

2.2 Final Adoption of Ordinances.

Recommendation:

(a) Ordinance No. 30992 - An Ordinance of the City of San José Amending Title 24 of the San José Municipal Code to Add a New Part 8 of Chapter 24.02 to Regulate Certain Private Development Projects by Withholding the Certificate of Occupancy when an Owner or Contractor Has Unpaid Final Wage Theft Judgments.

[Passed for Publication on 12/12/2023 - Item 3.7 (23-1695)] – **DROP**

(b) Ordinance No. 30993 –An Ordinance of the City of San José Amending Part 1 of Chapter 12.06 of Title 12 of the San José Municipal Code to Add Section 12.06.112 Defining a Foreign Entity, Section 12.06.114 Defining a Foreign-Influenced Business Entity, and Section 12.06.116 Defining a Foreign Owner; and Amending Part 2 of Chapter 12.06 of Title 12 to Add Section 12.06.270 Prohibiting Foreign Influenced Business Entities from Making Independent Expenditures, Campaign Contributions or Contributing to Independent Expenditure Committees and Requiring Any Business Entity Making an Independent Expenditure or Contribution to Certify They are Not a Foreign Influenced Business Entity.

[Passed for Publication on 12/12/2023 - Item 3.9 (23-1737)]

(c) Ordinance No. 30996 - An Ordinance of the City of San José Rezoning Two Certain Real Properties of Approximately 4.0 Acres Situated at the Northwest Corner of Leigh Avenue and Gunston Way (4343 Leigh Avenue, APNS 41-925-074; 41-925-014) from the R-1-8 Single-Family Residential Zoning District to the PQP Public/Quasi-Public Zoning District.

[Passed for Publication on 12/12/2023 - Item 10.1(a) (23-1699)]

(d) Ordinance No. 30997 - An Ordinance of the City of San José Rezoning Certain Real Property of Approximately 1.1-Gross Acres, Situated at the Northeast Corner of the Intersection of Doyle Road and Lawrence Expressway (APN 381-19-015) from the R-1-8 Single-Family Residence Zoning District to the LI Light Industrial Zoning District.

[Passed for Publication on 12/12/2023 - Item 10.1(b)(3) (23-1700)]

(e) Ordinance No. 30998 - An Ordinance of the City of San José Rezoning Three Parcels from the MUC Mixed Use Commercial Zoning District to the CP Commercial Pedestrian Zoning District, One Parcel from R-M Multiple Family Residence Zoning District to the CP Commercial Pedestrian Zoning District, Four Parcels from the MUC Mixed Use Commercial to the MUN Mixed Use Neighborhood Zoning District, 13 Parcels from the CP Commercial Pedestrian Zoning District to the MUN Mixed Use Neighborhood Zoning District, Two Parcels from the MUC Mixed Use Commercial Zoning District to the R-1-8 Single-Family Residence Zoning District, and Two Parcels from the MUC Mixed Use Commercial Zoning District to the OS Open Space Zoning District, Located on those Certain Real Parcels in Various Locations within and Adjacent to the Willow Street Neighborhood Business District within the City of San José.

[Passed for Publication on 12/12/2023 - Item 10.2(b) (23-1702)]

ORDINANCE NO.

AN ORDINANCE OF THE CITY OF SAN JOSE AMENDING PART 1 OF CHAPTER 12.06 OF TITLE 12 OF THE SAN JOSE MUNICIPAL CODE TO ADD SECTION 12.06.112 DEFINING A FOREIGN ENTITY, SECTION 12.06.114 DEFINING A FOREIGN-INFLUENCED BUSINESS ENTITY, AND SECTION 12.06.116 DEFINING A FOREIGN OWNER; AND AMENDING PART 2 OF CHAPTER 12.06 OF TITLE 12 TO ADD SECTION 12.06.270 PROHIBITING FOREIGN-INFLUENCED BUSINESS ENTITIES FROM MAKING INDEPENDENT EXPENDITURES, CAMPAIGN CONTRIBUTIONS OR CONTRIBUTING TO INDEPENDENT EXPENDITURE COMMITTEES AND REQUIRING ANY BUSINESS ENTITY MAKING AN INDEPENDENT EXPENDITURE OR CONTRIBUTION TO CERTIFY THEY ARE NOT A FOREIGN INFLUENCED BUSINESS ENTITY

WHEREAS, pursuant to the provisions and requirements of the California Environmental Quality Act of 1970, together with related State CEQA Guidelines and Title 21 of the San José Municipal Code (collectively, "CEQA"), the Director of Planning, Building and Code Enforcement has determined that the provisions of this Ordinance do not constitute a project, under File No. PP17-008 (General Procedure & Policy Making resulting in no changes to the physical environment); and

WHEREAS, the City Council of the City of San José is the decision-making body for this Ordinance; and

WHEREAS, this Council has reviewed and considered the "not a project" determination under CEQA prior to taking any approval actions on this Ordinance;

NOW, THEREFORE, BE IT ORDAINED BY THE COUNCIL OF THE CITY OF SAN JOSE:

SECTION 1. A new section is added to Chapter 12.06 of Title 12 of the San José Municipal Code, to be numbered, entitled, and to read as follows:

12.06.112 Foreign Entity

“Foreign Entity” means a person or entity for which at least one of the following conditions is met:

- A. Is a government of a foreign country; a foreign political party; a partnership, association, corporation, organization or other combination of persons organized under the laws of, or having its principal place of business, in a foreign country; or
- B. Is an individual outside of the United States who is not a citizen of the United States or a national of the United States, and who is not lawfully admitted for permanent residence.

SECTION 2. A new section is added to Chapter 12.06 of Title 12 of the San José Municipal Code, to be numbered, entitled, and to read as follows:

12.06.114 Foreign-Influenced Business Entity

“Foreign-Influenced Business Entity” means any Business Entity for which at least one of the following conditions is met:

- A. One percent (1%) or more of the total ownership interests of the Business Entity are held, owned, controlled, or otherwise directly or indirectly beneficially owned by a single Foreign EntityOwner;

- B. Five percent (5%) or more of the total ownership interests of the Business Entity are held, owned, controlled, or otherwise directly or indirectly beneficially owned by two (2) or more Foreign ~~Entities~~ Owners in aggregate; ~~or~~
- C. A Foreign Owner directly or indirectly participates in the Business Entity's decisions to engage in political activities in the United States; or
- D. The Business Entity is directly or indirectly controlled by a Business Entity meeting at least one of the conditions in subparagraphs A, B, or C.

