractor.
- M. “Representative” means a person authorized to legally bind the owner and/or contractor (for example, a corporate officer, general partner, or managing member of a limited liability company).
- N. “Unpaid wage theft judgment”<sup>9</sup> means a judgment, decision or order, for which all appeals have been exhausted or the time to appeal has expired,<sup>10</sup> that was

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<sup>8</sup> As written, the Ordinance applies to all employees of a contractor or subcontractor. For instance, project managers, executives, and Responsible Managing Officers are not excluded from the definition of “Project construction employees.” If the intent of the Ordinance is to address wage theft from vulnerable construction laborers, the definition of “Project construction employees” as including all employees is grossly overbroad. The Ordinance would make developers and contractors vicariously liable for wage and hour claims of home-office and managerial employees that do not perform actual construction labor at the project site (in San Jose or even in California), are not part of vulnerable populations, and who are not typically subject to project labor agreements or collective bargaining agreements. As such, it will also be essentially impossible for any owner, contractor, or subcontractor to sign a pay transparency certification stating that all of its “Project construction employees” are covered by collective bargaining agreements as contemplated in Chapter 24.02.850(B)(2). At a minimum, the definition of “Project construction employee” should be limited to “hourly employees performing construction labor or other construction services at a project site.”

<sup>9</sup> “Wage theft violation” is not a uniformly defined legal term. California Penal Code § 487m, adopted January 1, 2022, defines “theft of wages” as “the *intentional* deprivation of wages, as defined in Section 200 of the Labor Code, gratuities, as defined in Section 350 of the Labor Code, benefits, or other compensation due to the employee under the law.” See, Cal. Penal Code §487m(b). The most egregious cases of actual wage theft (e.g., Silvery Towers) are also the least common. But the Ordinance does not appear to adopt this targeted definition of misconduct. In contrast, it defines every pay dispute and every wage and hour claim as “wage theft.” Wage class actions and PAGA (Private Attorneys General Act) lawsuits are rampant, but most often concern technical Labor Code violations and class-action claims (e.g., claims that employees received only 28-minute lunch breaks instead of 30 minutes, or employee reimbursement for personal cell phone use). The Ordinance will unintentionally make developers and contractors targets of plaintiff class-action attorneys, who will use the threat of the City withholding a certificate of occupancy to force the settlement of disputed or otherwise frivolous claims to avoid the possibility of an unsatisfied judgment.

<sup>10</sup> The fact that the Ordinance only applies to judgments, decisions, and orders that are

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issued by a 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 Federal Fair Labor Standards Act, the California Labor Code, and the City of San Jose Minimum Wage Ordinance, and which has not been fully paid or satisfied. As used in this subsection, “investigatory government agency” includes the United States Department of Labor, the California Division of Labor Standards Enforcement, the city of San José, or any other governmental entity or division tasked with the investigation and enforcement of wage and hour laws.<sup>11</sup>

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final and for which all appeals have already been exhausted does not offer owners and contractors any significant protection. In fact, the requirement for a final judgment or order actually creates two problems. First, based on the length of time required for wage theft claimants to obtain a final judgment (a process which could takes months, if not years to fully litigate and resolve), the most likely application of the Ordinance against owners and contractors will be for wage violations committed by subcontractors or suppliers *on prior jobs*. This provides owners and contractors with no way to adequately protect themselves from vicarious liability. When a new project starts, for example, a Subcontractor may truthfully report that it is not subject to any final wage theft judgment, although a complaint may be pending. Owners and contractors may therefore be unaware of the pending complaint when hiring the Subcontractor but nevertheless become guarantors of the Subcontractor’s ability to satisfy the judgment when it is ultimately finalized. Conversely, if the owner or contractor become aware of any pending labor law complaint (including any disputed or obviously frivolous claim), then it is unlikely that the owner or contractor would agree to hire that Subcontractor at the risk of exposing themselves to uncertain financial responsibility. A payment bond will not protect the owner or contractor from such claims as they are project specific, and will not cover pending claims from prior projects. Second, the Ordinance’s requirement for a final judgment or order makes the Ordinance’s appeal process meaningless. Once a final judgment or order is issued, there is by definition no meaningful basis for an owner or contractor to further challenge liability. Without adequate due process, the Ordinance therefore makes owners and prime contractors strictly liable for the criminal conduct and financial solvency of all Subcontractors and suppliers. The Ordinance should be redrafted to impose liability *only* in cases where owners and contractors are capable of protecting themselves—*i.e.*, for unpaid wage theft judgments arising from a Contractor’s or Subcontractor’s wage theft violations on the project for which the Contractor or Subcontractor has been hired.

<sup>11</sup> The language of the Ordinance is not restricted to actual wage theft judgments. An “unpaid wage theft judgment” is defined as “a judgment, decision or order” issued by any court or other federal, state or local entity authorized to enforce wage and hours laws. The courts, Department of Labor, and the DLSE, and the City of San Jose, for example, are each authorized to enforce wage and hour laws. But there is no requirement that the

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## **24.02.820 Exemptions**

A project that meets any of the following criteria is exempt from the requirements of this chapter.

- A. The project consists of less than **fifteen thousand square feet<sup>12</sup>** of new construction or remodeling.

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judgment, decision or order arise from an actual wage and hour *violation*. On its face, therefore, the ambiguity in the Ordinance makes owners and contractors liable for paying all final judgments issued by any entity authorized to enforce wage and hour laws. Again, the Ordinance should be redrafted to only cover judgments arising from a Contractor's or Subcontractor's wage theft violations on the project for which the Contractor or Subcontractor was hired.

<sup>12</sup> The exemption for projects less than 15,000 square feet (or less than 10,000 square feet as proposed in the most recent amendments) are arbitrary and capricious. It is undeniable that wage theft occurs on smaller construction projects, including single-family residential projects, where it is more likely that day laborers or undocumented workers will be hired by contractors or subcontractors at less than minimum wage and without the protections of workman's compensation insurance. If the City is concerned about curbing wage theft violations, the minimum square foot exemption should be removed and the Ordinance made applicable to all private works of improvement requiring a building permit.

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B. The project is subject to prevailing wage requirements<sup>13</sup> under state law.

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<sup>13</sup> There is no articulated reason for excluding projects that are subject to prevailing wage requirements from the proposed Ordinance. The City's current Wage Theft Prevention Policy ostensibly exempts public works contracts because the Office of Equality Assurance is already tasked with enforcing prevailing wage requirements. Nevertheless, on November 19, 2019, the City Council directed staff to analyze the requirements for amending the City's Wage Theft Prevention Policy to remove the exclusion for public works contracts. See, Staff Memorandum <https://media.bizj.us/view/img/11602587/2-10-20-wage-theft-memo.pdf> It was Staff's conclusion at the time that removing the public works exclusion was possible and that concerns with increased project costs and delays could be avoided:

"To simultaneously ensure Public Works projects are included in the wage theft policy and that they can continue to move forward without significant delays during the procurement process, the definition of wage theft should be measurable, verifiable, and enforceable. This appears to be possible if the definition of wage theft is focused on DLSE final judgements, and possibly DOL final decisions, pending further analysis of the available DOL datasets." See, Staff Memorandum to Council dated February 11, 2020 re: Council Agenda 2/11/2020 Item 3.5, File No. 20-149.

Given the Council's stated prioritization of a comprehensive and uniform Wage Theft Prevention Policy, the exemption for public works projects should be removed from the proposed Ordinance.

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- C. The contractor and all subcontractors are legally bound by an agreement that establishes the terms and conditions of employment on the project, commonly referred to as a **project labor agreement or community workforce agreement**.<sup>14</sup>

#### **24.02.830 Acknowledgement of responsibility**

As a condition of approval for any building permit required for a project, **an applicant shall sign an acknowledgement**<sup>15</sup> that:

- A. The owner, contractor, and all subcontractors on the project **will comply with all applicable provisions of this chapter and the California Labor Code**,<sup>16</sup> including Labor Code Sections 2810.5 and 226a.

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<sup>14</sup> There is no basis to exempt projects subject to labor agreements. If adopted, the proposed Ordinance should be uniformly applied to all projects for maximum benefit to vulnerable workers. The exemption is a transparent attempt by organized labor to force owners and contractors to either accept union oversight or risk vicarious and strict liability for unpaid wage judgments, including judgments imposed on prior, unrelated projects.

<sup>15</sup> The acknowledgment of responsibility is unrealistic. One applicant cannot acknowledge future compliance by other parties. The owner cannot realistically promise that the contractor and all subcontractors will comply. Similarly, the contractor cannot realistically promise that all subcontractors, who may not even have been identified at the time of the application, will comply. Applications for building permits may also be submitted by design professionals. Will such professionals be expected to acknowledge the future compliance of all contractors and subcontractors? If so, why are design professionals, which regularly undertake construction administration duties on behalf of owners not required to submit pay transparency certifications?

<sup>16</sup> The requirement for an acknowledgement is unnecessary. Compliance with applicable statutes and ordinances is already mandatory. As a practical matter, it is impossible for employers to acknowledge future compliance with "the Labor Code," which is both complex and inconsistent (*i.e.*, Labor Code Sections 221 et seq. makes it unlawful to withhold earned wages, whereas Section 2928 permits the withholding of a half-hour's wages for any time loss of less than 30 minutes). Every wage and hour claim in California alleges violations of Section 226, and it is possible for plaintiff's attorneys to almost always find a technical violation of the notice and recordkeeping provisions. By requiring acknowledgement of responsibility, the Ordinance imposes the same liability on good-faith actors as intentional violators.

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- B. The owner and contractor are responsible for ensuring that the contractor and all subcontractors on the project pay any wage theft judgments<sup>17</sup> that have been entered against them either before or during the construction of the project.<sup>18</sup>
  
- C. A violation under Section 24.02.860 will result in withholding of the certificate of occupancy<sup>19</sup> at the conclusion of the project.

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<sup>17</sup> It is both inequitable and constitutionally questionable to make owners and contractors vicariously liable for the intentional misconduct of other contractors and lower-tier Subcontractors. There is no way to “ensure” that other contractors and Subcontractors will pay any wage theft judgments entered against them. What happens if a Subcontractor cannot pay? Contractors, subcontractors, and suppliers sometimes become insolvent or file bankruptcy. When that happens, it is a complex question whether liability for wage and hour violation is dischargeable. The violator may be protected in bankruptcy, while the innocent developer or contractor is left financially liable for a wage judgment. There are multiple unintended consequences that would flow from such a policy of collective responsibility. The City should expect that owners and contractors would be reluctant to hire Subcontractors that do not already have a proven history of financial stability, with potential impacts on opportunities for Disadvantaged Business Enterprises (MBE, WBE, and DBE). Contractors will price the risk of Subcontractor and supplier wage judgments, further increasing the cost of construction. Even as homelessness remains a City priority, the costs of building affordable housing in San Jose rose by more than 24% over the past year (see, Greschler, G. (2023, October 26.) *Death Spiral: It’s getting extremely expensive to build housing in San Jose*. The Mercury News; available at <https://www.mercurynews.com/2023/10/26/death-spiral-its-getting-obscenely-expensive-to-build-housing-in-san-jose/>). New barriers to development and unwelcome increases to already high construction costs will further incentivize owners and contractors to forego projects in San Jose.

<sup>18</sup> As previously indicated, the proposed Ordinance denies owners and contractors the ability to protect themselves from wage and hour claims on prior projects, including projects completed in other jurisdictions for other owners. The statute of limitations on wage and hour claims is typically three years, but can be as long as four years if the wage violation results from the breach of a written employment contract. Even if purchased, a payment bond would increase the owner’s cost of the project between 1-2%, but would not cover liability for prior projects. The imposition of vicarious liability on owners and contractors for the misconduct of other contractors and Subcontractors on prior projects therefore violates due process.

<sup>19</sup> This provision of the Ordinance should be removed. Withholding a certificate of occupancy from an innocent owner is an inappropriate and mistargeted remedy. Rather, the City may discipline the offending contractor or Subcontractor by denying, suspending, or revoking a business license, debarring the violator from contracting with the City, reporting the offender to the Contractor’s State License Board for license suspension, and

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### **24.02.840 Posting**

Each day that work is performed on the project, the contractor shall post, in a conspicuous place at each job site where work takes place, the notice published each year by the city informing employees of their rights under this chapter. The notice shall be written in the top three languages spoken in the city based on the latest available census information for the City.

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to the DIR for suspension of any public works registration.

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### **24.02.850 Pay transparency certification**

Prior to issuance of approval of certificate of occupancy for a project, for each contractor or subcontractor whose portion of the work **exceeds one hundred thousand dollars or one percent of the value of the construction cost of the project,<sup>20</sup>** whichever is greater, owner shall provide to the city a pay transparency certification (“certification”), **signed by a representative of the owner, the contractor and any subcontractor under penalty of perjury under the laws of the state of California.<sup>21</sup>** The certification required under this section shall be in a form approved by the city and contain the following.

- A. A statement that the owner, contractor, and any subcontractors have no unpaid wage theft judgments; and
- B. A statement that:
  - (1) **Project construction employees of the contractor and any subcontractors received written notice of the employers’ pay practices as required by California Labor Code Section 2810.5 and wage statements under Labor Code Section 226(a);<sup>22</sup> or**
  - (2) **Project construction employees of the contractor and/or any**

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<sup>20</sup> The minimum qualifying amounts for contractors and Subcontractors is arbitrary. If the policy is to protect vulnerable laborers from wage theft, why are subcontractors performing less than the greater of \$100,000 or 1% of the value of the work exempt? For purposes of comparison, on public works of improvements, all subcontractors performing more than ½ of 1% of the value of the work must be listed.

<sup>21</sup> What happens if a qualifying contractor, Subcontractor, or supplier refuses to sign, ceases operations, or dies or otherwise becomes incapacitated prior to the end of the project and signing the pay transparency certification? The Ordinance provides for no alternative other than the building official withholding the certificate of occupancy from an innocent owner.

<sup>22</sup> This imposes an unreasonable burden. Owners and contractors will not be able to sign statements under oath attesting to the compliance of any other contractors or Subcontractors regarding employees’ receipt of written notices and wage statements without auditing the records of every qualifying Subcontractor and supplier.

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subcontractors are covered by a valid collective bargaining agreement<sup>23</sup> that expressly provides for the wages, hours of work, and working conditions of the employee, and the agreement provides premium wage rates for all overtime hours worked and a regular hourly rate of pay for those employees of not less than thirty percent more than the state minimum wage. (See Labor Code Section 2810.5(c)).

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<sup>23</sup> “Project construction employees” are defined in Chapter 24.02.810(L) to mean all employees. Collective bargaining agreements will typically not include Responsible Managing Officers, project executives, and project managers and other dedicated office staff not performing field labor or supervision. Subsection (B)(2) therefore becomes effectively meaningless.

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## 24.02.860 Violations

- A. The building official shall not issue a certificate of occupancy under either of the following circumstances:
- (1) The owner has failed to submit the pay transparency certification required by Section 24.02.850.
  - (2) The Director of Public Works has sustained a complaint of an unpaid wage theft judgment pursuant to Section 24.02.870, and the owner or contractor has neither cured the unpaid wage theft judgment nor reversed the Director of Public Works' determination by appeal pursuant to Section 24.02.880.<sup>24</sup>
- B. In addition to any other remedies provided by law, violation of this chapter is an infraction punishable as set forth in Chapter 1.15 of this code and may be subject to administrative citations, fines, and penalties<sup>25</sup> as set forth in Chapters 1.14 and 1.15 of this code.

