



Memorandum

TO: RULES AND OPEN GOVERNMENT
COMMITTEE

FROM: Councilmember Raul Peralez
Vice-Mayor Charles "Chappie" Jones
Councilmember Magdalena Carrasco
Councilmember Sergio Jimenez

SUBJECT: SEE BELOW

DATE: 01-24-2019

Approved by:

SUBJECT: Update to San José's Wage Theft Prevention Ordinance

RECOMMENDATIONS:

1. Approve the attached ordinance (Attachment 1) updating San Jose's existing Wage Theft Prevention Ordinance to achieve the following goals:
 - a. Require Developers proposed major construction projects to disclose wage theft or other violations of labor and employment law committed in the past five years by their prime contractors and their subcontractors; and if any prime contractor or subcontractor has unpaid wage theft claims or other final unsatisfied judgments, citations, or final administrative decisions against them, disqualify that contractor from the project until they have complied with back wages owed or other final judgments, citations, or final administrative decisions.
 - b. If the City provides any economic development incentives to private construction projects, those incentives should be subject to penalties if illegal abuses of workers are committed on the project. And direct staff to return to City Council with recommendations for appropriate penalties for Developers, prime contractors, and subcontracts, such as a "clawback" mechanism allowing the City to revoke all or a portion of the incentive if illegal abuses of workers are committed on the project.
2. Adopt the attached amendments (Attachment 2) updating San Jose's existing Wage Theft Prevention Policy to achieve the following goals:
 - a. Remove the exclusion of public works contracts from the policy.
 - b. Clarify that the existing definition of "Final Judgments, Decisions, and Orders" also includes judgments resulting from a Civil Wage and Penalty Assessment (CWPA) or from a Bureau of Field Enforcement (BOFE)

citation, as well as citations for serious, willful, and repeat OSHA violations.

BACKGROUND

In June 2015, The City Council ranked wage theft prevention as the City's number one policy priority in its annual Priority setting process. In 2016, the City Council unanimously approved the Wage Theft Prevention Policy to help address a pervasive problem affecting San José workers, families and businesses: wage theft. The Council's ordinance focused on using the City's available tools.

Noting that "83% of employees who receive a favorable judgement from the State Division of Labor Standards Enforcement receive zero payment from their employers"¹, the Council established two avenues to help hold businesses accountable for wages owed: (1) amending the City's bidding and contracting policies and process to prevent wage theft by City contractors and (2) adding the authority to suspend revoke permits for designated businesses with unpaid final wage theft judgements or administrative actions.

The 2016 Wage Theft Prevention Policy was an important step towards protecting San José's workers and supporting the vast majority of law-abiding businesses. However, the initial policy excluded one of the industry's most negatively affected by wage theft: construction.

Wage theft in the construction industry is rampant. One in six California construction workers is a victim of wage theft; Latino and Asian immigrants are especially likely to be affected, and often face threats of retaliation if they speak out. In the Bay Area, since 2011, approximately 7,000 construction workers at over 500 companies have been victims of wage theft - and that includes only documented cases resulting in final federal administrative decisions and/or state judgements.² Contractors cheating workers out of their pay pushes more and more of these workers and their families into poverty and deprives them of the ability to work their way into the middle-class. It's an unfortunate reality of the underground and illegal economy that permeates the construction industry.

How does it happen? Unscrupulous contractors refuse to pay workers for overtime hours, for meal and rest breaks and/or misclassification of hourly workers as "independent contractors" to get around paying overtime and providing benefits. In worst case scenarios, this has tragically occurred in San José. Criminal contractors have held workers against their will and failed to pay them for work on construction projects. The most recent example, is the discovery of construction workers forced into human slavery to build the luxurious Silvery Towers. Due to developers and contractors have little, to no, oversight, the workers experienced wage theft and retaliation. The subcontractor was

¹ May 26, 2016. City of San José Memorandum, Councilmembers Kalra, Peralez, Carrasco, and Rocha. Actions Related to Wage Theft Prevention. http://sanjose.granicus.com/MetaViewer.php?meta_id=575454

² "Construction in San Jose: Crisis & Opportunity" by Working Partnerships USA, pg. 19. March 2018

not licensed and owed \$650,000 in unpaid citations and judgements. We as the City have a responsibility to act.