SECTION 3. A new section is added to Chapter 12.06 of Title 12 of the San José Municipal Code, to be numbered, entitled, and to read as follows:

12.06.116 Foreign Owner

“Foreign Owner” means (1) a Foreign Entity; or (2) a Business Entity in which a Foreign Entity holds, owns, controls, or otherwise directly or indirectly acquired beneficial ownership of equity or voting shares in an amount that is equal to or greater than fifty percent (50%) of the total equity or outstanding voting shares.

SECTION 4. A new section is added to Chapter 12.06 of Title 12 of the San José Municipal Code, to be numbered, entitled, and to read as follows:

12.06.270 Prohibited Contributions – Foreign-Influenced Business Entities

- A. No Foreign-Influenced Business Entity shall make any Contribution to a Candidate or Candidate Controlled Committee under this Chapter.

B. No Foreign-Influenced Business Entity shall make an Independent Expenditure in Elections for or against Candidates for City office, nor a Contribution to an Independent Expenditure Committee that has conveyed, implicitly or explicitly, that Contributions to the Committee may be used in Elections for or against Candidates for City office. An Independent Committee may dedicate any Contributions that do not comply with the restrictions under this Section for use in elections outside the City or for other lawful purposes.

C. No Foreign-Influenced Business Entity shall make any Contribution to a Committee or Person that has conveyed, implicitly or explicitly, that Contributions to the Committee or Person may be directly or indirectly used in Elections for or against Candidates for City office.

D. The Business Entity shall also provide a copy of the statement of certification to any Committee or Person to which it contributes.

~~E.G.~~ Any Business Entity making a Contribution to a Candidate for City office or making an Independent Expenditure or contributing to an Independent Expenditure Committee for or against Candidates for City office shall, within seven (7) business days after making such expenditure or Contribution, file with the City Clerk a statement of certification signed by its chief executive officer or president under penalty of perjury, avowing that after due inquiry, the Business Entity was not a Foreign-Influenced Business Entity as defined under the San José Municipal Code on the date such expenditure or Contribution was made. The Business Entity shall also provide a copy of the statement of certification to any Candidate-Controlled Committee or Independent Expenditure Committee to which it contributes. The statement of certification shall include the following:

1. The name and mailing address of the Business Entity;

2. For each Contribution or expenditure, the amount, date, and recipient;
3. The statement "I certify, after due inquiry and under penalty of perjury, that, on the date(s) on which the referenced contribution(s) or expenditure(s) was/were made, [name of business entity] was not a Foreign-Influenced Business Entity as defined by the San José Municipal Code"; and
4. The signature of the Business Entity's chief executive officer or president.

FD. It shall be unlawful for a Business Entity that is subject to this Section to fail to timely file the statement of certification. The penalty for any violation of this Section is the lesser of the following: (i) the amount of the contribution or expenditure for which certification was required, or (ii) \$500.00.

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

AYES:

NOES:

ABSENT:

DISQUALIFIED:

MATT MAHAN
Mayor

ATTEST:

TONI J. TABER, CMC
City Clerk



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KATHRYN G. SPELMAN

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.4th 49, the court held both that the issuance of a Certificate of Occupancy was a

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* (9th 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



ANDREW L. FABER



ALF

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

FW: Responsible Construction Ordinance - Open Letter

City Clerk <city.clerk@sanjoseca.gov>

Mon 1/8/2024 7:53 AM

To: Agendadesk <Agendadesk@sanjoseca.gov>

 1 attachments (862 KB)

An_Open_Letter_to_the_City_re_Responsible_Construction_Ordinance_1.5.pdf;

From: Todd Trekell <[REDACTED]>
Sent: Friday, January 05, 2024 5:03 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>; City Clerk <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
Importance: High

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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]

W:

| C:

[REDACTED]

[REDACTED]

HUNTER PROPERTIES

[REDACTED]

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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., 18th Floor
San José, CA 95113-1905

San Jose City Councilmembers
City of San José
200 East Santa Clara St., 18th 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
 Page 2 of 4

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.”¹

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

¹ 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
Page 3 of 4

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
Page 4 of 4

We oppose the City’s adoption of the proposed Responsible Construction Ordinance.


Gary Filizetti, President
Justine Pereira, Secretary
DEVCON CONTRUCTION, 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 Trekell, 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:

County : Santa Clara		Naics Code : 23		Judgment Entry Date : judgmentEntryFromDate : 5 / 1 / 2019 judgmentEntryToDate : 1 / 4 / 2024		
Labor Code § 2810.4	Judgment Name	Judgment Status	Court	Defendant/Employer Name	Primary Address	Judgment Total*
	J-90854	Open/Unpaid	California Superior Court, County of Santa Clara, Downtown Superior Court	Ricardo Rodriguez, an Individual		\$ 31,672.73
	J-90850	Open/Unpaid	California Superior Court, County of Santa Clara, Downtown Superior Court	Quartz Construction, a California Corporation		\$ 31,380.23
	J-90468	Open/Unpaid	California Superior Court, County of Santa Clara, Downtown Superior Court	Francisco Javier Morales Marques,		\$ 11,378.90

Labor Code § 2810.4	Judgment Name	Judgment Status	Court	Defendant/Employer Name	Primary Address	Judgment Total*
	J-90527	Open/Unpaid	California Superior Court, County of Santa Clara, Downtown Superior Court	DARL WATSON, an individual dba CBS Electrical,		\$ 24,683.10
	J-90529	Open/Unpaid	Santa Clara County Recorder	Garzon Leovardo Garcia, an Individual		\$ 8,719.28
	J-88826	Open/Unpaid	California Superior Court, County of Santa Clara, Downtown Superior Court	JOHNNY TRUNG HUA, an individual		\$ 10,121.52
	J-88825	Open/Unpaid	California Superior Court, County of Santa Clara, Downtown Superior Court	FM Builders, Inc., a California Corporation		\$ 11,511.78
	J-88527	Open/Unpaid	California Superior Court, County of Santa Clara, Downtown Superior Court	Elite Rooter Peninsula, Inc., a California Corporation		\$ 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		\$ 4,290.21

Labor Code § 2810.4	Judgment Name	Judgment Status	Court	Defendant/Employer Name	Primary Address	Judgment Total*
	J-87631	Closed-Claimant Judgment	California Superior Court, County of Santa Clara, Downtown Superior Court	Anthem Green Developers, Inc., a California Corporation		\$ 14,014.64
	J-87593	Open/Unpaid	California Superior Court, County of Santa Clara, Downtown Superior Court	Advantage Asphalt, a General Partnership		\$ 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		\$ 4,500.00
	J-87593	Open/Unpaid	California Superior Court, County of Santa Clara, Downtown Superior Court	Richard Harry Wasso, dba Advantage Asphalt		\$ 4,500.00
	J-86937	Open/Unpaid	California Superior Court, County of Santa Clara, Downtown Superior Court	Gabriel Huitron,		\$ 24,412.74