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<sup>24</sup> The withholding of a certificate of occupancy is an unwarranted remedy. Unpaid laborers and victims of wage theft are already entitled to (i) record a mechanic's liens against the owner's project to secure the right to payment. There is no requirement under California law that laborers serve preliminary lien notices to perfect their lien rights; (ii) make a claim against any payment bond or subcontractor default insurance provided for the project; (iii) make a claim and/or submit any unpaid judgment to the offending contractor's or subcontractor's license bond surety for payment. Rather than target innocent owners and contractors, the Ordinance should impose liability against the wage theft violator by suspending the offender's business license; suspending or debaring the offender's right to contract with the City; reporting the judgment to the CSLB for suspension of the offender's license; and to the DIR for the suspension of any public works contractor registration.

<sup>25</sup> This provision should be removed from the Ordinance. Once a final wage theft judgment is entered, an innocent owner or contractor has, by definition, no ability to meaningfully contest liability. The imposition of quasi-criminal remedies creates due process concerns and is unlikely to survive legal challenge.

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#### **24.02.870 Unpaid wage theft judgement – Complaint**

- A. Any person who is aware of an unpaid wage theft judgment against the contractor or a subcontractor on a project whose portion of the work exceeds one hundred thousand dollars or one percent of the value of the construction cost of the project, whichever is greater, may submit a complaint to the building official. The complaint must include: (1) a copy of a labor commissioner’s order, decision or award; (2) a copy of the judgment entered by a court of law that the specified contractor or subcontractor is the subject of an unpaid wage theft judgment; and (3) a declaration signed under penalty of perjury from the person that is owed the

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unpaid wages under the final wage theft judgment against the specified contractor or subcontractor that the judgment has not been satisfied.

- B. The complaint must be received by the building official before the building official has issued a certificate of occupancy. **After receiving a complaint, the building official shall not issue the certificate of occupancy if the Director of Public Works finds that the complaint is sustained.<sup>26</sup>**
- C. The Director of Public Works shall, within 10 working days, mail written notice of the complaint to the owner and contractor at the address(es) on file with the city for the project. If the review of the complaint will delay issuance of the certificate of occupancy, the Director of Public Works shall notify the owner and contractor as soon as practicable.
- D. **The owner or contractor may provide a written response to the complaint within 30 working days of the mailing of the notice of alleged violation. Failure to respond may be deemed an admission to the truth of the facts alleged in the complaint.<sup>27</sup>**
- E. After consideration of the complaint and the owner or contractor's response, if any, the Director of Public Works shall make a finding that the complaint is either sustained or not sustained. The Director of Public Works' decision shall be mailed to owner, contractor, complaining party, and the person that is owed the unpaid wages under the final wage theft judgment.

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<sup>26</sup> The provision prohibiting the building official from issuing a certificate of occupancy should be removed from the proposed Ordinance in favor of the more appropriate remedies discussed in Chapter 24.02.860 above.

<sup>27</sup> The ability to challenge the final wage theft judgment is essentially meaningless. The ordinance assumes that the period for any legal appeal to the merits of the judgment has already expired. There are only two anticipated responses that the Director would ever be required to consider: (i) the offending party was not a qualifying contractor or subcontractor; and/or (ii) the judgment has already been satisfied.

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**24.02.880 Unpaid wage theft judgement – Appeal**

- A. Notwithstanding Part 7 of this Chapter, if an owner or contractor is aggrieved by a decision of the Director of Public Works pursuant to Section 24.02.870, **the aggrieved owner or contractor may appeal the decision by submitting a written**

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appeal with the hearing officer within 10 working days of the mailing of the Director of Public Works' decision. The appeal shall contain the facts and basis for the appeal.<sup>28</sup> The appeal shall be accompanied by payment of the appeal fee adopted by the city council.

- B. The hearing shall be heard by the hearing officer within 60 working days of receipt of the appeal,<sup>29</sup> or at a date and time agreed to by the parties. The complaining party shall be the respondent at the appeal hearing.
- C. All parties involved shall have the right to offer testimonial, documentary, and tangible evidence bearing on the issues, to be represented by counsel, and to confront and cross-examine witnesses. Testimony may be taken on oath or affirmation. The hearing shall not be conducted according to formal rules of evidence. Any relevant evidence may be admitted if it is the sort of evidence upon which reasonable persons are accustomed to relying in the conduct of serious affairs.
- D. The hearing shall be de novo. The complaining party must prove by a preponderance of the evidence that the contractor or a subcontractor on the project is the subject of an unpaid wage theft judgment.
- E. The hearing officer shall issue a written decision within 10 working days of the hearing. The decision shall be final and shall be subject to judicial review according to the provisions and time limits set forth in Code of Civil Procedure

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<sup>28</sup> As indicated, once a final wage theft judgment is issued, the appeal process becomes meaningless.

<sup>29</sup> The additional 60-day timeframe for a hearing on appeal following the 10-day initial notice period and 30-day period for the aggrieved owner, contractor, or subcontractor to respond to the complaint creates an unnecessarily long delay. During the anticipated 90-120 days (*i.e.*, three to four months) that it would take to resolve any challenge to the unpaid wage theft judgment, an innocent owner would be denied occupancy and the use of the project at substantial costs and damages.

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Section 1094.6.

**24.02.890 Cure of violation**

The owner, contractor, or subcontractor may cure a violation of this chapter at any time, including a violation related to an unpaid wage theft judgment, by providing evidence

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that the judgment has been paid, or that it has been secured by a **labor payment bond, lien release bond, or similar security instrument<sup>30</sup>** in a form and amount sufficient to ensure that any wage claims and penalties can be fully paid.

**24.02.900 No private right of action**

Nothing in this chapter shall be interpreted to authorize a right of action against the city.

PASSED FOR PUBLICATION of title this \_\_\_\_\_ day of \_\_\_\_\_, 2023, by the following vote:

AYES:

NOES:

ABSENT:

DISQUALIFIED:

\_\_\_\_\_  
MATT MAHAN  
Mayor

ATTEST:

<sup>30</sup> Purchasing a new payment or lien release bond, or posting any similar security instrument would be a pointless act. The proposed Ordinance assumes that a final and non-appealable judgment has already been issued. At that point, in order to secure the certificate of occupancy, the innocent owner’s or contractor’s only alternative is to pay the judgment. Purchasing a payment or release bond or posting other security would immediately make that bond or security instrument subject to collection by the unpaid claimant and subject the innocent owner or contractor to an immediate demand for indemnity and reimbursement by the surety. It is inconceivable that any surety would underwrite such a bond once all avenues of appeal have been exhausted. Even if such a bond were available, however, no innocent owner or contractor would ever logically choose to purchase one, as the cost of the bond or other security would be an additional 2% or more of the judgment, the full amount of which would immediately become due and payable.

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TONI J. TABER, CMC  
City Clerk

**FW: NAIOP Silicon Valley Letter re: Responsible Construction Ordinance**

City Clerk <city.clerk@sanjoseca.gov>

Fri 1/12/2024 10:40 AM

To:Agendadesk <Agendadesk@sanjoseca.gov>

📎 1 attachments (157 KB)

NAIOP Letter\_RCO 1.11.2024.pdf;

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**From:** Eddie Truong [REDACTED]  
**Sent:** Friday, January 12, 2024 10:06 AM  
**To:** Eddie Truong <eddie@unite-strategies.com>  
**Subject:** NAIOP Silicon Valley Letter re: Responsible Construction Ordinance

[External Email]

Some people who received this message don't often get email from [REDACTED] [learn why this is important](#)

Honorable Mayor and City Council:

On behalf of NAIOP Silicon Valley, I am submitting this public comment letter regarding the Responsible Construction Ordinance. NAIOP Silicon Valley is the leading organization whose membership representing 100+ commercial developers, owners, investors, asset managers, brokers, and related professionals in office, industrial, R&D, and mixed-use real estate. If you have any questions about NAIOP's position on this policy, please contact me at 408-207-6667.

Regards,

--

**EDDIE TRUONG**

*Partner*

*Unite Strategies LLC*



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STRATEGIES**

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Curtis Leigh

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575 Market Street  
Suite 400  
San Francisco, CA 94105  
669-241-1864  
info@naiopsv.org



January 11, 2024

Honorable Mayor Mahan and City Council  
200 E. Santa Clara Street, 18<sup>th</sup> Floor  
San Jose, CA 95113

Dear Mayor Mahan and City Council,

I am writing on behalf of NAIOP Silicon Valley, the leading organization representing 100+ developers, owners, investors, asset managers, brokers, and related professionals in office, industrial, R&D, and mixed-use real estate. Our members are deeply committed to responsible and sustainable development practices that contribute to the economic growth and prosperity of San Jose and the greater Silicon Valley region.

We would like to express our opposition to the proposed "Responsible Construction Ordinance". The proposed law does not prevent or address wage theft in San Jose. According to a search of public records provided by the California Department of Industrial Relations' San Jose Office, the vast majority of wage theft claims are attributed to individuals or small contractors working on small residential projects, which are exempted from the "Responsible Construction" Ordinance. The search yields less than 90 results and suggests that wage theft is not as widespread a problem in the construction industry. Finally, existing State Law has worked in punishing perpetrators of wage theft. The subcontractor that committed human trafficking on the Silvery Towers project, Job Hernandez Torres, was convicted of these crimes and is now serving prison time.

Our primary concern is that the proposed ordinance places undue burdens on developers and builders, without adequately addressing real wage theft in the industry. The proposed ordinance would create exemptions for projects smaller than 10,000 SF; however, the data indicates that the vast majority of wage theft claims are initiated against small contractors. This policy misses the mark, when it comes to preventing real wage theft in our community.

Thank you for considering our perspective on this matter. We look forward to the opportunity for further discussion and collaboration to create policies that benefit both construction workers and the commercial real estate industry in San Jose. Should you have any questions about NAIOP Silicon Valley's position on this policy, please contact Eddie Truong at [REDACTED]

Sincerely,

[REDACTED]  
Curtis Leigh  
President  
NAIOP Silicon Valley

## FW: Public comment for City Council Jan. 23: Responsible Construction Ordinance

City Clerk <city.clerk@sanjoseca.gov>

Fri 1/12/2024 4:56 PM

To: Agendadesk <Agendadesk@sanjoseca.gov>

📎 1 attachments (274 KB)

Responsible Construction Ordinance comment.pdf;

---

**From:** Louise Auerhahn [REDACTED]

**Sent:** Friday, January 12, 2024 4:46 PM

**To:** City Clerk <city.clerk@sanjoseca.gov>

**Cc:** Loesch, Matthew <Matt.Loesch@sanjoseca.gov>; Hickey, Christopher <Christopher.Hickey@sanjoseca.gov>; Klein, Nanci <Nanci.Klein@sanjoseca.gov>

**Subject:** RE: Public comment for City Council Jan. 23: Responsible Construction Ordinance

[External Email]

You don't often get email from [REDACTED]. [Learn why this is important](#)

Hello – can you please ensure this letter is posted as part of the item packet for the Jan. 23 City Council agenda? It is for the Responsible Construction Ordinance, item 3.4.

Thanks,

Louise

---

**From:** Louise Auerhahn [REDACTED]

**Sent:** Friday, January 5, 2024 5:09 PM

**To:** '[district1@sanjoseca.gov](mailto:district1@sanjoseca.gov)' <[district1@sanjoseca.gov](mailto:district1@sanjoseca.gov)>; '[sergio.jimenez@sanjoseca.gov](mailto:sergio.jimenez@sanjoseca.gov)' <[sergio.jimenez@sanjoseca.gov](mailto:sergio.jimenez@sanjoseca.gov)>; 'Torres, Omar' <[Omar.Torres@sanjoseca.gov](mailto:Omar.Torres@sanjoseca.gov)>; '[David.Cohen@sanjoseca.gov](mailto:David.Cohen@sanjoseca.gov)' <[David.Cohen@sanjoseca.gov](mailto:David.Cohen@sanjoseca.gov)>; '[Peter.Ortiz@sanjoseca.gov](mailto:Peter.Ortiz@sanjoseca.gov)' <[Peter.Ortiz@sanjoseca.gov](mailto:Peter.Ortiz@sanjoseca.gov)>; '[district6@sanjoseca.gov](mailto:district6@sanjoseca.gov)' <[district6@sanjoseca.gov](mailto:district6@sanjoseca.gov)>; '[District7@sanjoseca.gov](mailto:District7@sanjoseca.gov)' <[District7@sanjoseca.gov](mailto:District7@sanjoseca.gov)>; '[district8@sanjoseca.gov](mailto:district8@sanjoseca.gov)' <[district8@sanjoseca.gov](mailto:district8@sanjoseca.gov)>; '[pam.foley@sanjoseca.gov](mailto:pam.foley@sanjoseca.gov)' <[pam.foley@sanjoseca.gov](mailto:pam.foley@sanjoseca.gov)>; '[district10@sanjoseca.gov](mailto:district10@sanjoseca.gov)' <[district10@sanjoseca.gov](mailto:district10@sanjoseca.gov)>; '[mayoremail@sanjoseca.gov](mailto:mayoremail@sanjoseca.gov)' <[mayoremail@sanjoseca.gov](mailto:mayoremail@sanjoseca.gov)>

**Cc:** '[city.clerk@sanjoseca.gov](mailto:city.clerk@sanjoseca.gov)' <[city.clerk@sanjoseca.gov](mailto:city.clerk@sanjoseca.gov)>; 'Loesch, Matthew' <[Matt.Loesch@sanjoseca.gov](mailto:Matt.Loesch@sanjoseca.gov)>; 'Hickey, Christopher' <[Christopher.Hickey@sanjoseca.gov](mailto:Christopher.Hickey@sanjoseca.gov)>; 'Klein, Nanci' <[Nanci.Klein@sanjoseca.gov](mailto:Nanci.Klein@sanjoseca.gov)>

**Subject:** Public comment for City Council Jan. 23: Responsible Construction Ordinance

Dear Mayor and City Councilmembers,

Attached please see a joint letter from the South Bay Labor Council, the Santa Clara Building Trades Council, the Wage Theft Coalition, and Working Partnerships USA regarding the Responsible Construction Ordinance. Thank you for the opportunity to provide comment on this matter.

Sincerely,

Louise Auerhahn

Director of Economic & Workforce Policy

Working Partnerships USA

[REDACTED]

San Jose City Council  
200 E. Santa Clara St.  
San Jose, CA 95110

January 5, 2024

Honorable Mayor and City Council,

On behalf of the South Bay Labor Council, the Santa Clara & San Benito Building & Construction Trades Council, the Santa Clara County Wage Theft Coalition, and Working Partnerships USA, we urge the City Council to protect workers and responsible businesses in San Jose by voting to enact the Responsible Construction Ordinance which the City Council voted to approve in concept on Dec. 12, without bowing to pressure from a small minority of unscrupulous developers who turn a blind eye to contractors that have adopted wage theft as a business model and are lobbying to continue exploiting our community members with impunity.

Wage theft in local construction is an alarmingly widespread crime. The Wage Theft Coalition's recent report found 12,376 Santa Clara County construction workers have been victims of wage theft, robbed of over \$46 million dollars - and that includes only documented cases.

This crime is especially directed against vulnerable Latino and Asian workers. Wage theft targeting workers of color and immigrants is a major source of pay inequity: Latino construction workers in San Jose bring home 38% less pay than white construction workers.