We must act by expanding our existing Wage Theft Prevention policy and ordinance to cover all major construction projects, both public and private. For City-funded projects, this means adding public works to the other types of City contracts designated by the existing Wage Theft Prevention Policy. For major private developments, we must extend the current ordinance, which provides the authority to suspend or revoke Title 6 permits (police permits) for the worst offenders, to apply an equivalent standard to Title 24 permits (building permits). The expanded ordinance must also include a provision requiring contractors and developers that engage in wage theft who received any taxpayer subsidy to repay that subsidy, with interest.

The proposed provisions and amendments to the existing policy and ordinance will ensure that another Silvery Towers does not occur again and that the City is not blindsided by another atrocity.

The signers of this memorandum have not had, and will not have, any private conversation with any other member of the City Council, or that member's staff, concerning any action discussed in the memorandum, and that each signer's staff members have not had, and have been instructed not to have any such conversation with any other member of the City Council or that member's staff.

Attachment 1

Responsible Construction Ordinance

1. Definitions

For purposes of this ordinance:

A. "Building permit holder" means a person or entity that has received a permit to undertake a major construction project. A building permit holder does not include an owner self-performing work on the owner's residence.

B. "Building permit applicant" means a person or entity that has applied for a permit to undertake a major construction project. A building permit applicant does not include an owner self-performing work on the owner's residence.

C. "Covered party" means a developer, building permit holder, or building permit applicant.

D. "Developer" means an entity or person who owns or controls a major construction project. Developer does not include an owner self-performing work on the owner's residence.

E. "Final judgment, final administrative decision, or citation" means either of the following:

i. A judgment, decision, determination, order, or citation including but not limited to a California Division of Labor Standards Enforcement's Bureau of Field Enforcement's citation, a California Division of Labor Standards Enforcement's Public Works' CWPA, or an OSHA citation that was issued by a court of law, an investigatory government agency authorized by law to enforce an applicable law, an arbitrator, or an arbitration panel and for which all appeals have been exhausted or the time period to appeal has expired.

ii. An admission of guilt or finding of guilt in a criminal proceeding.

F. "Financial Assistance" means any financial incentive or investment provided by the city or a city-controlled entity or political subdivision to facilitate or support a Major Construction Project, including:

i. Taxes, fees, costs, rents, insurance or bond premiums, loans, interest rates, inclusionary housing obligations, inclusionary housing in-lieu fees, or other obligations that would normally be required in the execution of the contract, that are paid, reduced, charged at less than fair market value, waived, rebated or forgiven by the city, including those provided under the existing Downtown High-Rise Incentive Program, as well as

any other city tax or fee break programs available to new developments or to a particular sub-category of developments.

ii. The payment of money or the equivalent of money for the design, development, construction, financing or any other component related to development of the project, including, but not limited to, infrastructure costs, preconstruction costs, demolition costs, construction costs, financing costs, equipment costs, design costs, environmental review costs, and environmental mitigation costs; and

iii. Any loan or loan guarantee.

G. "Major construction project" means a project that will involve construction, alteration, and/or demolition work of greater than 5,000 square feet of floor area within the city.

H. "Unsatisfied final judgment, final administrative decision, or citation" means a final judgment or citation that requires the payment of money, and that has not been fully satisfied, except that an unsatisfied judgment, decision or citation shall not disqualify a contractor or subcontractor if its enforcement against the contractor or subcontractor is stayed by court order or operation of law.

