



# Memorandum

**TO:** HONORABLE MAYOR  
AND CITY COUNCIL

**FROM:** Kim Welsh  
Matt Cano

**SUBJECT: PROPOSED ORDINANCE –  
MINIMUM LABOR STANDARDS  
FOR CERTAIN PRIVATE  
CONSTRUCTION PROJECTS**

**DATE:** July 24, 2019

Approved

Date

7/24/19

## RECOMMENDATION

- (a) Drop the second reading of the private development workforce standards ordinance approved in item 4.5 at the Council meeting on June 25, 2019.
- (b) Approve an ordinance amending the San José Municipal Code to add a new Chapter 14.10 to Title 14 to set forth certain minimum labor standards, including prevailing wage requirements, for any private construction project accepting a public subsidy.

## OUTCOME

Approval of the recommendation will add a new chapter to the Municipal Code setting forth minimum labor standards, including prevailing wage requirements, for any private construction project accepting a City subsidy.

## BACKGROUND

On April 3, 2018, Council directed the City Manager and City Attorney to draft an ordinance to require any private development project that accepts a City subsidy to:

- Pay prevailing wages to construction workers, and
- Have “goal – good faith effort” requirements for the use of apprentices, local workers and workers from underrepresented populations.

July 24, 2019

**Subject: Proposed Ordinance – Minimum Labor Standards for Certain Private Construction Projects**

Page 2

On June 25, 2019, Council approved an ordinance requiring a private construction project that accepts a City subsidy to pay prevailing wages to its construction workers (“Ordinance No. 1”). Council is scheduled to have the second reading of Ordinance No. 1 on August 13, 2019.

Ordinance No. 1 was limited to prevailing wage requirements and did not include provisions for apprentices, local hiring and targeted workers because these provisions needed further analysis. Staff anticipated bringing back a second ordinance that would address minimum labor requirements for using apprentices, local workers and underrepresented workers. Council directed staff to return with the second ordinance on August 6, 2019.

Once staff began drafting the second ordinance, it determined that putting the minimum labor requirements into one ordinance was clearer and more effective. Accordingly, the second ordinance (“Proposed Ordinance”) includes all the minimum labor requirements included in Council’s April 3, 2018 direction and in Ordinance No. 1.

## **ANALYSIS**

### **A. Dropping the Second Reading of Ordinance No. 1.**

Staff is recommending dropping Ordinance No. 1 because the Proposed Ordinance is intended to replace Ordinance No. 1. The Proposed Ordinance includes all the minimum labor requirements from Council’s April 3, 2018 direction, thereby making Ordinance No. 1 unnecessary.

### **B. Description of Proposed Ordinance.**

Staff believes the Proposed Ordinance reflects the material substance of Council’s April 3, 2018 direction in a manner that minimizes the potential for legal challenges. This section of the memorandum describes the most significant differences between the Proposed Ordinance and Ordinance No. 1.

#### **1. Definition of “Subsidy”**

The Proposed Ordinance adds language to clarify that the definition of “Subsidy” includes a permanent suspension or exemption of a fee or tax as well as a reduction. For ease, this memorandum’s reference to a fee or tax reduction is intended to include a permanent suspension or exemption of the fee or tax.

#### **2. Minimizes Potential Conflict with Existing Prevailing Wage Requirements.**

Just like Ordinance No. 1, Part 2 of the Proposed Ordinance requires a private construction project that accepts a City subsidy to pay its construction workers prevailing wages. The Proposed Ordinance requires prevailing wages to be paid in accordance with Chapter 14.09 of the San José Municipal Code, which sets forth the City’s *existing*

prevailing wage policy. Chapter 14.09 basically requires the City to follow State prevailing wage law.

To minimize the potential for conflicts between Chapter 14.09 and the Proposed Ordinance, the Proposed Ordinance includes language stating that its prevailing wage requirements do *not* apply to projects already subject to the prevailing wage requirements of Chapter 14.09. Under Chapter 14.09, prevailing wages are required for projects “paid for in whole or in part out of public funds,” which is expressly defined as including a contribution of land, money or other direct financial assistance, or the reduction in a fee. In other words, Chapter 14.09 already requires the payment of prevailing wages for the majority of projects receiving a City “subsidy.”