Allowing contractors convicted of wage theft to avoid any consequences also harms the majority of law-abiding business owners, including many local small businesses, who are trying to play by the rules, hire responsible subcontractors, and treat their workers fairly, but can't compete with those who cheat.

Workers who try to speak out are often re-victimized by retaliation from their boss. People have been fired or even deported for standing up for their rights and the needs of their families.

Even when workers overcome these odds to speak up and go through the whole intimidating process to report wage theft, file a claim, get a hearing, and receive a judgment finding their employer liable for wage theft, most workers who win their cases still don't get paid. 83% of workers who win a favorable wage theft judgment from the State Division of Labor Standards Enforcement never get a penny.

These same workers are often also subjected to dangerous and illegal conditions on the jobsite. Worksite safety violations in construction too often lead to injury or even death. In the United States, construction has one of the highest fatality rates of any job; according to the 2022 Census of Fatal Occupational Injuries, the rate of fatal occupational injuries in construction is nearly four times as high as for all workers, and higher than in any other sector except for transportation/utilities and agriculture. The reason is obvious: the same bad actors who willingly violate a court order to pay back wages are very likely to also violate health and safety requirements.

Thousands of San Jose construction workers are victimized by wage thieves each year. Workers and community members first alerted the City Council to wage theft in downtown private development projects in 2015, but nothing was done to stop it.

Then in 2017, the U.S. Labor Department announced more than a dozen undocumented immigrant workers were forced to work on KT Urban's Silvery Towers project, while being held prisoner in squalid living conditions in a compound in Hayward. To cut costs, the developer and builders had hired an unlicensed subcontractor who achieved those impossibly low costs through human trafficking. While the unlicensed subcontractor was eventually convicted in federal court and imprisoned, the developers who benefitted from the labor of the trafficked workers took no responsibility – and today, are still fighting to avoid accountability for hiring subcontractors with a pattern and practice of illegal worker exploitation.

In response, on January 30, 2019, the San Jose Rules and Open Government Committee voted to support a Responsible Construction Ordinance that would apply to private construction. A proposed draft ordinance, dated Jan. 24, 2019, was included in the Rules memo. At the March 5, 2019 City Council Priority Setting Session, Council prioritized the Responsible Construction Ordinance as proposed in the Jan. 2019 Rules memo.

It is shocking that five years after the Responsible Construction Ordinance was introduced and City Council voted to act, opponents continue to claim that they need more time. In the time that San Jose has already delayed, Milpitas, Sunnyvale, and Mountain View have all developed, passed, and implemented their own versions of a Responsible Construction Ordinance.

By prioritizing the exploitative business models of a handful of low-road builders and developers, not only is San Jose harming workers and their families, it is actively contributing to workforce shortages. With more than eight years of being known as the center of construction wage theft and low-road jobs, San Jose has actively discouraged investment in growing a skilled construction workforce. As this drives up costs for companies that do not practice wage theft, responsible developers and contractors have less and less incentive to take on projects in San Jose.

We wish to commend the Council for supporting the Responsible Construction Ordinance in concept. The Council requested that OEA focus on 4 specific areas: 1) third tier contractors; 2) contractors or subcontractors who declare bankruptcy; 3) geographical limitations; and 4) any finance issues. We believe that there should be no changes to the Ordinance as originally drafted and that the issues raised by those opposed to the wage theft ordinance lack merit.

It is our position that third tier contractors should be covered by the Ordinance because the goal is to deter wage theft among contractors and subcontractors of any tier. As stated below, California Labor Code 218.7 makes a contractor liable for a subcontractor's debt for wages and benefits on a project **regardless of tier**. Significantly, it would be easy to defeat the ordinance by placing a construction manager or other entity in the contracting hierarchy, thereby making only one "subcontractor" in the second tier. All other subcontractors would then be third tier and would not be covered by this ordinance. One aspect of being a responsible business is hiring partners who are accountable. Businesses/contractors have absolute control over their choice of subcontractor, and should be accountable for their choices.

The same logic applies to bankruptcy. If a subcontractor declares bankruptcy, the contractor should be accountable because the contractor selected the subcontractor and should have done its due diligence before hiring. Moreover, if the contractor and subcontractor worked on the same project, under the provisions of California Labor Code 218.7, the direct contractor assumes “and is liable for any debt owed” by a subcontractor for wages and benefits. The law applies to wages and benefits owed by any subcontractor, **regardless of tier** for construction contracts for “erection, construction, alteration, or repair of a building structure, or other private work.” The law allows direct contractors to require subcontractors to provide payroll records so that the direct contractor can evaluate the subcontractor’s compliance with wage and hour laws and for direct contractors to withhold payment until the subcontractor provides those records. <https://codes.findlaw.com/ca/labor-code/lab-sect-218-7/> If the subcontractor declares bankruptcy, the contractor should be accountable on any project because the contractor chose a subcontractor who owes a debt for wages.

It is also our position that the applicable wage theft judgments should include all judgements in the easy-to-access California Labor Commission’s database and federal Department of Labor database which covers the entire country.

Finally, we do not see the relevance of finance issues, because the existence of a final unpaid wage theft claim will never be a surprise to the offending business. Any business which has an unpaid final wage theft judgment has already received notice of the claim, had an opportunity to contest the claim, and been notified when the Labor Commission recorded the judgment in Superior Court. Additionally, the Ordinance requires the building permit applicant to sign an acknowledgment that the existence of any wage theft judgment against a contractor or subcontractor will result in the withholding of the certificate of occupancy at the end of the project. As a result, the contractor and subcontractor are provided ample time to satisfy a wage theft judgment and obviate the necessity for any delays.

We urge the City Council to act on Jan 23 to enact the Responsible Construction Ordinance (including items a and b from the memo drafted by Councilmembers Ortiz, Torres, Jimenez and Davis and approved unanimously on Dec. 12 by City Council) without delays or loopholes.

Sincerely,

Jean Cohen  
South Bay Labor Council

David Bini  
Santa Clara & San Benito Building & Construction Trades Council

Ruth Silver Taube  
Santa Clara County Wage Theft Coalition

Louise Auerhahn  
Working Partnerships USA

## FW: Responsible Construction Ordinance - Administration Memo

City Clerk <city.clerk@sanjoseca.gov>

Tue 1/16/2024 8:21 AM

To:Agendadesk <Agendadesk@sanjoseca.gov>

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**From:** Jon Ball [REDACTED]

**Sent:** Friday, January 12, 2024 9:34 PM

**To:** city.manager@sanjoseca.gov; Loesch, Matthew <Matt.Loesch@sanjoseca.gov>

**Cc:** Harkness, Kip <Kip.Harkness@sanjoseca.gov>; Klein, Nanci <Nanci.Klein@sanjoseca.gov>; Burton, Chris <Christopher.Burton@sanjoseca.gov>; Hickey, Christopher <Christopher.Hickey@sanjoseca.gov>; City Clerk <city.clerk@sanjoseca.gov>; city.attorney@sanjoseca.gov; District1 <district1@sanjoseca.gov>; District2 <District2@sanjoseca.gov>; District3 <district3@sanjoseca.gov>; District4 <District4@sanjoseca.gov>; District5 <District5@sanjoseca.gov>; District 6 <district6@sanjoseca.gov>; District7 <District7@sanjoseca.gov>; District8 <district8@sanjoseca.gov>; District9 <district9@sanjoseca.gov>; District 10 <District10@sanjoseca.gov>; The Office of Mayor Matt Mahan <mayor@sanjoseca.gov>

**Subject:** Responsible Construction Ordinance - Administration Memo

[External Email]

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Matt Loesch,

This will be carefully reviewed over this weekend.

I hope you and the City Manager take the time to do a deep introspection on why and how this labor drafted ordinance was allowed to be inappropriately expedited without public input. The city routinely prides itself on its public outreach diligence. That did not happen this time. It is very transparent that you and your colleagues were carrying this forward for the benefit of the building trades, not the public at large. Please be reminded that the public expects our Director of Public Works to be focused on maintaining and constructing our San Jose public infrastructure. The South Bay Labor Council and the Building Trades Council are solely responsible for recruiting new members. That is not your job.

As our attorney letters from Hersey and Faber have described in our communications, numerous aspects of the original ordinance are illegal, and case law has been referenced that proclaims this fact.

Why was the city attorney not requested to examine this obviously flawed document?

The city staff did not take the time or exert the effort to make the case for this ordinance.

The performance of city staff on this ordinance has eroded public trust.

The public expects and deserves better.

Jon

-  
On Jan 12, 2024, at 6:01 PM, Loesch, Matthew <[Matt.Loesch@sanjoseca.gov](mailto:Matt.Loesch@sanjoseca.gov)> wrote:

To all labor, construction, developer, and finance partners –

Thank you, again, for your time and attention to the subject listed item over the last few weeks. I am grateful for your time with us.

We published a memo this afternoon on the subject listed topic in preparation for the January 23<sup>rd</sup> Council meeting. You can find link to that below.

[Supplemental Memorandum, 1-12-2024 \(primegov.com\)](#)

We will be meeting with Council Members next week to walk them through the memo and discuss the topic with them.

This email is being sent to all that were on the outreach meeting invites or that sent me emails with comments and thoughts.

I am happy to receive your thoughts and feedback. My cell number is below.

Have a good weekend.

Matt Loesch, P.E.

City of San Jose - Department of Public Works

Director

200 E. Santa Clara St., 5<sup>th</sup> Floor Tower

San Jose, CA 95113-1905



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# FW: Public comment for City Council Jan. 23, item 3.4: Responsible Construction Ordinance

City Clerk <city.clerk@sanjoseca.gov>

Thu 1/18/2024 4:25 PM

To:Agendadesk <Agendadesk@sanjoseca.gov>

---

**From:** John Luebben <[REDACTED]>

**Sent:** Thursday, January 18, 2024 3:44 PM

**To:** City Clerk <city.clerk@sanjoseca.gov>

**Subject:** Re: Public comment for City Council Jan. 23, item 3.4: Responsible Construction Ordinance

[External Email]

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San Jose City Clerk Toni Taber,

Dear Mayor Mahan and City Councilmembers,

I hope this message finds you well. As a resident deeply invested in the well-being of our city, I urge you to take action against wage theft by supporting the memo from Councilmembers Davis, Jimenez, Torres, Ortiz, and Foley, which offers a compromise which addresses the concerns of legitimate developers and contractors while still enacting an effective Responsible Construction Ordinance. This ordinance is instrumental in shaping a city that prioritizes fairness, equity, and ethical business practices.

I recognize that you are likely well-acquainted with the statistics; over half of all final wage theft judgments against construction companies since 2019 remain unpaid, totalling over \$38 million in wages stolen from workers that have not been recovered. Passing the RCO is paramount in protecting our vulnerable workforce and upholding the values we cherish as a city.

The Responsible Construction Ordinance prevents wage theft, levels the playing field for responsible contractors, and holds perpetrators of wage theft accountable. Protecting our vulnerable workforce and fostering a fair environment is not just a duty but a commitment to our shared values as a community.

However, the proposed changes made in the Jan. 12 memo would create loopholes so broad that the result would be a sham law - an ordinance that professes to prevent wage theft, but excludes all actual wage theft judgements, doing nothing for workers and giving exploitative contractors free rein to steal from workers again and again. This deceptive proposal resulted from lobbying by a few wealthy, well-connected, and unscrupulous developers.

Fortunately, the majority of the construction community are legitimate businesses who want to support a fair industry. The memo from Councilmembers Davis, Jimenez, Torres, Ortiz, and Foley is a fair compromise that addresses those businesses' concerns about

simplifying compliance, while still giving workers a powerful tool to hold perpetrators of wage theft accountable.

As a resident of this city, and your constituent, I urge you not to neglect your duty to our most vulnerable residents and resist any influence from contractors opposing fair labor practices. If contractors are operating ethically, enforcement of existing wage theft laws poses no threat but ensures a city that thrives on principles of fairness and equality.

The Responsible Construction Ordinance represents a transformative approach to truly revitalizing our city by not only paving the way for partnerships with contractors and developers that value fair labor practices, but creating a socially and economically equitable and vibrant community.

Thank you for standing with the community on January 23, 2024.

Best regards,

John Luebben



San Jose, California 95112

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# FW: Public comment for City Council Jan. 23, item 3.4: Responsible Construction Ordinance

City Clerk <city.clerk@sanjoseca.gov>

Thu 1/18/2024 4:25 PM

To:Agendadesk <Agendadesk@sanjoseca.gov>

---

**From:** Bryce Montgomery [REDACTED]

**Sent:** Thursday, January 18, 2024 2:54 PM

**To:** City Clerk <city.clerk@sanjoseca.gov>

**Subject:** Re: Public comment for City Council Jan. 23, item 3.4: Responsible Construction Ordinance

[External Email]

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San Jose City Clerk Toni Taber,

Dear Mayor Mahan and City Councilmembers,

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Fortunately, the majority of the construction community are legitimate businesses who want to support a fair industry. The memo from Councilmembers Davis, Jimenez, Torres, Ortiz, and Foley is a fair compromise that addresses those businesses' concerns about

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As a resident of this city, and your constituent, I urge you not to neglect your duty to our most vulnerable residents and resist any influence from contractors opposing fair labor practices. If contractors are operating ethically, enforcement of existing wage theft laws poses no threat but ensures a city that thrives on principles of fairness and equality.

The Responsible Construction Ordinance represents a transformative approach to truly revitalizing our city by not only paving the way for partnerships with contractors and developers that value fair labor practices, but creating a socially and economically equitable and vibrant community.

Thank you for standing with the community on January 23, 2024.

Best regards,

Bryce Montgomery



San Jose, California 95123

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**FW: 3.4 Amendment to Title 24 of the San José Municipal Code for a Proposed Responsible Construction Ordinance**

City Clerk <city.clerk@sanjoseca.gov>

Thu 1/18/2024 4:24 PM

To:Agendadesk <Agendadesk@sanjoseca.gov>

 1 attachments (140 KB)

2024-1-18 Responsible Construction.pdf;

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**From:** Silicon Valley Biz PAC [REDACTED]

**Sent:** Thursday, January 18, 2024 1:55 PM

**To:** City Clerk <city.clerk@sanjoseca.gov>

**Subject:** 3.4 Amendment to Title 24 of the San José Municipal Code for a Proposed Responsible Construction Ordinance

[External Email]

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Honorable Mayor and City Council -

Please find our letter attached regarding item 3.4 on your January 23, 2024 City Council agenda.

Please let me know if you have any questions.

Regards,

**VICTOR GOMEZ**

Silicon Valley Biz PAC

[www.SVBIZPAC.com](http://www.SVBIZPAC.com)

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January 18, 2024

Mayor Mahan  
City of San Jose  
200 E. Santa Clara St.  
San Jose, CA 95113

**Re: Responsible Construction Ordinance**

Honorable Mayor and Councilmembers,

On behalf of the Silicon Valley Biz PAC, a local group of business owners who represent small to medium sized San Jose businesses, we would like to express our opposition to the proposed "Responsible Construction Ordinance".

As local business owners, we are deeply committed to responsible development that contribute to the economic growth and prosperity of San Jose and the greater Silicon Valley. Unfortunately, we have seen significant decline in investment and development in San Jose. The proposed Responsible Construction Ordinance will only further discourage investment when we need it most.

