



# Memorandum

**TO:** HONORABLE MAYOR  
AND CITY COUNCIL

**FROM:** Matt Cano  
Kim Walesh

**SUBJECT: PRIVATE DEVELOPMENT  
WORKFORCE STANDARDS**

**DATE:** June 14, 2019

Approved

Date

6/14/19

## **RECOMMENDATION**

Approve an ordinance amending the San Jose Municipal Code to add a new Chapter 14.10 to Title 14 to set forth additional prevailing wage requirements for certain private construction projects.

## **OUTCOME**

Approval of the recommendation will add a new chapter to the Municipal Code setting forth additional prevailing wage requirements for certain private construction projects that receive a public subsidy.

## **BACKGROUND**

On March 16, 2018 Mayor Liccardo submitted a memorandum which was agendized for the March 21, 2018 Rules and Open Government Committee. This memorandum was subsequently heard and the recommendation approved at the April 3, 2018 City Council meeting.

The approved recommendation provided direction on four specific items:

- 1) Capital bond measure;
- 2) Best value contracting;
- 3) Community workforce agreements/project labor agreement (PLA);
- 4) Private development workforce standards.

An information memorandum was provided to the Mayor and City Council on May 16, 2019 to provide a status update on this direction. In summary, the information memorandum indicated the following status for the first three items above:

- The capital bond measure (Measure T) was approved by the voters in November 2018 and work is underway to deliver the \$650 million in projects. An update on the status of this work will be provided to the Mayor and City Council on this same June 25, 2019 City Council agenda;
- The best value contracting (BVC) method of procurement was authorized by the voters in November 2018 and will be brought forward to the Mayor and City Council for implementation in August 2019;
- The project labor agreement (PLA) was executed in late March 2018 between the City, the Santa Clara and San Benito Building and Construction Trades Council and twenty separate affiliated local unions.

The above three initiatives all still require a significant amount of staff effort in the implementation phase. Implementation of these initiatives is in addition to staff's development of a Local Hire Policy, Disadvantage Business Enterprise Program, and Wage Theft Prevention Ordinance, which are currently Council Priority #1, #3, and #17 respectively. Staff will bring forward analysis and recommendations on the Local Hire Policy and Disadvantage Business Enterprise Program to the Community and Economic Development Committee in 2019. Staff will begin initial stakeholder outreach on Wage Theft Prevention Policy in Summer 2019.

With some of the workload on above policy initiatives completed, staff has been able to focus on the effort for private development workforce standards as discussed further below.

## **ANALYSIS**

On April 3, 2018 Council directed the City Manager and City Attorney to draft an ordinance to require private development projects that receive a City subsidy to: (1) pay prevailing wages to construction workers and (2) have "goal – good faith effort" requirements for the use of apprentices, local workers and workers from underrepresented populations. This direction requires staff to address numerous complex and challenging policy, legal, administrative and resource issues.

The proposed ordinance provides for the following:

- (1) A requirement to pay prevailing wage when the City provides a subsidy; and
- (2) Clarity on the issue of constitutes a City subsidy.

The proposed ordinance does not include provisions for apprentices, local hiring and targeted workers as these provisions need further analysis. The following sections of the analysis provide further detail on the proposed ordinance.

*Additional Prevailing Wage Requirement:*

The proposed ordinance requires a private construction project receiving a City subsidy to pay all workers employed on the construction not less than the applicable general prevailing rate of per diem wages for work of a similar character. The proposed ordinance would supplement and expand the City's **existing** prevailing wage requirements, which are in Chapter 14.09 of the San Jose Municipal Code and basically require the City to follow State prevailing wage requirements.

In the proposed ordinance, a subsidy is defined as either of the following:

- (1) The City's contribution of land, money or other direct financial assistance to a private construction project or
- (2) The City's reduction of any fee or tax applicable to a single private construction project or multiple private construction projects.

The definition of "subsidy" is subject to numerous exclusions, which are discussed below.