One significant difference in the application of Chapter 14.09 and the Proposed Ordinance regards a “programmatically” fee or tax reduction to any qualifying project within a class of projects. An example of a “programmatically” reduction would be a program that exempts any development project within the downtown area from paying development impact fees for below market rate units. The prevailing wage requirements in Chapter 14.09 do *not* apply to projects that are recipients of such a “programmatically” reduction in a fee or tax. On the other hand, the prevailing wage requirements of the Proposed Ordinance would apply to such a programmatically reduction in a fee or tax.

### **3. Apprenticeship**

As discussed above, the City’s *existing* prevailing wage policy is to follow State prevailing wage law. State prevailing wage law already sets forth detailed requirements regarding the use of apprentices, including that they be used in the ratio of 1 apprentice to every 5 journeymen.

The Proposed Ordinance clarifies that any private construction project subject to the Ordinance’s prevailing wage requirements is also subject to the apprenticeship requirements contained within those requirements.

### **4. Local Hire and Use of Underrepresented Workers**

The Proposed Ordinance adds the requirement that a private construction project that accepts a subsidy from the City must use good faith efforts to have “local residents” perform at least 30 percent of the total work hours necessary to complete the construction work. The following are key elements of this requirement:

- A resident is local if he/she is “domiciled” in Santa Clara County for at least 7 calendar days before starting work on the private construction project. “Domiciled” has the meaning set forth in Election Code Section 349(f), which states it is the place in which a person’s habitation is fixed, wherein the person has the intention of remaining, and to which, whenever the person is absent, the person has the intention

of returning. This definition is the same definition of “local resident” used by San Francisco in its Local Hiring Policy for Construction.

- In calculating the total work hours needed to complete the construction work, the hours of work performed by residents of states other than California will be excluded. This calculation is intended to reduce the risk of a legal challenge under the Commerce, Privileges and Immunities and Equal Protection Clauses of the United States Constitution, which prohibits limitations against out of state residents. This approach is the same as the one taken by San Francisco in its Local Hiring Policy for Construction.
- The local hire requirement does not apply if during the month that a private construction project accepts a subsidy from the City, the unemployment rate for the construction industry in Santa Clara County, as published by the Employment Development Department or some equivalent government publication covering that month, is equal or less than four (4) percent.

The Proposed Ordinance also adds the requirement that a private construction project accepting a subsidy from the City must use good faith efforts to hire “underrepresented workers” as entry-level apprentices to perform 25 percent of the total apprentice hours. An “underrepresented worker” is a person meeting one of the following requirements:

- The individual is a risk of losing his/her home, the individual is homeless, or the individual is housed within the past twelve months before which he/she was homeless;
- The individual is receiving public assistance;
- The individual is participating in a reentry program or was formerly incarcerated;
- The individual has been continuously unemployed for the previous year;
- The individual has a family or household income that falls below the current United States Department of Housing and Urban Development threshold for low income households in Santa Clara County;
- The individual has been emancipated from the foster care system;
- The individual is a veteran of the United States military;
- The individual is participating in a program for “at-risk” youth; or
- The individual is a survivor of labor trafficking.

The Proposed Ordinance makes the City's Department of Public Works responsible for promulgating regulations and procedures for the administration and enforcement of the local hire and use of underrepresented workers requirements. It requires that such regulations and procedures, including those related to complying with the good faith efforts requirements, must:

- Impact union and nonunion employees equally, and
- Neither encourage nor discourage the collective-bargaining process.

Regulations and procedures must comply with the above requirements to minimize the risk of the Proposed Ordinance being vulnerable to a challenge that it is preempted by the National Labor Relations Act.

## 5. Exclusions for Affordable Housing Developments

In light of the ongoing need for affordable housing throughout the region, the City has developed policies and programs supporting the development of affordable housing. The Proposed Ordinance contains the following exclusions for affordable housing developments to encourage future development of affordable housing.