The State of California already has the Private Attorney General Act (PAGA) enacted, which enables, motivates, and finances an army of private attorneys to pursue wage theft in California. The proposed Responsible Construction Ordinance is an inefficient and wasteful efforts which would only harm our city budget, create an expensive additional bureaucracy, and hinder much-needed development in San Jose.

According to the State of California, a majority of wage theft claims are committed by businesses whom this ordinance will not apply to (small sized contractors). To propose an ordinance like this only creates barriers to those who are already responsible and makes it harder to obtain financing for construction projects because of the unknown to those banks who are interested in financing local developments.

Addressing Wage theft is important to all, but this approach falls short in addressing what some may claim to be a wide-spread problem, while creating problems for those who are ready to build and put our residents to work.

With that said, we respectfully request that you reject this proposed ordinance and focus more on incentivizing developers to build more at every opportunity.

Sincerely,

**Victor Cuauhtémoc Gomez**  
Executive Director  
Silicon Valley Biz PAC

**SILICON VALLEY BIZ PAC Board of Trustees**

Tracey Infantino \* Phil Boyce \* Dan Bozzuto \* Matthew Estipona \* Steve Lopes \* Fran Hirsch  
Suzanne Salata \* Bernie Vogel \* John Davis \* Jim Campagna \* Jeff Zell \* Jim Castellanos

# FW: Public comment for City Council Jan. 23, item 3.4: Responsible Construction Ordinance

City Clerk <city.clerk@sanjoseca.gov>

Fri 1/19/2024 8:04 AM

To:Agendadesk <Agendadesk@sanjoseca.gov>

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**From:** Laurie Alaimo [REDACTED]

**Sent:** Friday, January 19, 2024 7:48 AM

**To:** City Clerk <city.clerk@sanjoseca.gov>

**Subject:** Re: Public comment for City Council Jan. 23, item 3.4: Responsible Construction Ordinance

[External Email]

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San Jose City Clerk Toni Taber,

Dear Mayor Mahan and City Councilmembers,

I hope this message finds you well. As a resident deeply invested in the well-being of our city, I urge you to take action against wage theft by supporting the memo from Councilmembers Davis, Jimenez, Torres, Ortiz, and Foley, which offers a compromise which addresses the concerns of legitimate developers and contractors while still enacting an effective Responsible Construction Ordinance. This ordinance is instrumental in shaping a city that prioritizes fairness, equity, and ethical business practices.

I recognize that you are likely well-acquainted with the statistics; over half of all final wage theft judgments against construction companies since 2019 remain unpaid, totalling over \$38 million in wages stolen from workers that have not been recovered. Passing the RCO is paramount in protecting our vulnerable workforce and upholding the values we cherish as a city.

The Responsible Construction Ordinance prevents wage theft, levels the playing field for responsible contractors, and holds perpetrators of wage theft accountable. Protecting our vulnerable workforce and fostering a fair environment is not just a duty but a commitment to our shared values as a community.

However, the proposed changes made in the Jan. 12 memo would create loopholes so broad that the result would be a sham law - an ordinance that professes to prevent wage theft, but excludes all actual wage theft judgements, doing nothing for workers and giving exploitative contractors free rein to steal from workers again and again. This deceptive proposal resulted from lobbying by a few wealthy, well-connected, and unscrupulous developers.

Fortunately, the majority of the construction community are legitimate businesses who want to support a fair industry. The memo from Councilmembers Davis, Jimenez, Torres, Ortiz, and Foley is a fair compromise that addresses those businesses' concerns about

simplifying compliance, while still giving workers a powerful tool to hold perpetrators of wage theft accountable.

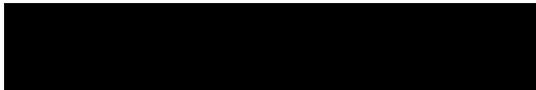
As a resident of this city, and your constituent, I urge you not to neglect your duty to our most vulnerable residents and resist any influence from contractors opposing fair labor practices. If contractors are operating ethically, enforcement of existing wage theft laws poses no threat but ensures a city that thrives on principles of fairness and equality.

The Responsible Construction Ordinance represents a transformative approach to truly revitalizing our city by not only paving the way for partnerships with contractors and developers that value fair labor practices, but creating a socially and economically equitable and vibrant community.

Thank you for standing with the community on January 23, 2024.

Best regards,

Laurie Alaimo



San Jose, California 95112

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# FW: Public comment for City Council Jan. 23, item 3.4: Responsible Construction Ordinance

City Clerk <city.clerk@sanjoseca.gov>

Fri 1/19/2024 8:04 AM

To:Agendadesk <Agendadesk@sanjoseca.gov>

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**From:** Charlotte Quinn [REDACTED]

**Sent:** Friday, January 19, 2024 6:46 AM

**To:** City Clerk <city.clerk@sanjoseca.gov>

**Subject:** Re: Public comment for City Council Jan. 23, item 3.4: Responsible Construction Ordinance

[External Email]

You don't often get email from [REDACTED]. [Learn why this is important](#)

San Jose City Clerk Toni Taber,

Dear Mayor Mahan and City Councilmembers,

I hope this message finds you well. As a resident deeply invested in the well-being of our city, I urge you to take action against wage theft by supporting the memo from Councilmembers Davis, Jimenez, Torres, Ortiz, and Foley, which offers a compromise which addresses the concerns of legitimate developers and contractors while still enacting an effective Responsible Construction Ordinance. This ordinance is instrumental in shaping a city that prioritizes fairness, equity, and ethical business practices.

I recognize that you are likely well-acquainted with the statistics; over half of all final wage theft judgments against construction companies since 2019 remain unpaid, totalling over \$38 million in wages stolen from workers that have not been recovered. Passing the RCO is paramount in protecting our vulnerable workforce and upholding the values we cherish as a city.

The Responsible Construction Ordinance prevents wage theft, levels the playing field for responsible contractors, and holds perpetrators of wage theft accountable. Protecting our vulnerable workforce and fostering a fair environment is not just a duty but a commitment to our shared values as a community.

However, the proposed changes made in the Jan. 12 memo would create loopholes so broad that the result would be a sham law - an ordinance that professes to prevent wage theft, but excludes all actual wage theft judgements, doing nothing for workers and giving exploitative contractors free rein to steal from workers again and again. This deceptive proposal resulted from lobbying by a few wealthy, well-connected, and unscrupulous developers.

Fortunately, the majority of the construction community are legitimate businesses who want to support a fair industry. The memo from Councilmembers Davis, Jimenez, Torres, Ortiz, and Foley is a fair compromise that addresses those businesses' concerns about

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As a resident of this city, and your constituent, I urge you not to neglect your duty to our most vulnerable residents and resist any influence from contractors opposing fair labor practices. If contractors are operating ethically, enforcement of existing wage theft laws poses no threat but ensures a city that thrives on principles of fairness and equality.

The Responsible Construction Ordinance represents a transformative approach to truly revitalizing our city by not only paving the way for partnerships with contractors and developers that value fair labor practices, but creating a socially and economically equitable and vibrant community.

Thank you for standing with the community on January 23, 2024.

Best regards,

Charlotte Quinn



San Jose, California ,95126

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**FW: Public comment for City Council Jan. 23, item 3.4: Responsible Construction Ordinance**

City Clerk <city.clerk@sanjoseca.gov>

Fri 1/19/2024 8:04 AM

To:Agendadesk <Agendadesk@sanjoseca.gov>

---

**From:** jackie tonkel [REDACTED]

**Sent:** Thursday, January 18, 2024 6:34 PM

**To:** City Clerk <city.clerk@sanjoseca.gov>

**Subject:** Re: Public comment for City Council Jan. 23, item 3.4: Responsible Construction Ordinance

[External Email]

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Thank you for standing with the community on January 23, 2024.

Best regards,

jackie tonkel



san jose, California 95128

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# FW: Public comment for City Council Jan. 23, item 3.4: Responsible Construction Ordinance

City Clerk <city.clerk@sanjoseca.gov>

Fri 1/19/2024 8:04 AM

To:Agendadesk <Agendadesk@sanjoseca.gov>

---

**From:** Lynda DeManti <[REDACTED]>  
**Sent:** Thursday, January 18, 2024 11:38 PM  
**To:** City Clerk <city.clerk@sanjoseca.gov>  
**Subject:** Re: Public comment for City Council Jan. 23, item 3.4: Responsible Construction Ordinance

[External Email]

You don't often get email from [REDACTED] [Learn why this is important](#)

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Thank you for standing with the community on January 23, 2024.

Best regards,

Lynda DeManti

  
San Jose, California 95120

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# FW: Public comment for City Council Jan. 23, item 3.4: Responsible Construction Ordinance

City Clerk <city.clerk@sanjoseca.gov>

Fri 1/19/2024 10:39 AM

To:Agendadesk <Agendadesk@sanjoseca.gov>

---

**From:** Karen Erickson [REDACTED]

**Sent:** Friday, January 19, 2024 8:16 AM

**To:** City Clerk <city.clerk@sanjoseca.gov>

**Subject:** Re: Public comment for City Council Jan. 23, item 3.4: Responsible Construction Ordinance

[External Email]

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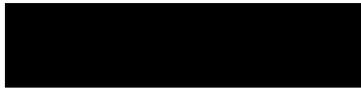
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Thank you for standing with the community on January 23, 2024.

Best regards,

Karen Erickson



San Jose, California 95125

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# FW: Public comment for City Council Jan. 23, item 3.4: Responsible Construction Ordinance

City Clerk <city.clerk@sanjoseca.gov>

Fri 1/19/2024 10:40 AM

To:Agendadesk <Agendadesk@sanjoseca.gov>

---

**From:** Stanley y [REDACTED]

**Sent:** Friday, January 19, 2024 10:14 AM

**To:** City Clerk <city.clerk@sanjoseca.gov>

**Subject:** Re: Public comment for City Council Jan. 23, item 3.4: Responsible Construction Ordinance

[External Email]

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Thank you for standing with the community on January 23, 2024.

Best regards,

Stanley y



Los Gatos, California 95032-3933

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## FW: Agenda item 3.4 Davis Memo Stop Wage Theft

City Clerk <city.clerk@sanjoseca.gov>

Fri 1/19/2024 10:41 AM

To:Agendadesk <Agendadesk@sanjoseca.gov>

---

**From:** Bill Roth [REDACTED]

**Sent:** Friday, January 19, 2024 9:55 AM

**To:** City Clerk <city.clerk@sanjoseca.gov>

**Subject:** Agenda item 3.4 Davis Memo Stop Wage Theft

[External Email]

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I fully support the policy outlined in the Davis Memo. The city should not be doing any business with folks who practice Wage Theft.

Sincerely,

Bill Roth

[REDACTED]

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# FW: Public comment for City Council Jan. 23, item 3.4: Responsible Construction Ordinance

City Clerk <city.clerk@sanjoseca.gov>

Fri 1/19/2024 1:33 PM

To:Agendadesk <Agendadesk@sanjoseca.gov>

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**From:** Jessica Stalions [REDACTED]

**Sent:** Friday, January 19, 2024 1:23 PM

**To:** City Clerk <city.clerk@sanjoseca.gov>

**Subject:** Re: Public comment for City Council Jan. 23, item 3.4: Responsible Construction Ordinance

[External Email]

You don't often get email from [REDACTED] [Learn why this is important](#)

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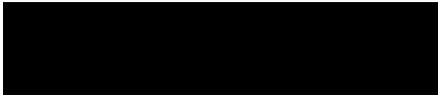
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Thank you for standing with the community on January 23, 2024.

Best regards,

Jessica Stalions



San Jose, California 95118

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# FW: Public comment for City Council Jan. 23, item 3.4: Responsible Construction Ordinance

City Clerk <city.clerk@sanjoseca.gov>

Fri 1/19/2024 1:33 PM

To:Agendadesk <Agendadesk@sanjoseca.gov>

---

**From:** Jackie O'Donnell <[REDACTED]>

**Sent:** Friday, January 19, 2024 11:23 AM

**To:** City Clerk <city.clerk@sanjoseca.gov>

**Subject:** Re: Public comment for City Council Jan. 23, item 3.4: Responsible Construction Ordinance

[External Email]

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Best regards,

Jackie O'Donnell



San Jose, California 95123

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**FW: Public comment for City Council Jan. 23, item 3.4: Responsible Construction Ordinance**

City Clerk <city.clerk@sanjoseca.gov>

Fri 1/19/2024 3:24 PM

To:Agendadesk <Agendadesk@sanjoseca.gov>

---

**From:** James Marshall [REDACTED]

**Sent:** Friday, January 19, 2024 2:16 PM

**To:** City Clerk <city.clerk@sanjoseca.gov>

**Subject:** Re: Public comment for City Council Jan. 23, item 3.4: Responsible Construction Ordinance

[External Email]

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Best regards,

James Marshall



San José, California 95125

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**FW: Responsible Construction Ordinance Letter from David Bini**

City Clerk <city.clerk@sanjoseca.gov>

Fri 1/19/2024 10:40 AM

To:Agendadesk <Agendadesk@sanjoseca.gov>

📎 1 attachments (506 KB)

Responsible Constr Ordinance Ltr.pdf;

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**From:** Norene Sakazaki [REDACTED]  
**Sent:** Friday, January 19, 2024 9:14 AM  
**To:** Norene Sakazaki <norene@scbtc.org>  
**Cc:** David Bini <david@scbtc.org>  
**Subject:** Responsible Construction Ordinance Letter from David Bini

[External Email]

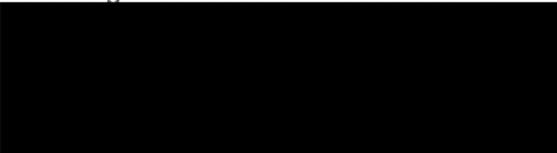
Some people who received this message don't often get email from [REDACTED] [Learn why this is important](#)

Good morning,

Attached please find a letter from David Bini addressed to the Honorable Mayor and City Council Members in support of a Responsible Construction Ordinance.

Thanks so much,  
Norene

**Norene Sakazaki**  
Santa Clara & San Benito Counties  
Building & Construction Trades Council



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David Bini  
 Executive Director

Brett Davis  
 President

- Boilermakers 549
- Brick & Tile 3
- Carpet & Linoleum 12
- Cement Masons 400
- Electricians 234
- Electricians 332
- Elevator Constructors 8
- Glaziers 1621
- Heat & Frost Insulators 16
- Iron Workers 377
- Laborers 67
- Laborers 270
- Operating Engineers 3
- Painters District Council 16
- Painters & Tapers 507
- Plasterers 300
- Plumbers & Steamfitters 393
- Roofers 95
- Sheet Metal Workers 104
- Sign, Display 510
- Sprinkler Fitters 483
- Sprinkler Fitters 669
- Teamsters 853
- UA Local 355

- Affiliated with:
- State Building and Construction Trades Council of California
  - California Labor Federation, AFL-CIO
  - California Labor C.O.P.E.
  - South Bay AFL-CIO Labor Council



January 18, 2024

Re: Item 3.4, January 23, 2024 Agenda

Honorable Mayor and City Council,

The Santa Clara and San Benito Counties Building and Construction Trades Council is in support of the memo from Councilmembers Davis, Jimenez, Torres, Ortiz, and Foley. Workers in the construction industry are at high risk for being subject to violations of wage and hour law. According to the United States Department of Labor, construction had the dubious honor of topping the chart of Low Wage, High Violation Industries in the amount of back wages assessed for compliance actions, in both fiscal years 2022 and 2023.<sup>1</sup> On the same chart, construction ranks third-highest in number of compliance actions for the same years. Clearly, this is not a problem that has been solved.