Labor Code § 2810.4	Judgment Name	Judgment Status	Court	Defendant/Employer Name	Primary Address	Judgment Total*
	J-86866	Open/Unpaid	California Superior Court, County of Santa Clara, Downtown Superior Court	Rosendo Villareal, an individual,		\$ 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		\$ 7,508.06
	J-86311	Closed-Claimant Judgment	California Superior Court, County of Santa Clara, Downtown Superior Court	LEONARDO CONTRERAS, an Individual		\$ 7,187.29
	J-85694	Closed-Claimant Judgment	California Superior Court, County of Santa Clara, Downtown Superior Court	DAVID FORKOSH, an Individual		\$ 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		\$ 15,118.66

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

Labor Code § 2810.4	Judgment Name	Judgment Status	Court	Defendant/Employer Name	Primary Address	Judgment Total*
	J-85836	Open/Unpaid	California Superior Court, County of Santa Clara, Downtown Superior Court	Tim Michael Facciolla, an Individual dba Whitehorse Builders		\$ 22,702.92
	J-85577	Closed-Claimant Judgment	California Superior Court, County of Santa Clara, Downtown Superior Court	Garzon Leovardo Garcia, an Individual		\$ 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		\$ 6,007.50
	J-84950	Open/Unpaid	California Superior Court, County of Santa Clara, Downtown Superior Court	Magdonal Antonio Palacios, an Individual		\$ 41,931.31
	J-84948	Open/Unpaid	California Superior Court, County of Santa Clara, Downtown Superior Court	CSI Building, Inc., a California Corporation		\$ 34,431.31

Labor Code § 2810.4	Judgment Name	Judgment Status	Court	Defendant/Employer Name	Primary Address	Judgment Total*
	J-84944	Open/Unpaid	California Superior Court, County of Santa Clara, Downtown Superior Court	CAL Structure, Inc., a California Corporation		\$ 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		\$ 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		\$ 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		\$ 14,645.37
	J-83136	Open/Unpaid	California Superior Court, County of Santa Clara, Downtown Superior Court	Sergio Arturo Aguilar Castillo, an Individual		\$ 25,323.65

Labor Code § 2810.4	Judgment Name	Judgment Status	Court	Defendant/Employer Name	Primary Address	Judgment Total*
	J-83137	Open/Unpaid	California Superior Court, County of Santa Clara, Downtown Superior Court	Plumbing Tech Repipe Specialists, Inc., a California Corporation		\$ 33,731.70
	J-83135	Open/Unpaid	California Superior Court, County of Santa Clara, Downtown Superior Court	Laura Yamila Valdez Miranda, an Individual		\$ 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		\$ 25,323.65
	J-83138	Open/Unpaid	California Superior Court, County of Santa Clara, Downtown Superior Court	Sergio Arturo Aguilar Castillo, an Individual		\$ 33,731.70
	J-83139	Open/Unpaid	California Superior Court, County of Santa Clara, Downtown Superior Court	Laura Yamila Valdez Miranda, an Individual		\$ 22,710.73

Labor Code § 2810.4	Judgment Name	Judgment Status	Court	Defendant/Employer Name	Primary Address	Judgment Total*
	J-83128	Open/Unpaid	California Superior Court, County of Santa Clara, Downtown Superior Court	Plumbing Tech Repipe Specialists, Inc., a California Corporation		\$ 22,425.79
	J-83152	Closed-Claimant Judgment	California Superior Court, County of Santa Clara, Downtown Superior Court	Laura Yamila Valdez Miranda, an Individual		\$ 51,489.55
	J-83151	Closed-Claimant Judgment	California Superior Court, County of Santa Clara, Downtown Superior Court	Sergio Arturo Aguilar Castillo, an Individual		\$ 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		\$ 63,130.52
	J-83131	Open/Unpaid	California Superior Court, County of Santa Clara, Downtown Superior Court	Anthoni Castillo,		\$ 19,521.94

Labor Code § 2810.4	Judgment Name	Judgment Status	Court	Defendant/Employer Name	Primary Address	Judgment Total*
	J-83130	Open/Unpaid	California Superior Court, County of Santa Clara, Downtown Superior Court	Adrian Alfaro Ortiz, an Individual		\$ 19,521.94
	J-83129	Open/Unpaid	California Superior Court, County of Santa Clara, Downtown Superior Court	Laura Yamila Valdez Miranda, an Individual		\$ 19,521.94
	J-78467	Closed-Claimant Judgment	California Superior Court, County of Santa Clara, Downtown Superior Court	DISTINCTIVE CONTRACTORS CORPORATION, a California Corporation		\$ 31,838.45
	J-78465	Open/Unpaid	California Superior Court, County of Santa Clara, Downtown Superior Court	DISTINCTIVE CONTRACTORS CORPORATION, a California Corporation		\$ 21,498.66
	J-78463	Open/Unpaid	California Superior Court, County of Santa Clara, Downtown Superior Court	DISTINCTIVE CONTRACTORS CORPORATION, a California Corporation		\$ 32,645.57

Labor Code § 2810.4	Judgment Name	Judgment Status	Court	Defendant/Employer Name	Primary Address	Judgment Total*
	J-79919	Open/Unpaid	California Superior Court, County of Santa Clara, Downtown Superior Court	Delucchi Electric Inc., a California Corporation		\$ 127,360.32
	J-79904	Closed-Claimant Judgment	California Superior Court, County of Santa Clara, Downtown Superior Court	Juan Carlos Jimenez, an Individual		\$ 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		\$ 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		\$ 5,148.52
	J-79405	Open - Partial Payment/Satisfaction	California Superior Court, County of Santa Clara, Downtown Superior Court	Richard De Jesus, an Individual		\$ 8,057.94

Labor Code § 2810.4	Judgment Name	Judgment Status	Court	Defendant/Employer Name	Primary Address	Judgment Total*
	J-79201	Stayed - Bankruptcy	California Superior Court, County of Santa Clara, Downtown Superior Court	RICHARD ALAN PIERCE, an Individual		\$ 15,851.40
	J-78808	Closed-Claimant Judgment	California Superior Court, County of Santa Clara, Downtown Superior Court	Hector Javier Flores-Napoles, an Individual		\$ 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		\$ 6,830.95
	J-79187	Closed-Claimant Judgment	California Superior Court, County of Santa Clara, Downtown Superior Court	RST Installations, a California Corporation		\$ 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		\$ 29,808.23