- **Previous Prevailing Wage Resolutions:** On February 7, 1989 and October 10, 1989 pursuant to Resolutions No. 61144 and 61716 the City adopted resolutions requiring the payment of prevailing wages to designated City projects and services be extended to all privately owned housing projects receiving acquisition, construction financing or commitment of such financing by the City's Department of Housing, except projects involving less than eight (8) dwelling units and the portion of projects involving volunteers or self help construction that are not contracted out by the developer. In 2005, the Council adopted Resolution No. 72518 which extended those requirements to privately owned projects receiving City permanent funding or commitment of such financing. These resolutions provide greater flexibility than the proposed ordinance and operate in a way that is consistent with the existing methods for the administration and financing of City affordable housing projects. The adoption of Municipal Code Chapter 14.09 superseded the resolutions to the extent they apply to public works construction contracts. It is the intent to exempt the housing projects in Resolutions Nos. 72518, 61144 and 61716 from the Proposed Ordinance and to have those housing projects remain subject to the Resolutions.
- **Housing projects funded by State or Federal Moneys:** This exemption is intended to ensure that private projects for community development related purposes that are (a) funded by the City through grants from the federal Consolidated Development Block Funds, HOME funds, or similar funds or State pass through of federal funds, (b) subject to the federal Davis-Bacon labor standards and (c) not otherwise subject to City prevailing wage, would not be subject to the Proposed Ordinance.

July 24, 2019

**Subject: Proposed Ordinance – Minimum Labor Standards for Certain Private Construction Projects**

Page 6

An additional exemption that should be considered at a future date is for certain private developments choosing to meet the inclusionary housing requirements by building affordable housing units onsite, rather than paying the in lieu fee. The exemption is intended to allow the Housing Department to provide funding from the Low and Moderate Housing Asset Fund to deepen the affordability of an on-site inclusionary unit in a privately-owned housing project without making the entire project subject to this Ordinance. Funding these units will allow for new residential development to provide housing for a more diverse range of income levels. This exemption will be considered along with proposed policy changes to the Inclusionary Housing Ordinance. These housing projects are not covered under Resolutions Nos. 72518, 61144 and 61716 so it is likely that, in order to create the exemption, both the Proposed Ordinance and the prevailing wage Council policy would need to be amended.

For the above reasons, Staff recommends that Council approve the Proposed Ordinance.

#### **EVALUATION AND FOLLOW-UP**

Staff will report on the status of this ordinance if any subsidies are proposed to the Mayor and City Council which would require implementation of this ordinance.

#### **PUBLIC OUTREACH**

This memorandum will be placed on the City's agenda website for August 6, 2019 Council Meeting.

#### **COORDINATION**

This memorandum has been coordinated with the City Attorney's Office and the Housing Department.

#### **COMMISSION RECOMMENDATION/INPUT**

No commission recommendation or input is associated with this action.

#### **COST SUMMARY/IMPLICATIONS**

Any private development projects that receive subsidies and have workforce standards applied to them will require staff from the Department of Public Works Labor Compliance team to monitor and oversee compliance. Public Works staff is proactively monitoring prevailing wage and

HONORABLE MAYOR AND CITY COUNCIL

July 24, 2019

**Subject: Proposed Ordinance – Minimum Labor Standards for Certain Private Construction Projects**

Page 7

apprenticeship ratios on all City public works projects and living wage on City service and maintenance contracts. In addition, Public Works staff is tasked with administration and enforcement of the San José Minimum Wage and Opportunity to Work. At this time, it is difficult to predict the workload associated with proposed Ordinance as the number of projects that would be impacted the requirements of the proposed Ordinance is unknown. However, as an example, based on current staffing levels and work assignments, for every high-rise development that is required to have workforce standards applied, it is estimate that 0.5 FTE of staff time will be required for labor compliance. Given the unknown workload, any additional staffing resource request for labor compliance will be brought forward to the City Council for consideration as part of any future recommendations where subsidies are considered.

### CEQA

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

/s/  
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/s/  
MATT CANO  
Director of Public Works

For questions, please contact Matt Cano, Public Works Director at 408-535-8300.