Unionization is one safe harbor for construction workers to avoid being victims of wage and hour violations, however it does not protect them completely from the effects of this unethical practice. The contractors that incorporate such illegal activity into their business models gain an unfair competitive advantage over responsible contractors, by having lower operating costs and more flexibility to lower their bids, pushing out the responsible contractors and depriving their employees from honest work opportunities.

I appreciate the vast majority of our local contractors, who do not engage in violations as a matter of practice, and I would like to stand with them in ensuring that they are free from unfair competition caused by illegal practices. This Responsible Construction Ordinance, as addressed by the Davis, Jimenez, Torres, Ortiz, and Foley memo, will remove the unfair advantage, and allow both workers and responsible businesses to prosper. As it should be.

I urge the City Council to adopt a Responsible Construction Ordinance with the changes addressed in this memo.

Thank you,



David Bini

<sup>1</sup> <https://www.dol.gov/agencies/whd/data/charts/low-wage-high-violation-industries>

## City Council Agenda Item 3.4 – Responsible Construction Ordinance

Eddie Truong [REDACTED]

Fri 1/19/2024 3:10 PM

To:Eddie Truong <[REDACTED]>

📎 1 attachments (205 KB)

RCO\_NAIOP follow-up letter 1.19.2024.pdf;

[External Email]

Some people who received this message don't often get email from [REDACTED] [learn why this is important](#)

Dear Mayor Mahan and City Council:

On behalf of NAIOP Silicon Valley, I am submitting this letter of support for the joint memorandum authored by Councilmembers Davis, Jimenez, Torres, Ortiz, and Foley. NAIOP Silicon Valley is the leading organization representing 200+ commercial developers, owners, investors, asset managers, brokers, and related professionals in office, industrial, R&D, and mixed-use real estate. If you have any questions about NAIOP's position on this policy, please contact me at [REDACTED]

Regards,

--

**EDDIE TRUONG**

*Partner*

*Unite Strategies LLC*



**UNITE  
STRATEGIES**

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NAIOP Silicon Valley  
2024 Board of Directors

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Chezka Solon

Public Policy  
Eddie Troung  
Sean Kali-Rai

575 Market Street  
Suite 400  
San Francisco, CA 94105  
669-241-1864  
info@naiopsv.org



January 19, 2024

Honorable Mayor Mahan and City Council  
200 E. Santa Clara Street, 18<sup>th</sup> Floor  
San Jose, CA 95113

**RE: City Council Agenda Item 3.4 – Responsible Construction Ordinance**

Dear Mayor Mahan and City Council,

I am writing on behalf of NAIOP Silicon Valley, the leading organization representing 200+ developers, owners, investors, asset managers, brokers, and related professionals in office, industrial, R&D, and mixed-use real estate. Our members are deeply committed to responsible and sustainable development practices that contribute to the economic growth and prosperity of San Jose and the greater Silicon Valley region.

We are supportive of the joint memorandum submitted by Councilmembers Davis, Jimenez, Torres, Ortiz, and Foley. In particular, we are appreciative of Councilmember Davis' leadership in convening and engaging with business leaders to craft thoughtful public policy for San Jose's future growth and economic development.

Thank you for considering our perspective on this matter. We look forward to the opportunity for further discussion and collaboration to create policies that facilitate construction jobs and the growth of commercial real estate industry in San Jose. Should you have any questions about NAIOP Silicon Valley's position on this policy, please contact Eddie Troung at [REDACTED]

Sincerely,

[REDACTED]

Curtis Leigh  
President  
NAIOP Silicon Valley

**FW: Public comment for City Council Jan. 23, item 3.4: Responsible Construction Ordinance**

City Clerk <city.clerk@sanjoseca.gov>

Mon 1/22/2024 8:12 AM

To:Agendadesk <Agendadesk@sanjoseca.gov>

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**From:** Caroline Thomas <[REDACTED]>  
**Sent:** Friday, January 19, 2024 5:41 PM  
**To:** City Clerk <city.clerk@sanjoseca.gov>  
**Subject:** Re: Public comment for City Council Jan. 23, item 3.4: Responsible Construction Ordinance

[External Email]

You don't often get email from [REDACTED] [Learn why this is important](#)

San Jose City Clerk Toni Taber,

Dear Mayor Mahan and City Councilmembers,

I hope this message finds you well. As a resident deeply invested in the well-being of our city, I urge you to take action against wage theft by supporting the memo from Councilmembers Davis, Jimenez, Torres, Ortiz, and Foley, which offers a compromise which addresses the concerns of legitimate developers and contractors while still enacting an effective Responsible Construction Ordinance. This ordinance is instrumental in shaping a city that prioritizes fairness, equity, and ethical business practices.

I recognize that you are likely well-acquainted with the statistics; over half of all final wage theft judgments against construction companies since 2019 remain unpaid, totalling over \$38 million in wages stolen from workers that have not been recovered. Passing the RCO is paramount in protecting our vulnerable workforce and upholding the values we cherish as a city.

The Responsible Construction Ordinance prevents wage theft, levels the playing field for responsible contractors, and holds perpetrators of wage theft accountable. Protecting our vulnerable workforce and fostering a fair environment is not just a duty but a commitment to our shared values as a community.

However, the proposed changes made in the Jan. 12 memo would create loopholes so broad that the result would be a sham law - an ordinance that professes to prevent wage theft, but excludes all actual wage theft judgements, doing nothing for workers and giving exploitative contractors free rein to steal from workers again and again. This deceptive proposal resulted from lobbying by a few wealthy, well-connected, and unscrupulous developers.

Fortunately, the majority of the construction community are legitimate businesses who want to support a fair industry. The memo from Councilmembers Davis, Jimenez, Torres, Ortiz, and Foley is a fair compromise that addresses those businesses' concerns about simplifying compliance, while still giving workers a powerful tool to hold perpetrators of wage theft accountable.

As a resident of this city, and your constituent, I urge you not to neglect your duty to our most vulnerable residents and resist any influence from contractors opposing fair labor practices. If contractors are operating ethically, enforcement of existing wage theft laws poses no threat but ensures a city that thrives on principles of fairness and equality.

The Responsible Construction Ordinance represents a transformative approach to truly revitalizing our city by not only paving the way for partnerships with contractors and developers that value fair labor practices, but creating a socially and economically equitable and vibrant community.

Thank you for standing with the community on January 23, 2024.

Best regards,

Caroline Thomas



San Jose, California 95123

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**FW: Public comment for City Council Jan. 23, item 3.4: Responsible Construction Ordinance**

City Clerk <city.clerk@sanjoseca.gov>

Mon 1/22/2024 9:15 AM

To:Agendadesk <Agendadesk@sanjoseca.gov>

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**From:** Marilyn Smith [REDACTED]

**Sent:** Monday, January 22, 2024 7:22 AM

**To:** City Clerk <city.clerk@sanjoseca.gov>

**Subject:** Re: Public comment for City Council Jan. 23, item 3.4: Responsible Construction Ordinance

[External Email]

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San Jose City Clerk Toni Taber,

Dear Mayor Mahan and City Councilmembers,

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I recognize that you are likely well-acquainted with the statistics; over half of all final wage theft judgments against construction companies since 2019 remain unpaid, totalling over \$38 million in wages stolen from workers that have not been recovered. Passing the RCO is paramount in protecting our vulnerable workforce and upholding the values we cherish as a city.

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Fortunately, the majority of the construction community are legitimate businesses who want to support a fair industry. The memo from Councilmembers Davis, Jimenez, Torres, Ortiz, and Foley is a fair compromise that addresses those businesses' concerns about simplifying compliance, while still giving workers a powerful tool to hold perpetrators of wage theft accountable.

As a resident of this city, and your constituent, I urge you not to neglect your duty to our most vulnerable residents and resist any influence from contractors opposing fair labor practices. If contractors are operating ethically, enforcement of existing wage theft laws poses no threat but ensures a city that thrives on principles of fairness and equality.

The Responsible Construction Ordinance represents a transformative approach to truly revitalizing our city by not only paving the way for partnerships with contractors and developers that value fair labor practices, but creating a socially and economically equitable and vibrant community.

Thank you for standing with the community on January 23, 2024.

Best regards,

Marilynn Smith



San Jose , California 95127

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**FW: Item 3.4 - SJDA Letter**

City Clerk <city.clerk@sanjoseca.gov>

Mon 1/22/2024 10:20 AM

To:Agendadesk <Agendadesk@sanjoseca.gov>

I'm using Adobe Acrobat.

Here's the [2024-1-22 City Council Agenda Item 3.4 – Responsible Construction Ordinance w signature.pdf](#) for you to review.

---

**From:** Victor Gomez <[REDACTED]>  
**Sent:** Monday, January 22, 2024 9:54 AM  
**Cc:** Alex Stettinski <[REDACTED]>  
**Subject:** Item 3.4 - SJDA Letter

[External Email]

Some people who received this message don't often get email from [REDACTED] [Learn why this is important](#)

Honorable Mayor Mahan and City Council -

Please see the attached letter from San Jose Downtown Association CEO Alex Stettinski regarding item 3.4 on your Council agenda for tomorrow.

Let me know if you have any questions.

Best Regards,

**VICTOR GOMEZ**  
*Pinnacle Strategy, LLC*  
*Government Affairs + Land-Use Consulting*

[www.PinnacleStrategy.org](http://www.PinnacleStrategy.org)

This message is from outside the City email system. Do not open links or attachments from untrusted sources.

**San Jose Downtown Association**  
28 N. First Street, Suite 1000  
San Jose, CA 95113



sjdowntown.com  
408.279.1775

January 22, 2024

The Honorable Mayor Mahan and City Council Members  
City of San José  
200 East Santa Clara Street  
San José, CA 95113

**RE: CITY COUNCIL AGENDA ITEM 3.4 – RESPONSIBLE CONSTRUCTION ORDINANCE**

Dear Mayor Mahan and City Councilmembers,

The San Jose Downtown Association (SJDA) has represented downtown for 37 years and together with more than 2000 current businesses and property owner members we strive to increase the vitality and livability of downtown San Jose.

When first made aware of this proposed “Responsible Construction Ordinance” in November, we were extremely concerned about its impacts on future development in Downtown San Jose and planned to oppose such ordinance. Though we are very supportive of tackling any ongoing wage theft and any unpaid claims, withholding Occupancy Permits would be disastrous for those contractors who had subs with unknown claims.

The San Jose Downtown Association works closely with small businesses every day to help navigate the process of opening a business in downtown and have firsthand knowledge of how difficult and complex the process is. Every additional step and layer of bureaucracy can discourage businesses from wanting to locate here. As you may be aware, additional requirements when obtaining building permits adds more complexity to an already highly complex and burdensome process.

On Thursday, as we reviewed the City Council agenda, we were very pleased to see the collaboration and thoughtful approach of the memo prepared by Councilmembers Davis, Jimenez, Torres, Ortiz and Foley. This memo allows the issue of outstanding wage claims to be addressed before any work is done, therefore satisfying the intent of the City Council’s concerns.

As you move toward redrafting this ordinance, we want to emphasize to City Council and staff the importance of a well-defined ordinance that is easy to understand and does not become a burden to those trying to open up in Downtown San Jose. For that to happen, we encourage Council to add clear definitions to the ordinance language, including but not limited to the definitions of “Subcontractor” and “Wage Theft”. Additionally, we believe that putting this ordinance in the Building Department makes much more sense than with Public Works.

With that said, I encourage you to approve this memo and bring back an ordinance for the development community’s review and adoption in the future.

Cordially,



Alex Stettinski  
Chief Executive Officer

**FW: Chamber letter of support re: Agenda Item 3.4 - Responsible Construction Ordinance**

City Clerk <city.clerk@sanjoseca.gov>

Mon 1/22/2024 12:26 PM

To:Agendadesk <Agendadesk@sanjoseca.gov>

I'm using Adobe Acrobat.

Here's the [City Council 1-23-24 Agenda Item 3.4 Responsible Construction Ordinance San Jose Chamber of Commerce.pdf](#) for you to review.

---

**From:** Leah Toeniskoetter [REDACTED]

**Sent:** Monday, January 22, 2024 12:09 PM

**To:** The Office of Mayor Matt Mahan <mayor@sanjoseca.gov>; District1 <district1@sanjoseca.gov>; District2 <District2@sanjoseca.gov>; District3 <district3@sanjoseca.gov>; District4 <District4@sanjoseca.gov>; District5 <District5@sanjoseca.gov>; District 6 <district6@sanjoseca.gov>; District7 <District7@sanjoseca.gov>; District8 <district8@sanjoseca.gov>; District9 <district9@sanjoseca.gov>; District 10 <District10@sanjoseca.gov>

**Cc:** City Clerk <city.clerk@sanjoseca.gov>; Klein, Nanci <Nanci.Klein@sanjoseca.gov>; Loesch, Matthew <Matt.Loesch@sanjoseca.gov>; Burton, Chris <Christopher.Burton@sanjoseca.gov>

**Subject:** Chamber letter of support re: Agenda Item 3.4 - Responsible Construction Ordinance

[External Email]

Some people who received this message don't often get email from [REDACTED] [Learn why this is important](#)

Honorable Mayor, Councilmembers and city staff,

Please find the attached letter in reference to Council Agenda Item 3.4 on tomorrow's council agenda.

Thank you for your service to our community.

My best,

Leah



Leah Toeniskoetter

President & CEO

San Jose Chamber of Commerce  
[REDACTED]



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January 22, 2024

Honorable Mayor and City Council  
City of San Jose  
200 East Santa Clara Street  
San Jose, CA 95113

**RE: Council meeting 1/23/24. Item 3.4 Responsible Construction Ordinance**

Dear Honorable Mayor Mahan and Councilmembers:

The San Jose Chamber of Commerce is in support of the January 18, 2024 Memorandum submitted by Councilmembers Davis, Jimenez, Torres, Ortiz and Foley.

The San Jose Chamber represents a diverse community of private industry professionals, developers, general and sub-contractors, and small to large business owners in our city. The recommendations in the memo address concerns raised by our members since review of the original Ordinance.

As staff drafts the final version, we respectfully request consideration of the following to reduce ambiguity:

- Further define 'Subcontractor' to mean any subcontractor physically on site of the project and directly hired by the general contractor.
- Emphasize the Temporary Certificate of Occupancy is not affected, and would not be withheld, by nature of this process.
- Designate Planning, Building & Code Enforcement as the implementor of the ordinance instead of Public Works, given building permits and Certificates of Occupancy stem from the PBCE office.
- Enable all stakeholders to review the Ordinance language before the final vote by City Council.

We would like to thank the Mayor, Councilmembers and staff for considering the insights and expertise of the private sector professionals who value its purpose and are impacted by its direction.

Sincerely,



Leah Toeniskoetter  
President & CEO  
San Jose Chamber of Commerce

Cc: Matt Loesch, P.E., Director, Dept. of Public Works  
Nanci Klein, Director, Office of Economic Development  
Chris Burton, Director, Planning, Building & Code Enforcement



Premier Recycle Company  
348 Phelan Avenue  
San Jose, California 95112

Phone 408-297-7910  
Fax 408-297-7915  
[www.premierrecycle.com](http://www.premierrecycle.com)

To the Mayor and San Jose City Council

RE: Responsible Construction Ordinance, Agenda Item 3.4

CC: City Attorney's Office, City Manager's Office

I witnessed the most egregious display of disingenuousness and doublespeak that I have ever seen from the council when they discussed the "Responsible Construction Ordinance". In fact, it means the exact opposite.