Labor Code § 2810.4	Judgment Name	Judgment Status	Court	Defendant/Employer Name	Primary Address	Judgment Total*
	J-78758	Open/Unpaid	California Superior Court, County of Santa Clara, Downtown Superior Court	Laura Yamila Valdez Miranda, an Individual		\$ 18,501.21
	J-78759	Open/Unpaid	California Superior Court, County of Santa Clara, Downtown Superior Court	Adrian Alfaro Ortiz, an Individual		\$ 18,501.21
	J-78805	Open/Unpaid	California Superior Court, County of Santa Clara, Downtown Superior Court	Gabriel Macedo Castillo, an Individual		\$ 9,910.87
	J-78760	Open/Unpaid	California Superior Court, County of Santa Clara, Downtown Superior Court	Anthoni Castillo,		\$ 18,501.21
	J-78464	Open/Unpaid	California Superior Court, County of Santa Clara, Downtown Superior Court	GERARDO PADILLA, an Individual		\$ 21,498.66

Labor Code § 2810.4	Judgment Name	Judgment Status	Court	Defendant/Employer Name	Primary Address	Judgment Total*
	J-78462	Open/Unpaid	California Superior Court, County of Santa Clara, Downtown Superior Court	GERARDO PADILLA, an Individual		\$ 32,645.57
	J-78466	Closed-Claimant Judgment	California Superior Court, County of Santa Clara, Downtown Superior Court	GERARDO PADILLA, an Individual		\$ 31,838.45
	J-78470	Closed-Claimant Judgment	California Superior Court, County of Santa Clara, Downtown Superior Court	Benjamin Orejel, an Individual		\$ 19,579.24
	J-78482	Closed-Claimant Judgment	California Superior Court, County of Santa Clara, Downtown Superior Court	Modern Developers, Inc., a California Corporation		\$ 62,421.19
	J-78483	Closed-Claimant Judgment	California Superior Court, County of Santa Clara, Downtown Superior Court	Benjamin Orejel, an Individual		\$ 46,808.24

Labor Code § 2810.4	Judgment Name	Judgment Status	Court	Defendant/Employer Name	Primary Address	Judgment Total*
	J-78469	Closed-Claimant Judgment	California Superior Court, County of Santa Clara, Downtown Superior Court	Modern Developers, Inc., a California Corporation		\$ 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		\$ 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		\$ 20,995.55
	J-77662	Closed-Claimant Judgment	California Superior Court, County of Santa Clara, Downtown Superior Court	Jesus Gomez, an Individual		\$ 7,027.03
	J-76430	Open - Partial Payment/Satisfaction	California Superior Court, County of Santa Clara, Downtown Superior Court	Shad Joseph Gibson,		\$ 4,162.60

Labor Code § 2810.4	Judgment Name	Judgment Status	Court	Defendant/Employer Name	Primary Address	Judgment Total*
	J-75943	Open/Unpaid	California Superior Court, County of Santa Clara, Downtown Superior Court	Gabriel Macedo Castillo, an Individual		\$ 12,988.85
	J-74812	Closed - Satisfied	California Superior Court, County of Santa Clara, Downtown Superior Court	Aria Build & Construction, Inc., a California Corporation		\$ 2,272.76
	J-74808	Open/Unpaid	California Superior Court, County of Santa Clara, Downtown Superior Court	Jesus Fong, an Individual		\$ 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		\$ 5,969.08
	J-74056	Closed-Claimant Judgment	California Superior Court, County of Santa Clara, Downtown Superior Court	David Tinsley, an Individual		\$ 12,767.81

Labor Code § 2810.4	Judgment Name	Judgment Status	Court	Defendant/Employer Name	Primary Address	Judgment Total*
	J-72786	Open - Partial Payment/Satisfaction	California Superior Court, County of Santa Clara, Downtown Superior Court	Chun Ki Kim, an Individual		\$ 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		\$ 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		\$ 11,897.61
	J-72922	Open/Unpaid	California Superior Court, County of Santa Clara, Downtown Superior Court	Leo Jimenez, an Individual		\$ 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		\$ 7,271.24

Labor Code § 2810.4	Judgment Name	Judgment Status	Court	Defendant/Employer Name	Primary Address	Judgment Total*
	J-70946	Closed-Claimant Judgment	California Superior Court, County of Santa Clara, Downtown Superior Court	Sergio Arturo Aguilar Castillo, an Individual Anthoni Castillo,		\$ 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		\$ 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		\$ 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		\$ 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		\$ 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.4th 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* (9th 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: [Redacted]

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 code¹ 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.

¹ 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.

NVF:OTE:JMD
11/6/2023

B. “Contractor” means the prime contractor for the project.²

² 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

NVF:OTE:JMD
11/6/2023

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

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

³ 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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D. "Hearing officer" means the City Manager or designee.

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

be removed.

⁴ 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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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"⁵ is a provision of the California Labor Code that

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

⁵ 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.**⁶

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).

⁶ 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.⁷

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.

⁷ 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 employees⁸ 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”⁹ means a judgment, decision or order, for which all appeals have been exhausted or the time to appeal has expired,¹⁰ that was

⁸ 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.”

⁹ “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.

¹⁰ 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.¹¹

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.

¹¹ 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 feet¹²** of new construction or remodeling.

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.

¹² 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 requirements¹³ under state law.

¹³ 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**.¹⁴

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**¹⁵ 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**,¹⁶ including Labor Code Sections 2810.5 and 226a.

¹⁴ 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.

¹⁵ 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?

¹⁶ 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 judgments¹⁷ that have been entered against them either before or during the construction of the project.¹⁸
- C. A violation under Section 24.02.860 will result in withholding of the certificate of occupancy¹⁹ at the conclusion of the project.

¹⁷ 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.

¹⁸ 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.

¹⁹ 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 Subcontract 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.

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,²⁰ 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.²¹ 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);²² or
 - (2) Project construction employees of the contractor and/or any

²⁰ 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.

²¹ 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.

²² 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 agreement²³ 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)).

²³ “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 24.02.880.²⁴
- 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 penalties²⁵ as set forth in Chapters 1.14 and 1.15 of this code.

²⁴ 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.

²⁵ 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.**²⁶
- 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.**²⁷
- 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.

²⁶ 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.

²⁷ 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.²⁸ 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,²⁹ 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

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

²⁹ 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.