2. Bidding and Contracting Requirements

A. A covered party shall require, in all solicitations or invitations for bids to perform work on a major construction project, and prior to awarding any contract to perform work on a major construction project, that every contractor and subcontractor performing work in excess of \$50,000 on the project must complete and return to the covered party the disclosure form required by this ordinance. The completed form shall be verified by a representative of the contractor or subcontractor under penalty of perjury.

B. A covered party shall disqualify a contractor or subcontractor from entering into a contract to perform work, and from performing such work, if the required disclosure form has not been submitted, if the disclosure form is materially false or incomplete, or if the disclosure form reports that the contractor or subcontractor has an unsatisfied final judgment, final administrative decision, or citation. Nothing in this ordinance shall preclude a covered party from disqualifying a contractor or subcontractor for additional reasons.

C. A developer or building permit holder subject to this ordinance shall file a copy of the completed disclosure forms required by this ordinance with the city prior to the contractor or subcontractor performing work on the project. The completed disclosure forms for a project shall be available from the city as public records.

D. A contractor or subcontractor performing work for which a disclosure form is required must complete the disclosure form prior to entering into a contract to perform the work.

E. Upon notification from the city to a covered party that a contractor or subcontractor performing work for which a disclosure form is required has not completed a disclosure form, or has submitted a disclosure form that is incomplete, the covered party shall remove the contractor or subcontractor from the project within 48 hours and bar the contractor or subcontractor from performing further work on the project until such time the contractor submits a complete disclosure form.

G. Upon notification from the city to a covered party that a contractor or subcontractor performing work for which a disclosure form is required has submitted a disclosure form that is materially false, or has submitted a disclosure form that reports an unsatisfied final judgment, final administrative decision, or citation, the covered party shall remove the contractor or subcontractor from the project within 48 hours and bar the contractor or subcontractor from performing further work on the project.

H. A contractor or subcontractor which has been ordered removed and/or barred from a project due to failure to submit a complete and accurate disclosure form, or due to failure to satisfy a final judgement, administrative decision, or citation may request an administrative hearing before the Appeals Hearing Board.

3. Access Requirements

A. A covered party shall provide investigators for the city with access to the project jobsite upon request, and with the right to inspect payroll records and interview workers upon request, for the purpose of verifying compliance with any labor standards laws applicable to workers on the project.

B. A covered party shall require its contractors and subcontractors to provide investigators for the city with access to the project jobsite upon request, and with the right to inspect payroll records and interview workers upon request, for the purpose of verifying compliance with any labor standards laws applicable to workers on the project.

C. A contractor or subcontractor performing work on a project subject to this ordinance shall provide investigators for the city with access to the project jobsite upon request, and with the right to inspect payroll records and interview workers upon request, for the purpose of verifying compliance with any labor standards laws applicable to workers on the project.

D. The city may contract with a non-profit organization to conduct investigations on behalf of the city for purposes of this ordinance and such investigators shall be provided with the jobsite access and right to inspect payroll records and interview workers that are provided this ordinance.

E. Upon notification from the city to a covered party that a contractor or subcontractor refuses to provide the city with the jobsite access and right to inspect payroll records and interview workers that are required by this ordinance, the covered

party shall remove the contractor or subcontractor from the project within 48 hours and bar the contractor or subcontractor from performing further work on the project.

4. Prohibition on Retaliation

No covered party, contractor or subcontractor shall discriminate or retaliate against any person or entity for cooperating with an investigation under this ordinance or for making a complaint concerning an alleged violation of this ordinance.

5. Guarantee Against Wage Theft

A. A covered party shall be jointly responsible for satisfying any unpaid final judgment, final administrative decision, or citation issued against a contractor or subcontractor on its project to the extent it awards wages, benefits, penalties, interest, and attorneys' fees to a worker on account of the worker's performance of work on the project.

B. Upon notice from the city of an unpaid final judgment, final administrative decision or citation subject to subdivision A, a covered party shall provide the city within 30 days with proof that the judgment, administrative decision or citation, or relevant portion thereof, has been satisfied. If the covered party fails to provide such proof, the city may, in addition to pursuing any other remedies, suspend any building permits or business license issued to the covered party until the covered party provides proof that the judgement, administrative decision or citation has been satisfied.