This ordinance is being heralded as a champion of the worker, preventing, and prosecuting the terrible act of wage theft on construction projects.

This ordinance cites no data. Furthermore, wage theft is already illegal, and there are multiple state mechanisms to investigate these claims.

But the name of the ordinance, is a significant intentional act, to be able to discredit anyone who might speak out against its flaws.

NO ONE is in support of wage theft, that is not a thing.

Certain council members and supporters point to the Silvery Towers as proof that something needs to be done. What happened there was heinous, and the criminal is in jail, rightfully so. Justice worked its course and people are serving time.

This ordinance is not about wage theft.

Earlier this year, I received a call from one of our customers that our company name was used in a council meeting, as a gross example of a company not paying employees. Peter Ortiz repeatedly mentioned our name.

I found this personally insulting as we have never engaged in that type of behavior, nor have we had any claims.

Our company was shocked and confused.

Shortly after, Councilmembers Ortiz and Torres personally brought bullhorns to the front of our building and yelled at our staff. They shoved a letter at one of my managers.

This letter was on ACTUAL City letterhead accusing us of wage theft, terrible treatment of our employees, and other acts. We saw this as nothing short of a threat from the City itself, that if we didn't unionize (which by the way, is out of our control and the City's control) the City would make sure we had problems. Our operational permits rest in the hands of City council votes. Candelas signed this letter as well. This is an alarming abuse of power. A scan of the letter can be found in the attachments to this letter.

I reached out to the City Attorney and The Mayor's office, to see how we could stop rogue, out-of-district councilmembers, from targeting us personally. We did not even know who they were as they were yelling and shoving a letter in our face. This letter had ownership incorrect, the address incorrect, and our company name incorrect. The councilmembers clearly do not know who we are.

The City essentially told us this is acceptable behavior when we received correspondence back.

Are we fine with this as a City? If so, who would want to do business here in such a hostile council environment?

When we went to the media, the councilmembers felt the pressure of their insane behavior, and proceeded to hold a press conference, where they called us racist and homophobic on live television. That was news to us here, considering our very diverse and inclusive workplace.

I spent months losing sleep over why this was happening to us. Then I read this ordinance and it all made sense. Someone needed to be used as an example and we were the sacrifice, no need to even be true.

Our company now has an unwarranted reputation-ruining blemish, brought on by knowingly untrue statements by councilmembers. It takes decades to earn the trust of the building community here in San Jose.

I bring you this story as a cautionary tale and the underlying reason why this specific piece of legislation is bad, and the council should be fully against it in its current form.

It is not about wage theft; it is about power.

The legislation would suspend the certificate of occupancy for any project that is accused of wage theft, or any judgements against General Contractors, subcontractors, or third-tier contractors and vendors.

Again, no one is in favor of this type of behavior.

But highly convenient, Project Labor Agreements and Community Workforce agreements are exempted.

The most important problem: The mere act of accusation will cause the loss of clients. No project will have any company ACCUSED on their site, because of worry of later problems. Will competitors make a well-placed call on your behalf? Will a councilmember?

Small businesses and merit-based shops should be supported by this City. This is a major play for the balance of power, in which our small business was caught in the crossfire of a larger agenda, pushed by specific people.

This doesn't stop with Construction. Think future ordinances on responsible restaurants, responsible tech, responsible retail, etc. If we do not stop the obvious takeover of private business, the bulldozer will continue to run over businesses like ours.

Wage theft is and should be illegal. But, using it as a legislative tool to pick winners and losers for the future construction in San Jose is not something this council should be supporting.

**I am asking that Councilmembers Ortiz, Torres, and Candelas recuse themselves from this vote. There is obvious bias that cannot be ignored. They used the power of their dais to personally berate employees of our company ON CITY LETTERHEAD.**

A similar situation occurred in Los Angeles that opened the City of LA up to massive legal implications for councilmembers clearly showing bias in a parallel fashion. (Article Attached).

I cannot in good faith believe they will ever be able to vote without bias on any future operational permit our company needs to stay in business.

**Ortiz, Torres, and Candelas cannot vote on this ordinance.**

While I support Councilmember Dev Davis' proposed revisions, our stance does not change on the recusal.



Brock Hill

Vice President

Premier Recycle Company

March 23<sup>rd</sup>, 2023

Premier Recycle Company, Dumpster Debris Bin Service  
338 Phelan Ave, San Jose, CA 95112

Owners Brock & Rocky Hill:

As the Councilmembers representing Districts 5, 3, and 8 – **the diverse neighborhoods of East Side, Evergreen, and Downtown San José that over 300,000 residents call home** – we are writing to support the workers at Premier Recycle Company, Dumpster Debris Bin Service.

For context, we are the sons of working-class parents who struggled their whole lives to keep a roof over our heads. It was thanks to our parents' union membership that they were able to maintain rent and keep our families fed.

**We firmly believe that all workers have the right to a union and to a collective voice in the conditions of their own employment. We know from our own experiences that unions play an important role to play in stabilizing families by ensuring they can pay their rent/mortgage, put food on the table, and send their children to school.** The threat of displacement and rising cost of living are critical issues facing San José neighborhoods, which we believe can be successfully addressed via a unionized workforce.

We are well acquainted with the strategies you are all implementing to intimidate your workers from organizing and ensuring a quality workplace. **We have heard concerns of safety & wage theft claims, falsification of votes, unwarranted surveillance and a general environment of hostility, division and divisiveness among other unfair labor practices.**

**Let it be known that we take jeopardizing the wellbeing of working families as a personal issue.** The resilience and strength of San José is built upon the labor of the working-class. This is an understanding that many of our Council colleagues share.

It is our hope that these negotiations can begin to be performed in good faith, centering fairness and justice for workers. As Councilmembers, we would be happy to offer my support in negotiations.

Thank you, and we eagerly look forward to a fair contract for the hardworking workers at Premier Recycle Company, Dumpster Debris Bin Service.

Sincerely,



The Honorable Peter Ortiz  
San José City Councilmember | District 5 – East San José



The Honorable Omar Torres  
San José City Councilmember | District 3 - Downtown San José



The Honorable Domingo Candelas  
San José City Councilmember | District 8 – Evergreen & East San José

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**Premier Recycle**

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Rocky Hill [REDACTED]

Mon, Jul 17, 2023 at 4:52 PM

To: Nora Frimann &lt;nora.frimann@sanjoseca.gov&gt;, Mayor Matt Mahan &lt;mayor@sanjoseca.gov&gt;

Cc: matt.mahan@sanjoseca.gov, arjun.batra@sanjoseca.gov, pam.foley@sanjoseca.gov, domingo.candelas@sanjoseca.gov, bien.doan@sanjoseca.gov, david.cohen@sanjoseca.gov, peter.ortiz@sanjoseca.gov, dev.davis@sanjoseca.gov, rosemery.kamei@sanjoseca.gov, sergio.jimenez@sanjoseca.gov, omar.torres@sanjoseca.gov

Bcc: brock [REDACTED]

Dear City Council,

We ask for a formal apology from the San Jose City Council. And a letter of apology from each of the three Councilmembers who signed letters on City stationery which were intended to intimidate and also accused Premier Recycle Company of unfair labor practices (link below). They need to acknowledge why these letters were intimidating and biased. They should also explain that they did not investigate their written inaccurate accusations against us.

We also ask for an effective government watchdog organization to be created with public oversight and input. And clear ethical lines be enforced as stated in the City Charter. Far too often the City hopes that the buzz will die down and representatives will not be held accountable for their behavior. Take this opportunity to make substantial changes.

While the Councilmembers may have said they did not understand that City Council Letterhead indicates that the Council supports the contents of the letter, by using City Council Letterhead the intention was to threaten and intimidate.

This is why we need an apology and a new watchdog organization. [Ortiz, Torres, Candelas intimidating local business](#)

This is a clear pattern of intimidation, overstepping, and bias.

**This clear and consistent pattern of intimidation.**

1. More than one letter sent, repetitive harrassment
2. Letters sent as if from the entire City of San Jose Council
3. Letters sent from Councilmembers outside their own district
4. Letters hand delivered by Councilmembers at our place of business with the Unions leaders standing behind them
5. Inaccurate threatening accusations
6. Word choice in the letters insinuating that we are "jeopardizing the wellbeing of working families"
7. See photos in article of Councilmember using bullhorns on the picket line; all three were on the picket line

**These Councilmembers overstepped.**

The Councilmembers did not stay in their ethical lane of representing all their constituents. They crossed the line from representing their constituents to being threatening advocates for their cause that they 'believe can be successfully addressed via a unionized workforce.'

**Labor negotiations intrusion.**

By offering to assist in labor negotiations the council members crossed another ethical line.

**Biased against business in San Jose.**

We ask for copies of any letters sent to the Unions from the same Council members to the Unions. It is our hope that letters were also sent to the Unions to substantiate a lack of bias against business in San Jose.

We are a strong family business in San Jose that has been providing jobs for generations. Whether a union is in our shop is of no importance to us as long as the process is fair, all our employees are treated with

respect, and the highest ethical standards for our elected officials are enforced.

We hope better for the City, for employees and for businesses. These letters of apology and renewed focus on ethics will go a long way to improving our partnership with the City.

Thank you,

Rocky Hill  
Premier Recycle

--

Rocky Hill



**Premier Recycle**  
348 Phelan Ave  
San Jose, Ca 95112



Visit us on the web at [www.premierrecycle.com](http://www.premierrecycle.com)

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# LA City attorney to CMs: Stop favoring union workers

July 26, 2023

*Who would've thought that councilmembers' brassy lopsided advocacy for unionized labor workers might be a major city liability? The LA Times analyzes a recent memo from the City of Los Angeles' attorney Hydee Feldstein Soto, which implores CMs to stay out of union strikes. Perhaps concern over these legal entanglements explain SJ CMs Ortiz' and Torres' bizarre July 25 presser, in which they squawked at the idea that conflating their personal politics with the City's was false, misleading, and unethical.*

In recent months, an array of federal, state and local politicians — including several members of the City Council — have walked picket lines or offered support not just to Unite Here Local 11, the hotel workers union, but also TV and film writers marching outside studios and school workers demonstrating outside Los Angeles Unified campuses.

Yet in recent weeks, lawyers with Los Angeles City Atty. Hydee Feldstein Soto's office have begun quietly advising the city's elected officials to refrain from getting involved in labor disputes, saying such activities could result in legal action against the city.

In a confidential July 3 memo, a copy of which was reviewed by The Times, Feldstein Soto's team warned elected leaders that if they show up on picket lines or rally with demonstrators, they might have to recuse themselves from voting on a related issue in the future....

In the memo, the city attorney's legal team said it provided its advice in response to inquiries from elected officials about picketing in support of Unite Here. The lawyers acknowledged that those officials, in their capacity as individuals, still retain their "constitutional rights of speech and assembly and are free to exercise those rights in peaceful union protests."

The lawyers suggested that council members who appear at protests over contract disputes make clear that they are speaking in their own capacity, not as

observer, not a participant, and avoid wearing clothing with the city seal.

Lawyers for Feldstein Soto said much of their concern is based on a federal law barring the city from using “economic pressure or regulatory powers” to interfere in union disputes. They cite *Golden State Transit Corp. vs. City of Los Angeles*, a sprawling case that twice reached the U.S. Supreme Court, which stemmed from actions taken by the council during a labor dispute more than 40 years ago.

The saga began in 1981, when the council intervened on behalf of a Teamsters chapter on strike against Yellow Cab Co., then the city’s largest taxi company. At the behest of the Teamsters, the city voted to block the renewal of Yellow Cab’s franchise because of the dispute.

The taxi company subsequently went out of business, and Golden State Transit Corp., Yellow Cab’s parent company, sued the city.

The Supreme Court found in the company’s favor twice, concluding that the city had improperly interfered in a labor dispute, and later ruling that the city was liable for damages.

This article originally appeared in the *Los Angeles Times*. Read the whole thing [here](#).

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CALIFORNIA

## L.A. politicians are joining picket lines. The city attorney wants them to stay away



Members of Unite Here Local 11 hotel workers union and the Writers Guild of America picket outside the Fairmont Miramar Hotel in Santa Monica. Los Angeles City Atty. Hydee Feldstein Soto has recommended that city elected officials refrain from taking part in labor disputes, saying in a memo that such activities could lead to lawsuits or recusals by council members on labor issues. (Luis Sinco / Los Angeles Times)

In the middle of L.A.'s hot labor summer, City Atty. Hydee Feldstein Soto has advised city officials to refrain from speaking out at

strikes or union protests.

BY DAVID ZAHNISER, JULIA WICK

JULY 17, 2023 5 AM PT

Los Angeles City Councilmembers Hugo Soto-Martínez and Nithya Raman sat cross-legged in the middle of Century Boulevard last month, helping to block cars from reaching Los Angeles International Airport in a show of solidarity with the region's hotel workers.

That demonstration — and the [subsequent arrest](#) of Soto-Martínez, Raman and nearly 200 others — generated headlines for obvious reasons. Zip ties and police processing aside, the presence of the two council members was hardly surprising.

In recent months, an array of federal, state and local politicians — including several members of the City Council — have walked picket lines or offered support not just to Unite Here Local 11, the hotel workers union, but also TV and film writers marching outside studios and school workers demonstrating outside Los Angeles Unified campuses.

Yet in recent weeks, lawyers with Los Angeles City Atty. Hydee Feldstein Soto's office have begun quietly advising the city's elected officials to refrain from getting involved in labor disputes, saying such activities could result in legal action against the city.

In a confidential July 3 memo, a copy of which was reviewed by The Times, Feldstein Soto's team warned elected leaders that if they show up on picket lines or rally with demonstrators, they might have to recuse themselves from voting on a related issue in the future.

“Participation in such activities by multiple members may affect council's ability to meet quorum on matters involving the union or the employers and could expose the city to liability,” the memo said.

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## L.A. attorney admits her pick for Skid Row receiver was a fail. But she doesn't want to talk about the \$8,500

July 11, 2023

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That advice threatens to throw a wet blanket on L.A.'s [hot labor summer](#), which has seen a series of walkouts and labor actions in the hospitality and entertainment industries. The memo also runs counter to decades of pro-union activism in Los Angeles, a deep-blue city where organized labor and municipal politics are inextricably entwined.

L.A.'s politicians have voiced their support over the years for teachers, janitors, longshore workers and a wide range of other unionized professions. Councilmember Kevin de León, asked about the memo last week, said he has no intention of abdicating his right to free speech and to assemble.

De León, who ran for mayor last year with more than \$430,000 in support from Unite Here Local 11, said he plans to remain outspoken about workers' demands for fair wages, including when they are on strike.

“Legal opinions do not extinguish the constitutional rights of elected officials who use their voices to champion the struggles of hotel workers or Hollywood writers in their fight for dignity and respect,” he said in a statement.

Kurt Petersen, co-president of Unite Here Local 11, had an even stronger reaction, saying the memo is “based on an extreme and unsupported mischaracterization of federal labor law.”

“There is nothing inappropriate about city officials exercising their individual constitutional free speech rights to join or express support for workers on the picket lines,” he said in a statement.