NVF:OTE:JMD
11/6/2023

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

NVF:OTE:JMD
11/6/2023

that the judgment has been paid, or that it has been secured by a **labor payment bond, lien release bond, or similar security instrument**³⁰ 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:

³⁰ 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.

NVF:OTE:JMD
11/6/2023


TONI J. TABER, CMC
City Clerk

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

City Clerk <city.clerk@sanjoseca.gov>

Mon 1/8/2024 7:53 AM

To: Agendadesk <Agendadesk@sanjoseca.gov>

 1 attachments (274 KB)

Responsible Construction Ordinance comment.pdf;

From: Louise Auerhahn <[REDACTED]>**Sent:** Friday, January 05, 2024 5:09 PM**To:** District1 <district1@sanjoseca.gov>; Jimenez, Sergio <sergio.jimenez@sanjoseca.gov>; Torres, Omar <Omar.Torres@sanjoseca.gov>; Cohen, David <David.Cohen@sanjoseca.gov>; Ortiz, Peter <Peter.Ortiz@sanjoseca.gov>; District 6 <district6@sanjoseca.gov>; District7 <District7@sanjoseca.gov>; District8 <district8@sanjoseca.gov>; Foley, Pam <Pam.Foley@sanjoseca.gov>; District 10 <District10@sanjoseca.gov>; The Office of Mayor Matt Mahan <mayor@sanjoseca.gov>**Cc:** City Clerk <city.clerk@sanjoseca.gov>; Loesch, Matthew <Matt.Loesch@sanjoseca.gov>; Hickey, Christopher <Christopher.Hickey@sanjoseca.gov>; Klein, Nanci <Nanci.Klein@sanjoseca.gov>**Subject:** Public comment for City Council Jan. 23: Responsible Construction Ordinance

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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
www.wpusa.org

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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 - Open Letter - Associated Builders and Contractors, Northern California Chapter

City Clerk <city.clerk@sanjoseca.gov>

Mon 1/8/2024 7:54 AM

To:Agendadesk <Agendadesk@sanjoseca.gov>

 1 attachments (170 KB)

ABC NorCal Letter opposing Responsible Construction Ordinance San Jose.pdf;

From: Matthew Estipona <[REDACTED]>**Sent:** Saturday, January 06, 2024 9:07 AM**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>; City Clerk <city.clerk@sanjoseca.gov>; Susan Siegert <[REDACTED]>**Subject:** Responsible Construction Ordinance - Open Letter - Associated Builders and Contractors, Northern California Chapter**Importance:** High

[External Email]

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

The Associated Builders and Contractors of Northern California, representing all open shop contractors, approximately 85% of the workforce, in San Jose and Santa Clara County and as part of a coalition of concerned contractors, developers, and business advocacy groups, would like to submit this attached Open Letter to the City of San Jose Regarding the Proposed "Responsible Construction" Ordinance.

ABC is the voice of the merit shop and we accept the responsibility for ensuring that voice is heard. We believe the merit shop movement is a movement for the betterment of the individual, the construction industry and the nation.

We believe in the system of free enterprise.

We believe employees and employers should have the right to determine wages and working conditions through either individual or collective bargaining, as they choose, within the boundaries of the law.

We believe the employer must have concern for the general welfare of the employee and that there must be a fair compensation for work performed. At the same time, we believe that the employee has an obligation for satisfactory performance of assigned work.

We support sound legislation in the areas of workers compensation, safety and unemployment compensation.

We believe legislation that embraces fair play for employer and employee is essential to the preservation of our free enterprise system.

We believe the law should protect the right of employees to work regardless of race, color, creed, age, sex, national origin or membership or non-membership in a labor organization. We believe work opportunities should be made available to all legal residents and we support programs toward this end.

We oppose violence, coercion, intimidation and the denial of the rights of employees and employers.

We believe it is incumbent upon all branches of government to be responsible stewards of taxpayer dollars and we believe that government should award contracts only to the lowest responsible bidder. We oppose unjust pressure to violate these principles.

We believe monopolies or any kind of price or wage fixing, in either the public or private sector, are detrimental to our system of free enterprise.

We believe the destiny of all Americans can be best served by cooperation, reconciliation and following the tenants of free enterprise and a democratic government. We believe business leaders can best preserve these tenets by becoming active in politics and civic affairs.

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

Sincerely,

Matthew Estipona

Director of Government Affairs and Community Engagement

(C) [REDACTED]

Associated Builders and Contractors, Northern California Chapter (ABC NorCal)

<https://www.abcnorcal.org/political-advocacy/>

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AN OPEN LETTER TO THE CITY OF SAN JOSÉ **OPPOSING 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., 18th Floor
Floor San José, CA 95113-1905

San Jose City Councilmembers
City of San José
200 East Santa Clara St., 18th
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 Associated Builders and Contractors of Northern California has been actively participating in the Workshops regarding the proposed Ordinance and strongly OPPOSE the City's adoption of the proposed Responsible Construction Ordinance. We believe this Ordinance is an attempt by the Unionized Building Trades to force Project Labor Agreements onto Private Work to avoid perceived compliance risks of wage theft. Wage Theft complaints sufficient to warrant such an Ordinance do not exist. Therefore, adding these risks to a project is not warranted and will have unwanted consequences to the City of San Jose.



Matthew Estipona
Government Affairs Director



Susan Siegert
Community Entrenchment


1/5/2024

FW: San Jose RCO BIA Comments

City Clerk <city.clerk@sanjoseca.gov>

Mon 1/8/2024 12:40 PM

To: Agendadesk <Agendadesk@sanjoseca.gov>

 4 attachments (780 KB)

BIA Comments to Draft San Jose RCO 1.5.24 final.pdf; BIA Bay Area Comments to San Jose RCO 1.5.24 Attachment 1.pdf; MV_RCO_CouncilReport_9.13.22.pdf; City of Sunnyvale_RCO_StaffReport_3.1.22.pdf;

From: Loesch, Matthew <Matt.Loesch@sanjoseca.gov>**Sent:** Monday, January 08, 2024 12:25 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:** Klein, Nanci <Nanci.Klein@sanjoseca.gov>; City Clerk <city.clerk@sanjoseca.gov>; Burton, Chris <Christopher.Burton@sanjoseca.gov>**Subject:** FW: San Jose RCO BIA Comments

To all –

I received this additional feedback last Friday afternoon. Sharing in case you did not receive it as well.