The proposed ordinance defines a "private construction project" as any project that is:

- (1) Owned and controlled by one or more private persons or entities, and
- (2) Involves the construction of one or more buildings or structures.

The phrase expressly includes any development project that includes a plan to undertake the construction of one or more buildings or structures.

The proposed ordinance provides for prevailing wages to be the amount fixed by the Director of the Department of Industrial Relations in accordance with State law. It states that the City will administer and enforce the requirement to pay workers the applicable general prevailing rate of per diem wages in accordance with the existing prevailing wage requirements in Chapter 14.09. It also provides that if the existing prevailing wage requirements and the requirements of the proposed ordinance conflict regarding the application of prevailing wages (i.e. one requires it and the other does not), the provision requiring prevailing wages controls.

As mentioned above, the proposed ordinance contains numerous exceptions to the definition of "subsidy."

One of the more significant exceptions is when a fee or tax reduction is applied uniformly across all private construction projects within a specific subcategory of use (a term that is defined in the ordinance) and the Council determines construction of the projects is not likely absent the reduction. The following are the significant requirements for this exception to apply:

1. Council's determination, supported by findings, must occur following a public hearing,
2. Council's findings must be supported by evidence presented at the public hearing, including a financial feasibility study analyzing whether construction of the projects within the specified subcategory of use is reasonably unlikely absent the fee or tax reduction,
3. The financial feasibility study must be performed by a consultant qualified to provide real-estate analytic services and procured through the City's usual procurement process, and
4. The Council must use reasonable efforts to conduct the hearing within 90 calendar days following completion of the financial feasibility study.

Other exclusions to the definition of "subsidy" include the following:

- The contribution or reduction is de minimus in the context of the project,
- The contribution or reduction meets certain restrictions related to affordable housing,
- The contribution or reduction is for the benefit of a homeowner constructing an accessory dwelling unit (ADUs),
- The use of impact fees by the City to construct infrastructure benefitting a private construction project under certain defined conditions,
- The City's reimbursement of a private construction project for the cost of constructing infrastructure that would normally be paid for the City (e.g., the project is required to install a certain sized sewer line, the City requests the project to oversize the sewer line for reasons unrelated to the project, and the City reimburses the project for the cost of oversizing the sewer line),
- A fee or tax reduction resulting from a change in any federal or state law or regulation, and
- A fee or tax reduction applied uniformly to all projects within any of the following five general land use categories: residential, office, retail, research and development, or industrial.

The proposed ordinance provides a requirement that projects receiving a subsidy pay prevailing wage. The proposed ordinance does not yet incorporate requirements for targeted hire, apprenticeships, and local hire since more study is required surrounding the implications of these policies. Unlike the proposed ordinance, developing an ordinance that imposes local hire, targeted hire and apprenticeship requirements on private construction projects – even those

receiving a City subsidy – raises numerous challenges. These include legal, administrative, enforcement, and resource challenges that still need to be fully analyzed. Some of the challenges were outlined in the informational memo of May 16, 2019. At this point, staff anticipates completing its analysis and returning to Council with the ordinance for these requirements on August 6, 2019.

Staff is also in the process of reviewing the potential extension of Downtown highrise incentives. This review, which will include a feasibility study to determine whether or not the extension would be deemed a subsidy, is anticipated to be brought forward to the City Council for consideration on August 6, 2019 after consideration of the remaining elements of the workforce standards ordinance.

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

As mentioned above, staff is anticipated to return to Council in August 2019 for a discussion on the additional private development workforce requirements.

### **PUBLIC OUTREACH**

This memorandum will be placed on the City's agenda website for June 25, 2019.

### **COORDINATION**

This memorandum has been coordinated with the City Attorney's Office, City Manager's Budget 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. At this time it is difficult to predict the workload associated with this as the number of projects that will have these standards applied is unknown. Given the unknown workload, any additional resource requests for labor compliance may be brought forward to the City Council for consideration as part of any future recommendations where subsidies are considered.

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**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/  
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Director of Public Works

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