Soto-Martínez, a former organizer with Unite Here, offered a more diplomatic assessment, saying he appreciates the city attorney's advice and will use it to “weigh

the pros and cons” of any action he takes in the future.

“I have showed up for working Angelenos my entire life, that’s why I was elected. I will do what I can to ensure they are treated fairly,” he said in a statement. “If an issue arises where there may be a potential recusal, I will consult with the city attorney and move forward from there.”

A spokeswoman for Raman said her boss was not available to discuss the memo.

Neither Feldstein Soto nor her spokesperson responded to requests for comment from The Times.

In the memo, the city attorney’s legal team said it provided its advice in response to inquiries from elected officials about picketing in support of Unite Here. The lawyers acknowledged that those officials, in their capacity as individuals, still retain their “constitutional rights of speech and assembly and are free to exercise those rights in peaceful union protests.”

The lawyers suggested that council members who appear at protests over contract disputes make clear that they are speaking in their own capacity, not as elected officials, to avoid raising concerns about “bias and impartiality.” They also suggested that city elected officials who appear on picket lines do so as a legal observer, not a participant, and avoid wearing clothing with the city seal.

Lawyers for Feldstein Soto said much of their concern is based on a federal law barring the city from using “economic pressure or regulatory powers” to interfere in union disputes. They cite *Golden State Transit Corp. vs. City of Los Angeles*, a sprawling case that twice reached the U.S. Supreme Court, which stemmed from actions taken by the council during a labor dispute more than 40 years ago.

The saga began in 1981, when the council intervened on behalf of a Teamsters chapter on strike against Yellow Cab Co., then the city’s largest taxi company. At the behest of the Teamsters, the city voted to block the renewal of Yellow Cab’s franchise because of the dispute.

The taxi company subsequently went out of business, and Golden State Transit Corp., Yellow Cab's parent company, sued the city.

The Supreme Court [found in the company's favor](#) twice, concluding that the city had improperly interfered in a labor dispute, and later ruling that the city was liable for damages.

The Golden State Transit decisions are seminal holdings in labor law, and the case cost the city millions. Still, several legal experts said they do not believe it has a bearing on the types of activities that were assessed by Feldstein Soto.

William B. Gould IV, a professor emeritus at Stanford Law School, said he doesn't see any reason the city's elected officials should be discouraged from joining picket lines during a labor dispute. The Golden State Transit precedent centered on a "decision by government, not an expression of view," said Gould, a former chairman of the National Labor Relations Board.

UC Berkeley School of Law Dean Erwin Chemerinsky also drew a stark separation between the council's 1981 vote to block Yellow Cab's franchise renewal and demonstrations of support for hotel workers or Hollywood screenwriters.

"There is a huge difference between the city, as an entity, taking the coercive action of not renewing a contract, and individual city officials expressing their views," he said in an email.

Former Los Angeles City Atty. Carmen Trutanich said he did not provide such guidance while in office between 2009 and 2013.

"Absent someone doing something stupid on the picket lines, I can't see a problem with it," he said. "But everyone defines stupid differently."

The memo from Feldstein Soto offered another reason for city leaders to refrain from participating in Unite Here protests: The city [has a contract](#) with a union hotel — the

L.A. Grand in downtown Los Angeles, which is being used as [temporary homeless housing](#) at a cost of nearly \$4,700 per room per month.

The L.A. Grand could claim that picketing with workers from the Unite Here Local 11 is evidence of bias against the hotel or “undue interference with the hotel’s contractual rights,” the memo said.

Catherine Fisk, faculty director of the Berkeley Center for Law and Work, said she had not heard of a situation in which a government lawyer has told elected officials to avoid speaking out on a high-profile labor dispute.

Still, Fisk said it is not irrational for the city’s lawyer to write a letter describing the litigation risk posed by the Golden State Transit case.

“To be fair, attorneys for organizations — and the city attorney is an attorney for an organization — their job is to worry about possible risks of liability to the organization,” she said.



David Zahniser

David Zahniser covers Los Angeles City Hall for the Los Angeles Times.

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Julia Wick

Julia Wick is a Metro reporter covering Los Angeles City Hall. She and her colleagues won the 2023 Pulitzer Prize in breaking news for reporting on a leaked audio recording that upended Los Angeles politics. She was also part of the team that was a 2022 Pulitzer Prize finalist for work covering a fatal shooting on the set of the film “Rust.” Before joining the Times, Wick was the editor in chief of LAist.

## FW: City Council Agenda Item 3.4 - Responsible Construction Ordinance

City Clerk <city.clerk@sanjoseca.gov>

Tue 1/23/2024 7:43 AM

To:Agendadesk <Agendadesk@sanjoseca.gov>

I'm using Adobe Acrobat.

Here's the [Agenda Item 3.4 Responsible Construction Ordinance Letter of Support.pdf](#) for you to review.

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**From:** Todd Trekell [REDACTED]

**Sent:** Monday, January 22, 2024 5:57 PM

**To:** The Office of Mayor Matt Mahan <mayor@sanjoseca.gov>; District1 <district1@sanjoseca.gov>; District2 <District2@sanjoseca.gov>; District3 <district3@sanjoseca.gov>; District4 <District4@sanjoseca.gov>; District5 <District5@sanjoseca.gov>; District 6 <district6@sanjoseca.gov>; District7 <District7@sanjoseca.gov>; District8 <district8@sanjoseca.gov>; District9 <district9@sanjoseca.gov>; District 10 <District10@sanjoseca.gov>

**Cc:** Loesch, Matthew <Matt.Loesch@sanjoseca.gov>; Klein, Nanci <Nanci.Klein@sanjoseca.gov>; Harkness, Kip <Kip.Harkness@sanjoseca.gov>; City Clerk <city.clerk@sanjoseca.gov>; Burton, Chris <Christopher.Burton@sanjoseca.gov>; Maguire, Jennifer <jennifer.maguire@sanjoseca.gov>

**Subject:** City Council Agenda Item 3.4 - Responsible Construction Ordinance

[External Email]

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Dear Mayor Mahan and City Council:

I am submitting this joint letter of support for the memorandum authored by Councilmembers Davis, Jimenez, Torres, Ortiz and Foley dated January 18<sup>th</sup>, 2024.

Please contact me should you have any questions.

Thank you,

**Todd C. Trekell**

Development Manager

[REDACTED]

HUNTER PROPERTIES

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**A LETTER IN SUPPORT OF THE JOINT MEMORANDUM OF  
COUNCILMEMBERS DAVIS, JIMENEZ, TORRES, ORTIZ, AND FOLEY  
REGARDING SAN JOSE’S PROPOSED “RESPONSIBLE  
CONSTRUCTION” ORDINANCE**

January 22, 2024

The Honorable Matt Mahan  
Mayor, City of San José  
200 East Santa Clara St., 18<sup>th</sup> Floor  
San José, CA 95113-1905

San Jose City Councilmembers  
City of San José  
200 East Santa Clara St., 18<sup>th</sup> Floor  
San José, CA 95113-1905

Jennifer Maguire, City Manager  
City of San José  
200 East Santa Clara St.  
San José, CA 95113-1905

Nora Frimann, City Attorney  
City of San José  
200 East Santa Clara St., 16<sup>th</sup> Floor  
San José, CA 95113-1905

**RE: City Council Agenda Item 3.4 – Responsible Construction Ordinance**

Dear Mayor Mahan, Honorable Councilmembers, Ms. Maguire, and Ms. Frimann:

On January 5, 2024, we wrote to you as a community of local developers, contractors, subcontractors, and business owners to explain our concerns with the “Responsible Construction Ordinance” being considered at the Council meeting on January 23, 2024. Since that time, members of our group have had the opportunity to meet not only with various Councilmembers, but to also provide input to Staff in the City’s Department of Public Works, Office of Economic Development, and Building, Planning & Code Enforcement. We appreciate the opportunity to finally be heard.

**Most importantly, we are in full support of the recommendations proposed by Councilmembers Davis, Jimenez, Torres, Ortiz, and Foley in their joint memorandum of January 18, 2024.**

As originally drafted, the proposed Ordinance represents bad governance. It would disincentivize development in the City, including the construction of new housing projects, and would therefore inadvertently hurt the very workers that organized labor intends to protect. It would also unfairly target developers and contractors with liability for the unpaid wage judgments of lower-tier subcontractors and suppliers – even when the wage theft occurred on other projects, for different owners, located outside of the City or even out of the state.

In response, the joint memorandum spearheaded by Councilmember Davis addresses the fundamental issues we have with the Responsible Construction Ordinance, and represents a thoughtful approach towards addressing the problem of wage theft without disincentivizing development, unlawfully targeting developers, or overburdening Staff.

To: City of San José  
Re: Support for Joint Memorandum on “Responsible Construction” Ordinance  
January 22, 2024  
Page 2 of 3

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Under the recommended approach, developers will be required to verify that contractors and subcontractors working on large construction projects in San Jose are not subject to unpaid wage theft judgments. Workers will be protected, and developers and contractors will not be unnecessarily targeted.

We urge the Council to accept the recommendations in the joint memorandum submitted by Councilmembers David, Jimenez, Torres, Ortiz, and Foley on January 23, 2024, and look forward to continuing our positive discussions with Staff in preparing the final form of a Responsible Construction Ordinance that addresses wage theft and continues to promote economic growth and future development in San Jose.

cc: Matt Loesch, P.E., Director, Dept. of Public Works  
Nanci Klein, Director, Office of Economic Development  
Chris Burton, Director, Building, Planning & Code Enforcement

To: City of San José  
Re: Support for Joint Memorandum on “Responsible Construction” Ordinance  
January 22, 2024  
Page 3 of 3

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**We SUPPORT the City’s adoption of a proposed Responsible Construction Ordinance that includes the recommendations proposed in the Joint Memorandum issued by Councilmembers David, Jimenez, Torres, Ortiz, and Foley.**



---

Gary Filizetti, President  
Justine Pereira, Secretary  
DEVCON CONSTRUCTION, INC.

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Mark Tersini, Principal  
KT URBAN



---

Brock Hill, Vice President  
PREMIER RECYCLE COMPANY

---

Case Swenson, President/CEO  
SWENSON



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Todd Trekell, Development Manager  
HUNTER PROPERTIES, INC.

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Megan Toeniskoetter, CEO  
TOENISKOETTER CONSTRUCTION,  
INC



---

Patricia Saucedo  
BIA|BAY AREA

---

Mike Walsh, Projects Director  
URBAN CATALYST

---

Dave Edgar, President & CEO  
IRON CONSTRUCTION, INC.

**FW: Public comment for City Council Jan. 23, item 3.4: Responsible Construction Ordinance**

City Clerk <city.clerk@sanjoseca.gov>

Tue 1/23/2024 7:45 AM

To:Agendadesk <Agendadesk@sanjoseca.gov>

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**From:** Bob P. [REDACTED]

**Sent:** Monday, January 22, 2024 8:11 PM

**To:** The Office of Mayor Matt Mahan <mayor@sanjoseca.gov>; District1 <district1@sanjoseca.gov>; District2 <District2@sanjoseca.gov>; District3 <district3@sanjoseca.gov>; District4 <District4@sanjoseca.gov>; District5 <District5@sanjoseca.gov>; District 6 <district6@sanjoseca.gov>; District7 <District7@sanjoseca.gov>; District8 <district8@sanjoseca.gov>; District9 <district9@sanjoseca.gov>; District 10 <District10@sanjoseca.gov>

**Cc:** City Clerk <city.clerk@sanjoseca.gov>

**Subject:** Public comment for City Council Jan. 23, item 3.4: Responsible Construction Ordinance

[External Email]

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Dear Mayor Mahan and Esteemed City Councilmembers,

We are writing to you in our capacity as the executive board member at the South Bay Labor Council , an organization committed to fairness for workers. We want to commend the San Jose City Council for progressing with the Responsible Construction Ordinance, a pivotal step in reducing wage theft in our city. We strongly urge you to approve the proposed ordinance on January 23.

Our mission at SBLC aligns with the goals of creating a fair and just community. Wage theft, a prevalent crime affecting low-wage workers, immigrants, women, and people of color, demands our attention and intervention.

The construction industry, with a significant workforce, has broader implications for the families and communities we serve. The Responsible Construction Ordinance is a crucial step in addressing this issue, conveying zero tolerance for wage theft in our city and paving the way for a future where all workers are protected.

We express our full support for the Responsible Construction Ordinance (RCO), specifically endorsing the compromise proposed in the memo from Councilmembers Davis, Jimenez, Torres, Ortiz, and Foley. This compromise addresses business concerns while ensuring the protection of workers.

The Responsible Construction Ordinance represents a transformative approach to revitalizing our city, fostering partnerships with contractors and developers committed to fair labor practices. It is an opportunity to create a socially and economically equitable and vibrant community, aligning with the values we hold dear.

Thank you for your attention to this crucial matter. We commend the Mayor and City Council for their endorsement last month and urge you to finalize the process by enacting the Responsible Construction Ordinance on January 23, 2024.

Regards,

Robert Prola

Sent from my iPhone

**FW: Public comment for City Council Jan. 23, item 3.4: Responsible Construction Ordinance**

City Clerk <city.clerk@sanjoseca.gov>

Tue 1/23/2024 7:49 AM

To:Agendadesk <Agendadesk@sanjoseca.gov>

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**From:** Pamela Campos [REDACTED]  
**Sent:** Monday, January 22, 2024 10:27 PM  
**To:** City Clerk <city.clerk@sanjoseca.gov>  
**Subject:** Re: Public comment for City Council Jan. 23, item 3.4: Responsible Construction Ordinance

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San Jose City Clerk Toni Taber,

Dear Mayor Mahan and City Councilmembers,

I hope this message finds you well. As a resident deeply invested in the well-being of our city, I urge you to take action against wage theft by supporting the memo from Councilmembers Davis, Jimenez, Torres, Ortiz, and Foley, which offers a compromise which addresses the concerns of legitimate developers and contractors while still enacting an effective Responsible Construction Ordinance. This ordinance is instrumental in shaping a city that prioritizes fairness, equity, and ethical business practices.

I recognize that you are likely well-acquainted with the statistics; over half of all final wage theft judgments against construction companies since 2019 remain unpaid, totalling over \$38 million in wages stolen from workers that have not been recovered. Passing the RCO is paramount in protecting our vulnerable workforce and upholding the values we cherish as a city.

The Responsible Construction Ordinance prevents wage theft, levels the playing field for responsible contractors, and holds perpetrators of wage theft accountable. Protecting our vulnerable workforce and fostering a fair environment is not just a duty but a commitment to our shared values as a community.

However, the proposed changes made in the Jan. 12 memo would create loopholes so broad that the result would be a sham law - an ordinance that professes to prevent wage theft, but excludes all actual wage theft judgements, doing nothing for workers and giving exploitative contractors free rein to steal from workers again and again. This deceptive proposal resulted from lobbying by a few wealthy, well-connected, and unscrupulous developers.

Fortunately, the majority of the construction community are legitimate businesses who want to support a fair industry. The memo from Councilmembers Davis, Jimenez, Torres, Ortiz, and Foley is a fair compromise that addresses those businesses' concerns about simplifying compliance, while still giving workers a powerful tool to hold perpetrators of wage theft accountable.

As a resident of this city, and your constituent, I urge you not to neglect your duty to our most vulnerable residents and resist any influence from contractors opposing fair labor practices. If contractors are operating ethically, enforcement of existing wage theft laws poses no threat but ensures a city that thrives on principles of fairness and equality.