[Matt Loesch, P.E.](#)

City of San Jose - Department of Public Works

Director

200 E. Santa Clara St., 5th Floor Tower

San Jose, CA 95113-1905

(408) 975 - 7381 Office

From: Dennis Martin <[REDACTED]>**Sent:** Friday, January 5, 2024 4:07 PM**To:** Loesch, Matthew <Matt.Loesch@sanjoseca.gov>**Subject:** San Jose RCO BIA Comments

[External Email]

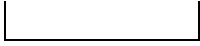
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Greetings Mr. Loesch,

On behalf of BIA Bay Area, I am providing the attached letter of comment to the Draft San Jose Responsible Construction Ordinance. Please note the three accompanying attachments to the letter supporting our comments.

Please feel free to contact me if you have any questions or comments. We look forward to hearing from you and participating in future events associated with the progress of this important policy.

Yours sincerely,
Dennis Martin
BIA | Bay Area



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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.

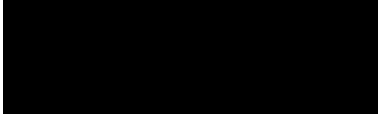
4. No Private Right of Action

- 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

Attachment 1:

SENATE RULES COMMITTEE

Office of Senate Floor Analyses

██████████ Fax: ██████████

SB 727

UNFINISHED BUSINESS

Bill No: SB 727

Author: Leyva (D), et al.

Amended: 9/2/21

Vote: 21

This bill:

- 1) Establishes a sunset date of December 31, 2021, for Labor Code Section 218.7
- 2) Establishes that for contracts entered into on or after January 1, 2022, a direct contractor taking a contract in the state for the erection, construction, alteration, or repair of a building, structure, or other *private* work, shall assume, and is liable for, any debt owed to a wage claimant incurred by a subcontractor acting under the direct contractor.
- 3) Requires that the direct contractor's liability extends to penalties and liquidated damages if the direct contractor had knowledge of the subcontractor's failure to pay the specified wage or benefit.
- 4) Requires that the direct contractor's liability extends to penalties and liquidated damages if the direct contractor fails to comply with the following requirements:
 - a) The contractor must monitor the payment of subcontractor wages by periodic review of payroll records.
 - b) Upon becoming aware of a failure to pay wages, the contractor must take diligent corrective action to halt or rectify the failure, including withholding payments from the subcontractor.
 - c) Prior to making final payment to the subcontractor, the contractor must obtain an affidavit from the subcontractor affirming that all workers have been properly paid.
 - d) The Division of Labor Standards Enforcement must notify the contractor and subcontractor within 15 days of the receipt of a complaint of a failure to pay specified wages or benefits.
- 5) Clarifies that this bill does not prohibit a direct contractor or subcontractor from establishing a contract that addresses liability created by failure to pay

wages, including penalties and liquidated damages.

6) Allows the Labor Commissioner, a third party acting on a wage claimant's behalf or a joint labor-management cooperation committee to bring a civil action against a direct contractor to enforce the liability created by the failure to pay wages or other benefits. No other party may bring an action against a direct contractor to enforce this liability.

7) Requires the Labor Commissioner to notify the direct contractor and any subcontractor on a private works project at least 30 days prior to holding a hearing, issuing a citation, or filing a civil action for the failure of a subcontractor to pay specified wage, fringe or other benefits due to workers. This notice need only describe the general nature of the claim, the project name or address, and the name of the employer.

8) Holds that the above sections do not apply to work performed by employees of the state or any political subdivision of the state.

9) Requires that a subcontractor must provide payroll records in accordance with Labor Code Section 226 to a direct contractor upon request. Further requires the subcontractor to provide information including the project name, name and address of the subcontractor, the contractor with whom the subcontractor is under contract, anticipated start date, duration, and estimated journeymen and apprentice hours, and contact information for its subcontractors on the project upon request.

10) Allows the direct contractor to withhold as "disputed" all sums owed if a subcontractor does not timely provide the information required above. A contractor must specify the documents and information that they will require from the subcontractor.

11) Holds that the provisions of this bill are severable.



COUNCIL REPORT

DATE: September 13, 2022

CATEGORY: Consent

DEPT.: City Manager's Office

TITLE: **Adopt Ordinances to Add Article III, Responsible Construction, and Article IV, Wage Theft, to Chapter 42 of the Mountain View City Code (Second Reading)**

RECOMMENDATION

1. Adopt an Ordinance of the City of Mountain View Adding Article III, Responsible Construction, to Chapter 42 of the Mountain View City Code, to be read in title only, further reading waived (Attachment 1 to the Council report). (First reading: 7-0)
2. Adopt an Ordinance of the City of Mountain View Adding Article IV, Wage Theft, to Chapter 42 of the Mountain View City Code, to be read in title only, further reading waived (Attachment 2 to the Council report). (First reading: 7-0)

SUMMARY

On August 30, 2022, the City Council introduced the Responsible Construction Ordinance and Wage Theft Ordinance to help ensure accountability and compliance with existing State wage and hour laws, enhance the protection of workers' rights, and support the City's existing Minimum Wage Ordinance.

The Responsible Construction Ordinance would be effective January 1, 2023 and would apply to commercial and residential construction projects of 15,000 square feet and above, including new construction and significant additions or modifications. The Ordinance exempts projects already covered by prevailing wage requirements; will be administered through the building permit process; and requires submittal of a Pay Acknowledgment, submitted prior to issuance of a building permit, and a Pay Transparency Certification, submitted prior to issuance of a Certificate of Occupancy.

The Pay Acknowledgement acknowledges the responsibility to comply with State wage and hour laws, including payment of any wage theft judgments. The Pay Transparency Certification certifies that employees received required written wage statements and notice of the employer's pay practices (or that the employees are covered by a valid collective bargaining agreement), and that project owners, contractors, and specified subcontractors do not have any unpaid wage theft judgments. A complaint and appeals process allows employees awarded unpaid wage theft

judgments to submit a complaint to the City and for aggrieved owners, contractors, or subcontractors to appeal the City's decision on a complaint.

The Wage Theft Ordinance would be effective January 1, 2023 and would require all businesses operating in Mountain View that are required to have a business license to submit an affidavit attesting that the business has either not been found in violation of wage and hour laws or has complied with any wage theft judgments. Business operators without employees are exempt from completing an affidavit. The Ordinance will be administered in conjunction with the business license application and renewal process.

FISCAL IMPACT

Staff time associated with incorporating the requirements into the business license and building permit processes as well as time and materials associated with outreach can be absorbed within existing staff capacity and budgeted resources. Staff will assess the staffing and contracting needs to administer the ordinances and the appeal process and return to Council with a budget proposal, if necessary.