C. A covered party which has been subjected to a suspension of its building permit due to failure to satisfy a final judgement, administrative decision, or citation may request an administrative hearing before the Appeals Hearing Board.

6. Compliance

A. A building permit applicant subject to this ordinance shall complete and submit with their building permit application a copy of the Disclosure Form for each contractor or subcontractor that has been awarded a contract on the project.

i. The City shall not issue the building permit until a complete Disclosure Form has been filed for each contractor and subcontractor. If no contracts have yet been awarded for the project, the applicant shall submit to the City an attestation to that effect with the building permit application.

ii. If additional contracts or subcontracts are awarded after issuance of the building permit, the permit holder shall submit a copy of the Disclosure Form for each contractor or subcontractor prior to commencing work on the project.

iii. As part of the application for a building permit, every applicant subject to this ordinance shall agree to comply with all applicable portions of this ordinance, including submittal of all required Disclosure Forms.

B. A covered party, contractor, or subcontractor shall be subject to a civil fine payable to the city of up to \$1,000 for each violation of this ordinance.

C. Any person injured by a violation of this ordinance may bring a civil action against a covered party, contractor, or subcontractor for damages in any court of competent jurisdiction.

D. Any person who contends that a contractor or subcontractor is performing work for which a disclosure form is required by this ordinance and that no such disclosure form was filed with the city may file a complaint with the city supported by evidence to show the violation. The city shall promptly provide a copy of the complaint to the contractor or subcontractor and to the covered party and request a response within seven days. Unless the contractor or subcontractor provides a completed disclosure form within seven days, or establishes to the satisfaction of the city that no violation occurred, the city shall give notice to the covered party that the contractor or subcontractor must be removed from the project within 48 hours and barred from performing further work on the project.

E. Any person who contends that a contractor or subcontractor performing work for which a disclosure form is required by this ordinance has provided a disclosure form that is materially false or incomplete may file a complaint with the city supported by evidence to show the violation. The city shall promptly provide a copy of the complaint to the contractor or subcontractor and to the covered party and request a response within seven days. Unless the contractor or subcontractor establishes to the satisfaction of the city that no violation occurred, the city shall give notice to the covered party that the contractor or subcontractor must be removed from the project within 48 hours and barred from performing further work on the project.

F. For any major construction project receiving Financial Assistance, if a covered party is found to have an unsatisfied final judgment, final administrative decision, or citation, then in addition to any other penalties, the City shall issue an assessment requiring the recipient to repay the full amount of the Financial Assistance provided for that project, including but not limited to the full amount of any tax and fees that were reduced, suspended, or waived as part of an economic incentive program. Any such repayments shall be deposited in the fund which was the source of the incentive, or in the case of tax and fee breaks, in the fund to which the tax or fee would have been directed.

7. Disclosure form.

The disclosure form required by this ordinance shall be the form contained in Appendix A to this ordinance and shall be completed under penalty of perjury.

Appendix A

City Responsible Construction Ordinance Disclosure Form

To be completed by contractor or subcontractor. A separate form must be completed for each project.

1. Name of Contractor or Subcontractor:
2. Address:
3. Responsible managing officer:
4. State Contractor's License Number:
5. Project name:
6. Project location:
7. Project owner or developer:
8. Party who retained contractor/subcontractor to perform work on the project:
9. Approximate date work by contractor/subcontractor is scheduled to commence on project:
10. During the five years prior to completion of this form, has contractor/subcontractor been found liable by any court or administrative agency for failing to pay wages or benefits to an employee or for violating any wage and hour provisions of the California Labor Code or the Fair Labor Standards Act? If so, list all such judgments and administrative awards and attach copies to this form. Do not list or attach judgments or administrative awards that have been overturned.
11. During the five years prior to completion of this form, has contractor/subcontractor been subject to any citations or penalties imposed by the U.S. Department of Labor, California Department of Industrial Relations, California Labor Commissioner or California Division of Occupational Safety and Health? If so, list all such citations and penalty assessments and attach copies to this form. Do not list or attach citations or penalty assessments that have been overturned.
12. During the five years prior to completion of this form, has contractor/subcontractor been subject to any cause findings by the Department of Fair Employment and Housing or the Equal Employment Opportunity Commission for the laws enforced by those agencies? If so, list all such findings and attach copies to this form. Do not list cause findings that have been overturned.