The Responsible Construction Ordinance represents a transformative approach to truly revitalizing our city by not only paving the way for partnerships with contractors and developers that value fair labor practices, but creating a socially and economically equitable and vibrant community.

Thank you for standing with the community on January 23, 2024.

Best regards, Pamela

Pamela Campos



San José , California 95136

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**FW: Wage theft**

City Clerk <city.clerk@sanjoseca.gov>

Tue 1/23/2024 11:46 AM

To: Agendadesk <Agendadesk@sanjoseca.gov>

-----Original Message-----

From: Daniel Martin <[REDACTED]>

Sent: Tuesday, January 23, 2024 11:37 AM

To: City Clerk <city.clerk@sanjoseca.gov>

Subject: Wage theft

[External Email]

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I am currently retired but for many years I wasn't. After my military service I got into the construction industry. I worked for years living hand to mouth supporting a wife and children. At times there just wasn't enough money to cover my obligations. The saying goes "every little bit helps". That was very true in my case and in the case of millions of others that give their labor to survive. The last thing each and every worker needs is to have someone else putting their fingers into your wallet to steal your hard earned money. A wage theft prevention law was needed then and it is still needed. I am so happy to see that the San Jose area is taking the lead on this. Thank you so much!

The opposition to this is probably the same ones that have fought against every inch of gain that workers have earned with their lives and blood. I urge every official to support this like your livelihood depends on this.

Daniel Martin

[REDACTED]  
Sent from my ipad pro

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## FW: Support for Davis Memo item 3.4

City Clerk <city.clerk@sanjoseca.gov>

Tue 1/23/2024 12:48 PM

To: Agendadesk <Agendadesk@sanjoseca.gov>

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**From:** Francisco Gomez [REDACTED]  
**Sent:** Tuesday, January 23, 2024 12:14 PM  
**To:** City Clerk <city.clerk@sanjoseca.gov>  
**Subject:** Support for Davis Memo item 3.4

[External Email]

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Hello,

I am a registered voter in the city of San Jose and would like to voice my support for the Dev Davis Memo item 3.4. We need wage protection and responsible construction practices in San Jose.

Thanks,

Francisco Gomez  
IBEW Member  
[REDACTED]

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**FW: Public comment for City Council Jan. 23, item 3.4: Responsible Construction Ordinance**

City Clerk <city.clerk@sanjoseca.gov>

Tue 1/23/2024 1:24 PM

To:Agendadesk <Agendadesk@sanjoseca.gov>

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**From:** Maria Lee [REDACTED]

**Sent:** Tuesday, January 23, 2024 1:09 PM

**To:** City Clerk <city.clerk@sanjoseca.gov>

**Subject:** Re: Public comment for City Council Jan. 23, item 3.4: Responsible Construction Ordinance

[External Email]

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San Jose City Clerk Toni Taber,

Dear Mayor Mahan and City Councilmembers,

I hope this message finds you well. As a resident deeply invested in the well-being of our city, I urge you to take action against wage theft by supporting the memo from Councilmembers Davis, Jimenez, Torres, Ortiz, and Foley, which offers a compromise which addresses the concerns of legitimate developers and contractors while still enacting an effective Responsible Construction Ordinance. This ordinance is instrumental in shaping a city that prioritizes fairness, equity, and ethical business practices.

I recognize that you are likely well-acquainted with the statistics; over half of all final wage theft judgments against construction companies since 2019 remain unpaid, totalling over \$38 million in wages stolen from workers that have not been recovered. Passing the RCO is paramount in protecting our vulnerable workforce and upholding the values we cherish as a city.

The Responsible Construction Ordinance prevents wage theft, levels the playing field for responsible contractors, and holds perpetrators of wage theft accountable. Protecting our vulnerable workforce and fostering a fair environment is not just a duty but a commitment to our shared values as a community.

However, the proposed changes made in the Jan. 12 memo would create loopholes so broad that the result would be a sham law - an ordinance that professes to prevent wage theft, but excludes all actual wage theft judgements, doing nothing for workers and giving exploitative contractors free rein to steal from workers again and again. This deceptive proposal resulted from lobbying by a few wealthy, well-connected, and unscrupulous developers.

Fortunately, the majority of the construction community are legitimate businesses who want to support a fair industry. The memo from Councilmembers Davis, Jimenez, Torres, Ortiz, and Foley is a fair compromise that addresses those businesses' concerns about simplifying compliance, while still giving workers a powerful tool to hold perpetrators of wage theft accountable.

As a resident of this city, and your constituent, I urge you not to neglect your duty to our most vulnerable residents and resist any influence from contractors opposing fair labor practices. If contractors are operating ethically, enforcement of existing wage theft laws poses no threat but ensures a city that thrives on principles of fairness and equality.

The Responsible Construction Ordinance represents a transformative approach to truly revitalizing our city by not only paving the way for partnerships with contractors and developers that value fair labor practices, but creating a socially and economically equitable and vibrant community.

Thank you for standing with the community on January 23, 2024.

Best regards,

Maria Lee



San Jose, California 95111

This message is from outside the City email system. Do not open links or attachments from untrusted sources.



January 5, 2024

Matt Loesch, Director  
City of San Jose  
Department of Public Works  
TRANSMITTED VIA EMAIL

RE: Comments to the City of San Jose Draft Responsible Construction Ordinance

Dear Mr. Loesch,

The Building Industry Association of the Bay Area (BIA) respectfully submits this letter of comment to the City of San Jose (City) regarding the Draft Responsible Construction Ordinance (Ordinance). BIA, representing hundreds of residential builders of single family and multifamily homes, is acutely concerned about the proposed Ordinance and its potential effect on the feasibility of residential development in the City. As drafted the Ordinance should be rejected and brought back to the drawing board to craft a new vision with a collaborative effort involving all stakeholders.

To the extent that wage theft in the construction industry is a pressing issue in San Jose warranting action by the City Council, there are other approaches that could add to the already strong state law protections construction workers possess in California with regard to wage theft without effectively shutting down most new housing construction in a city that desperately needs much more but is woefully behind in its production and continues to be unable to obtain a certified housing element.

To avoid exacerbating its dire housing situation and adding a massive new governmental constraint roadblock to housing element certification and the resulting vulnerability to prolonged Builder's Remedy exposure, BIA strongly encourages significant revisions to the Ordinance prior to its next hearing scheduled for the January 23, 2024 City Council meeting.

BIA is concerned about the alarming effect of overregulation on residential development that this Ordinance would embody. The City is clearly aware and focused on the cost of residential development, initiating comprehensive studies to gauge the fiscal viability of residential construction. These studies have presented a development environment that is extremely challenging to the financial feasibility of new home development. According to the City's studies, residential construction is infeasible throughout San Jose even without this significant new constraint.

In a recent City Council study session on the cost of construction, the Council made clear its desire that nothing should be done to make the state of affairs in residential development worse. Make no mistake: the Ordinance would make the situation much worse and perhaps untenable by discouraging the investment of hundreds of millions of dollars because of an unacceptable level of risk that this overreaching Ordinance injects in an already risky environment.

Proponents of the Ordinance claim that because there is residential construction occurring in Mountain View and Sunnyvale—two jurisdictions that have recently adopted Responsible Construction Ordinances—the Ordinance will not materially burden or deter new housing in San Jose. This assertion is dubious at best.

Preliminary review of the development pipeline in those cities provides no evidence that any residential project has been subject to an RCO and completed the entitled process, secured financing, and completed construction. Prior to adopting the Ordinance in any form, it is incumbent on the City to investigate and provide complete and accurate information on new housing development and construction in Mountain View and Sunnyvale following the actual imposition of the RCO (as opposed simply to the date of adoption of the ordinances) to specific new housing projects, including:

- Confirmation of how many, if any, residential or mixed use projects in the pipeline or under construction in those cities were not exempt from the RCO either because of local grandfathering, submittal of an SB 330 preapplication prior to RCO adoption, or proceeding as a “placeholder” Builder’s Remedy project application;
- Copies of any project’s written assurance, under penalty of perjury pursuant to the RCO, that no entity doing work on the project is the subject of any unpaid wage judgment;
- Confirmation from any project applicant that its lenders/capital partners are aware of the RCO and have committed to provide construction financing notwithstanding the RCO’s placing the COO at risk;
- Identification of the number of residential units that have actually been constructed in Mt. View and Sunnyvale that were approved as part of projects that were subject to all aspects of the RCO from start to completion.

## **SPECIFIC AREAS OF CONCERN WITH THE ORDINANCE**

### **1. Improper Interference with Certificate of Occupancy.**

- Any San Jose policy regarding consequences for prior/outstanding wage theft claims either in San Jose or elsewhere should be handled through business licensing regulations and procedures as the City of Milpitas has done since 2018. Similarly, any newly adopted project specific penalties should only be directly related to a wage theft violation on the specific project. For example, the City could provide assistance for construction workers in exercising their significantly expanded rights under state

legislation that became effective for new private development construction contracts entered into after January 1, 2022 (SB 727). According to the labor union sponsors of the legislation it imposes “serious” economic consequences that ensure all workers will get paid in full:

*The author and sponsor of this bill contend that, in the absence of joint liability for penalties and liquidated damages, direct contractors still do not face serious enough economic consequences to incentivize careful monitoring by the direct contractors to make sure that all workers on their projects are getting paid in full. This bill would make direct contractors jointly liable for the penalties and liquidated damages associated with wages, fringe benefits, and labor trust fund contributions that go unpaid on their projects....(Senate Judiciary Committee Report on SB 727, April 21, 2021) (a summary of the extensive new penalties and enforcement mechanisms added by SB 727 is included later in this letter)*

- Critically, the Ordinance states that an unpaid wage theft judgment against a project’s subcontractor shall be used as a basis to withhold the COO on a project, regardless of whether that judgment is on another project, or even in another state. This takes the control of when a project can be occupied out of the hands of a developer or owner. On a typical multifamily project with a construction duration of 24 months, even if the developer and general contractor make efforts to only hire subcontractors without any outstanding unpaid judgments, these hiring decisions are made at the beginning of construction. During the construction of the SJ project, if a subcontractor then incurs a judgment on another project or in another state, then a COO would required to be withheld on the San Jose project for factors completely out of the developer’s control.

The Certificate of Occupancy signals the moment that a construction project can finally collect rent and generate income after a significant investment of capital, and it represents a critical event for construction lenders and equity investors in a project. If the developer cannot control when the COO is received, and when a loan can start to be repaid, the project will not be financeable. The Ordinance claims that a developer can simply cure a judgment by paying it off, but this claim ignores that a judgment may be in dispute or subject to a judicial or bankruptcy proceeding that the developer is not a party to, and therefore cannot intervene in. Despite the inherent challenges to financing new housing development today, this Ordinance represents an unforced roadblock to attracting new investment in San Jose housing projects by City staff. Which bank is going to lend tens of millions of dollars on a housing project, when the borrower cannot control whether the project can be occupied at the end of construction?

- Another reason the City should avoid withholding the COO as an enforcement mechanism is that under California state law, builders have a protected property

interest in the COO that entitles them to the protections of procedural due process and equal protection under the federal Constitution. The Ordinance provides no due process protections before the initial deprivation of the COO and no time limit on how long the initial deprivation can be maintained without holding a hearing. Under the Ordinance it is the initial filing of a complaint that unilaterally divests the building official of the ability to issue the COO that constitutes the property deprivation and the Ordinance is not reasonably calculated to provide any semblance of due process or accurate information.

- Similarly, the Ordinance's differential treatment of builders that have a Project Labor Agreement (PLA) vs. those that don't gives rise to equal protection concerns under the federal constitution. There is no rational basis for exempting builders that use union labor and enter into a PLA from the wage theft ordinance. Nothing in the Ordinance's substantive requirements has any relation to union vs. nonunion labor and therefore there is no nexus whatsoever between the Ordinance's penalty provision of withholding COOs and a builder's use or non-use of union labor. The lack of any rational basis for treating nonunion builders differently than union builders violates the federal Equal Protection Clause.
- The PLA exemption also exposes the Ordinance's purported purpose and justification as pretextual for leveraging private development projects to use union labor by holding the proverbial Sword of Damocles over hundreds of millions of dollars in investment capital right up to the point of new residents readying to move into a completed building. Placing such a heavy thumb on the side of forcing private employers to use union labor not only violates the National Labor Relations Act, it cannot serve as a legitimate state interest for discriminating against non-union builders for equal protection purposes.
- Proponents of the Ordinance point to Mountain View and Sunnyvale as precedent for its contents. However, the reports prepared by professional staff in both jurisdictions specifically warned their respective City Councils that California's Labor Commissioner informed them that California's unpaid wage theft judgment data is "not particularly trustworthy." Yet this very data would be the "gold-standard" under the Ordinance for causing potentially hundreds of millions of dollars in damages. If the State of California's unpaid wage theft judgment data is "untrustworthy," then prima facie judgments from other states will be even less reliable and capable of being verified.
- In fact, California's own data is so unreliable that in both Mountain View and Sunnyvale (and now as proposed by San Jose), the municipal governments

themselves want no part of any responsibility or liability for actually administering this punitive and unreliable enforcement regime. Instead they have created effectively a bounty-hunter private complaint mechanism without due process. It is also notable that professional staff in Sunnyvale described the direction it received from elected officials after outside counsel found insurmountable legal problems with what advocacy groups pressured Sunnyvale to adopt initially as: move forward with drafting an ordinance *“that would not be as legally challenging for the City.”*

Sunnyvale’s (and Mountain View’s) adoption of their ordinances therefore should not provide San Jose with any degree of comfort that the Ordinance would not expose San Jose to extensive legal liability—especially in light of the fact that the Ordinance’s due process and equal protection vulnerabilities are for more extensive than the other cities’ and the most that could be said for the “goal” set for those ordinances by the elected officials in those cities is that they not be “as legally challenging.”

## **2. Significantly Overbroad “Assurances”**

- The Ordinance’s requirement that the owner provide to the City a pay transparency certification signed by a representative of the owner, contractor and any subcontractor “under penalty of perjury” that they have no unpaid wage theft judgements. This is impractical and onerous on the “owner” who may have no knowledge of unpaid wage theft judgements against the contractors or subcontractors.
- Project ownership must be able to sign off with a “good faith belief” and “with the best of their knowledge” that there are no unpaid wage theft judgements for the project.

## **3. PLA Exemption**

- As discussed above, whatever requirements are imposed on new private construction projects with the City acting in its regulatory as opposed to market-participant role must not exempt projects with PLAs.

## **4. No Private Right of Action**

- The Ordinance provides that it creates no private right of action by a complainant against the City. The Ordinance should be modified to state that it also does not create any private right of action against any builder that is subject to the Ordinance. The Ordinance only purports to be a city regulation of the building industry and does not purport to create a private right to action. That should be stated explicitly.

In conclusion, BIA strongly recommends that the City address the many concerns with the Ordinance that we and other developers and contractors have expressed. The time to correct deficient and burdensome provisions in the Ordinance is before it moves to the Council for adoption, not after it's been adopted.

BIA stands ready to work with the City and other partners in the development and construction industry to achieve the best results possible for business, labor, and the community.

Yours very truly,



Dennis Martin  
BIA Government Affairs

**Attachments:**

- Excerpts from SB 727 Judiciary Committee Staff Report
- City of Mountain View Responsible Construction Ordinance Staff Report
- City of Sunnyvale Responsible Construction Ordinance Staff Report