ALTERNATIVES

1. Do not adopt the Responsible Construction Ordinance or the Wage Theft Ordinance.

PUBLIC NOTICING

Agenda posting. The ordinances were published at least two days prior to adoption in accordance with City Charter Section 522.

Prepared by:

Christina Gilmore
Assistant to the City Manager

Approved by:

Audrey Seymour Ramberg
Assistant City Manager/
Chief Operating Officer

CG-NCW/6/CAM
608-09-13-22CR
202158

Attachments: 1. Responsible Construction Ordinance
2. Wage Theft Ordinance



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Details Print Version

File #: 22-0236

Type: Report to Council

Status: Passed

Meeting Body: City Council

On agenda: 3/1/2022

Title: Introduce an Ordinance Adopting Chapter 16.80 of the Sunnyvale Municipal Code Related to Responsible Construction (Study Issue)

Attachments: 1. [OCM 19-02 Study Issue Paper](#), 2. [Advocates Proposed Ordinance](#), 3. [Advocates Ordinance 2](#), 4. [Milpitas Responsible Construction Ordinance](#), 5. [City of Sunnyvale Proposed Ordinance](#), 6. [Presentation to Council 20220226](#)

Text Version

REPORT TO COUNCIL

SUBJECT

Title
Introduce an Ordinance Adopting Chapter 16.80 of the Sunnyvale Municipal Code Related to Responsible Construction (Study Issue)

Report

BACKGROUND

Study Issue OCM 19-02 (Study Issue), Responsible Construction Ordinance (Attachment 1), was ranked number one by Council among the proposed Office of the City Manager (OCM) Study Issues in 2019. A budget supplement to provide funding for this Study Issue was approved by Council as part of the FY 2019/20 Adopted Budget. The Study Issue's key elements are:

- Define the scope of a Responsible Construction Ordinance (Ordinance)
- Determine any legal implications/issues of implementing an Ordinance
- Review the merits of an Ordinance and whether one is appropriate for the City
- Determine how an Ordinance would be implemented in the City
- Identify additional resources (staff and funds) needed to implement an Ordinance
- Engage the County's Office of Labor Standards and Enforcement (OLSE) for guidance and support in preventing wage theft

Staff began working on the Study Issue, met with the advocates that proposed the Study Issue and ordinance (Advocates Ordinance), hired outside counsel to evaluate the Advocates Ordinance (Attachment 2) and planned to return to Council in 2020 with a recommendation. The Study Issue was placed on hold due to staff being redirected to work on COVID-19 issues. In September 2021, the group that proposed the Advocates Ordinance provided a revised ordinance (Advocates Ordinance 2) to staff (Attachment 3). The City of Milpitas adopted a Responsible Construction Ordinance (Milpitas Ordinance) in January 2021 (Attachment 4). The City of Milpitas began enforcement of the Milpitas Ordinance on April 15, 2021.

EXISTING POLICY

Sunnyvale Municipal Code

Section 3.80.040. Minimum Wage - Employers shall pay employees no less than the minimum wage set forth in this section for each hour worked within the geographic boundaries of the city of Sunnyvale. Governmental agencies are exempt from the minimum wage requirements under the principle of governmental immunity when the work performed is related to the agency's governmental function.

ENVIRONMENTAL REVIEW

The adoption of an ordinance and general policy does not constitute a "project" within the meaning of the California Environmental Quality Act ("CEQA") pursuant to CEQA Guidelines section 15378(b)(5) in that it is a governmental policy making and administrative activity that will not result in direct or indirect changes in the environment.

DISCUSSION

Study Issue OCM19-02 was proposed to prevent wage theft in the construction industry and to ensure contractors and subcontractors meet all employment, insurance, tax, and safety obligations. The proposed Advocates Ordinance posed several legal issues and staff determined that the Advocates Ordinance could not be adopted as proposed. In September 2021, the group that proposed the Advocates Ordinance provided Advocates Ordinance 2 to staff (Attachment 3). The main difference in the Advocates' proposed ordinances is the methodology used to determine impacted projects which changed from a dollar valuation (\$500,000) to square feet (5,000).

Pursuant to the key elements of the Study Issue, staff:

- Hired an outside attorney to analyze both proposed ordinances to identify potential legal issues
- Reviewed wage theft data, provided by Study Issue advocates, to learn whether an ordinance is appropriate for the City
- Tried to identify sources of wage theft data at the State and County level

The outside attorney analyzed both ordinances and determined that both ordinances had serious legal issues and had a high likelihood of litigation if adopted. The ordinances also posed some unintended consequences such as workers losing wages if projects were stopped and tenants not being able to occupy completed buildings.

Also, staff was unable to find data identifying contractors or subcontractors working on Sunnyvale projects with unpaid wage theft judgments and was unable to determine the problem the ordinance would address. Staff asked the California Labor Commissioner's Office, whose main role is to ensure a just day's pay in every workplace in the State to promote economic justice through robust enforcement of labor laws, for unpaid wage theft judgments in Sunnyvale. The State's Division of Labor Standards Enforcement (DLSE) responded that the data available is not particularly trustworthy as some judgments listed as unpaid may be paid in full or may have been discharged.

Incorporating the process of verifying that every contractor applying for permits has no unpaid wage thefts into the City's permitting process would require additional staff and increase the time in which the City could issue building permits. Staff also reached out to the County for assistance, but the County's Office of Labor Standards Enforcement (OLSE) Memorandum of Understanding with the State's DLSE only applies to restaurant operators not building permit applicants or construction contractors. If the City needs to confirm whether an entity has an unpaid wage theft, City staff must contact DLSE and have specific details (name, address, work site location, etc.) to confirm whether the judgment is still unpaid.

Staff was unable to find another California City with an adopted Responsible Construction Ordinance like the Advocates' Ordinance. However, in January 2021, the City of Milpitas adopted a Responsible Construction Ordinance (Milpitas Ordinance) (Attachment 4). The Milpitas Ordinance applies to new construction of more than 15,000 square feet except for projects subject to prevailing wage requirements. Building permit applicants must acknowledge, under penalty of perjury, that they are subject to the California Labor Code and the Milpitas Ordinance. At the end of construction, prior to issuance of a Certificate of Occupancy, each contractor and subcontractor whose work exceeds \$100,000 or 1% of the construction cost of the project, whichever is greater, must submit a Pay Transparency Certification that certifies that owners, contractors, and subcontractors have no unpaid wage theft judgments. If building permit applicants have any unpaid wage theft judgments, Milpitas will not issue a Certificate of Occupancy for the completed project.