13. During the five years prior to completion of this form, has contractor/subcontractor been found liable for failing to maintain worker's compensation insurance or for engaging in fraudulent activity related to worker's compensation insurance? If so, list and attach copies of all such determinations. Do not list or attach determinations that have been overturned.

14. During the five years prior to completion of this form, has contractor/subcontractor been found liable by any court or administrative agency for retaliating or discriminating against a worker for making a complaint about a violation of laws enforced by the Labor Commission, Department of Labor, the Department of Fair Employment and Housing, or the Equal Employment Opportunity Commission? If so, list all such judgments and administrative awards and attach copies to this form. Do not list or attach judgments or administrative awards that have been overturned.

15. During the five years prior to completion of this form, has contractor/subcontractor been found liable by any court or administrative agency for failing to pay any payroll taxes? If so, list all such judgments and administrative awards and attach copies to this form. Do not list or attach judgments or administrative awards that have been overturned.

16. During the five years prior to completion of this form, has contractor/subcontractor been found liable, admitted guilt, or been found guilty by any court or administrative agency for violating any laws relating to human trafficking? If so, list all such judgments and administrative awards and attach copies to this form. Do not list or attach judgments or administrative awards that have been overturned.

17. During the five years prior to completion of this form, has contractor/subcontractor been found by the Contractors State License Board to have performed covered work without a contractor's license or to have performed work without the appropriate license for the classification of work? If so, list all such citations and orders. Do not list citations or administrative awards that have been overturned.

18. Have any judgments, decisions, determinations, orders, or citations been issued against the contractor/subcontractor by a court of law, an investigatory government agency authorized by law to enforce an applicable law, an arbitrator, or an arbitration panel, that 1) require the payment of money by the contractor/subcontractor, and 2) have not been fully satisfied, and 3) are no longer subject to appeal? If so, list and attach copies of all such unsatisfied judgments, decisions, determinations, orders, or citations. Has enforcement of the unsatisfied judgment, decision, determination, order, or citation against the contractor/subcontractor been stayed by court order or operation of law? If so, attach proof of the stay.

Summary of recommended edits to Council Policy 0.44:

1. Under Bid or Proposal Disqualification Circumstances, which currently applies to bids or proposals submitted pursuant to San José Municipal Code Chapter 4.12 (Procurements of Goods and Services), add bids or proposals submitted pursuant to Chapter 14.04 (Public Works);
2. Replaced the sentence stating that “This Policy does not apply to any “public works” contracts as defined in City Charter Section 1217” with “This Policy also applies to any “public works” contracts as defined in City Charter Section 1217”;
3. Under “REVOCATION OF PERMITS, LICENSES AND REGISTRATIONS”, which adds an additional ground to deny, suspend or revoke a permit or license for permits issued under Title 6 (Business Licenses and Regulations), add “or Title 24” (Technical Codes); and
4. Make other minor or technical clarifications, including:
 - a. Replace “contractor with “contractor or business” where applicable.
 - b. Under the definition of “Final Judgments, Decisions, or Orders”, add: “Final judgment, decision, or order also refer to Civil Wage and Penalty Assessments (CWPA's) by the California Division of Labor Standards Enforcement Public Works and California Division of Labor Standards Bureau of Field Enforcement (BOFE) citations for which all appeals have been exhausted or the time period to appeal has expired.”