At the September 28, 2021, Council Study Session, staff presented the Study Issue's legal challenges as well as potential operational impacts such an ordinance might have on City's operations. Staff asked for Council's feedback on whether Council wanted staff to complete the Study Issue by not moving forward with any additional work or if Council wanted staff to draft an ordinance that could work for Sunnyvale. Council's guidance was for staff to continue working on the Study Issue and return to Council with an ordinance that would not be as legally challenging for the City and would have an impact in preventing wage theft in the construction industry.

Staff continued researching the issue, and talking to colleagues in other Cities, but could not find an example of any City in the United States that has adopted the type of ordinance that the Advocates are promoting. Many larger cities such as San Francisco, Los Angeles, Seattle, Chicago, Minneapolis, and Philadelphia have a city department or office of labor standards enforcement that can issue administrative orders and fines against employers for wage theft violations within their jurisdiction. A few cities and counties, such as San Jose, Santa Clara County, Houston, Cincinnati, and Columbus, have programs that disqualify employers with unpaid wage theft judgments from certain public benefits such as entering contracts with the jurisdiction, receiving funding or tax benefits for development, or receiving certain types of regulatory permits.

At the state level, no additional legislation has been introduced to address wage theft in the construction industry. City of Mountain View staff is in the process of writing a Responsible Construction Ordinance that will be presented to their Council later this year.

Staff drafted a proposed Ordinance (Attachment 5) modeled after the Milpitas Ordinance but with additional provisions that provide developers with the opportunity for a due process appeal of the building official's decision. The Ordinance would not apply to projects with less than 15,000 square feet of new construction, projects subject to prevailing wage requirements and projects that have a project labor or community workforce agreement. Building permit applicants must acknowledge, under penalty of perjury, that they are subject to the California Labor Code and the Ordinance. At the end of construction, prior to final inspection, each contractor and subcontractor whose work exceeds \$100,000 or 1% of the construction cost of the project, whichever is greater, must submit a Pay Transparency Certification that certifies that owners, contractors, and subcontractors do not have any unpaid wage theft judgments.

The City's Building Inspectors will not sign a final inspection if the contractor fails to provide a pay certification stating project employees were paid or if the City receives a complaint of an unpaid wage theft judgment. If the City receives a wage theft complaint related to the contractor or subcontractor whose work exceeds \$100,000 or 1% of the construction cost of the project, whichever is greater, the City will provide a process for the contractor to remedy the issue by providing proof that the judgment has been paid, or that it has been secured by a labor payment or bond, in a form and amount sufficient to ensure that any wage claims and penalties can be fully paid. The proposed ordinance also has an effective date of July 1, 2022, as this will provide time for City staff to implement the required forms needed for the building permit process.

Under the proposed Ordinance, the owner or contractor would have the ability to appeal the building official's decision to withhold a certificate of occupancy. The appeal would be heard by a hearing officer designated by the City Manager.

Staff shared a draft of the proposed Ordinance with the Study Issue Advocates. The feedback from the Study Issue Advocates was positive and while they acknowledged that the proposed Ordinance is not as restrictive as they prefer, they agreed that the proposed Ordinance will deter some "bad contractors" from working in Sunnyvale. The Study Issue Advocates wanted the proposed Ordinance to require Worker's Compensation Insurance. The proposed Ordinance does not need to address Worker's Compensation requirements as the City's Building Code already requires that each contractor applying for a building permit have current Worker's Compensation Insurance.

Staff also invited over 300 property owners and contractors that have completed projects, that would be subject to the proposed Ordinance, in the past three years to an online meeting to present the pertinent parts of the proposed Ordinance. About 20 people attended the online meeting. The attendees did not voice any objections to the proposed Ordinance. The attendees asked and staff responded and clarified questions regarding implementation date, due process, and confirmed that the City would not require prevailing wages on private projects.

The proposed Ordinance adds another tool to prevent wage theft and provides sufficient due process to help survive a legal challenge. In addition to enforcing the proposed Ordinance, staff will also monitor applicable legislation at the state level and will work with the Santa Clara County Wage Theft Coalition to advocate for wage theft policies at a regional level.

FISCAL IMPACT

Introduction and adoption of the proposed Ordinance will not have a direct financial impact. The primary fiscal impact to implement the proposed Ordinance can be absorbed with current staff resources. Initially, staff in Community Development (Building Division) and the Office of the City Attorney will need to develop forms and notices. The number of complaints and appeals that may result from the ordinance is unknown and estimating the staff time involved in any enforcement actions are difficult to estimate at this time. Staff will closely monitor this

issue and if additional workload is created by the adopted Ordinance that cannot be handled by current resources, staff will return to Council with a request for additional resources.

PUBLIC CONTACT

Staff invited over 300 property owners and contractors that have completed projects, that would be subject to the proposed Ordinance, in the past three years to an online meeting. Contact was also made by posting the Council agenda on the City's official-notice bulletin board outside City Hall, at the Sunnyvale Public Library and in the Department of Public Safety Lobby. In addition, the agenda and report are available at Office of the City Clerk, and on the City's website.

ALTERNATIVES

1. Introduce the Ordinance adopting Chapter 16.80 of the Sunnyvale Municipal Code Related to Responsible Construction and find that the action is exempt from the California Environmental Quality Act ("CEQA") pursuant to CEQA Guidelines section 15378(b)(5)
2. Do not introduce the Ordinance adopting Chapter 16.80 of the Sunnyvale Municipal Code Related to Responsible Construction
3. Other Action as Directed by Council

STAFF RECOMMENDATION

Recommendation

Alternative 1: Introduce the Ordinance adopting Chapter 16.80 of the Sunnyvale Municipal Code Related to Responsible Construction and find that the action is exempt from the California Environmental Quality Act ("CEQA") pursuant to CEQA Guidelines section 15378(b)(5)

JUSTIFICATION FOR RECOMMENDATION

Staff prepared the Study pursuant to the scope of Study Issue OCM 19-02. Staff presented the concepts to Council at a Study Session on September 28, 2021. At that time, Council was supportive of the preliminary findings and supported the next steps of bringing the Ordinance to Council for a public hearing.

Staff

Prepared by: Connie Verceles, Assistant to the City Manager

Reviewed by: Teri Silva, Assistant City Manager

Approved by: Kent Steffens, City Manager

ATTACHMENTS

1. Study Issue Paper OCM 19-02
2. Advocates Proposed Ordinance
3. Advocates Proposed Ordinance 2
4. City of Milpitas Responsible Ordinance
5. City of Sunnyvale Proposed Ordinance