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February 10, 2020

Hon. Mayor Sam Liccardo and Members of the City Council
200 East Santa Clara Street
San José, CA 95113

Re: Wage Theft Policy and Responsible Construction Ordinance

Dear Mayor Liccardo and Members of the City Council:

In March 2019, the Council set as a priority to tackle the serious problem of wage theft in San José. The City's efforts have included the adoption of a Wage Theft Policy that restricts employers with a history of wage violations from receiving contracts with the City.

Extending the Wage Theft Policy to Public Works

Under the City's Wage Theft Policy, the City has made a commitment only to contract with high-road employers. While this effort has been commendable, to date there has been a significant gap in the Wage Theft Policy's coverage. The Policy as currently drafted neglects to cover construction employers on public works projects in the City, notwithstanding that wage theft is particularly widespread in the construction industry. Nevertheless, some have suggested that extending the City's Wage Theft Policy to contractors on public works projects is unnecessary because the City's Office of Equality Assurance already ensures wage compliance on ongoing public works. However, the purpose of the Wage Theft Policy is to ensure that the City enters into contracts only with high-road employers, while the OEA's compliance procedures apply only after a contractor has already been selected to do business with the City. A contractor's history of prior wage violations is certainly relevant to determine which employers the City wants to do business with.

As a charter city, San José's prevailing wage policies for its own public works projects are a "municipal affair" that the City may structure as it chooses. *See State Building & Construction Trades Council v. City of Vista*, 54 Cal.4th 547, 559 (2012) ("the construction of a city-operated facility for the benefit of a city's inhabitants is quintessentially a municipal affair,

as is the control over *the expenditure of a city's own funds*") (emphasis in original). Extending the Wage Theft Policy to contractors on public works projects is unquestionably within the City's authority, and would go far toward ensuring that the City does not enter into contracts with employers known to have a poor record of complying with their wage obligations.

Further, the City should expand the categories of "final judgments" in the Wage Theft Policy to include such orders as prevailing wage Civil Wage & Penalty Assessments (CWPAs) issued by the DLSE and orders issued by DLSE's Bureau of Field Enforcement (BOFE). BOFE investigates systemic wage violations in the construction industry (as well as other industries), and CWPAs are issued when an employer has been found to have violated state prevailing wage law (again, commonly in a systemic fashion). Adding such enforcement orders to the Wage Theft Policy's definition of "final judgments" will ensure that significant wage theft violations are captured by the Policy.

Responsible Construction Ordinance

Consistent with the City's objective of combatting wage theft within its borders, the City should also adopt a Responsible Construction Ordinance that would apply to private construction work within the City. The proposed Ordinance would bar contractors with unsatisfied judgments for wage violations, or who conceal or misrepresent their history of such violations, from operating on building permits issued for private work within the City. Nevertheless, City staff have raised questions about the mechanism the Ordinance uses for accomplishing this objective.

There can be no serious dispute that the City has the police power under Cal. Const., Art. 1, §7, to regulate the operation of private businesses within the City, including construction contractors on private projects. The proposed Ordinance would bar contractors with a history of wage theft from performing work on private construction projects by placing conditions on building permits.

While City staff suggest that the building codes, and hence the issuance of building permits, are "issued under technical codes," such that imposing conditions on permits would be inappropriate, there is no legal obstacle to doing so. Cities have broad police power to impose conditions on building permits, and routinely impose all manner of regulations consistent with that authority that may affect the ability to obtain a building permit. Building permits may only be issued if they are consistent with other city ordinances, such as zoning ordinances. For example, the California Supreme Court held that a city legitimately exercised its police power by imposing a limit on any new building permits until the city accomplished certain goals for accommodating growth. *Associated Home Builders v. City of Livermore*, 18 Cal.3d 582 (1976). Limits on the issuance of building permits may be tied to a city's interests in promoting the public health and welfare. *Id.* at 603-04. A building permit may lawfully be denied, for example, if it would be inconsistent with an ordinance protecting views, *Kucera v. Lizza*, 59 Cal.App.4th 1141 (1992), or if it fails to provide for public art required by a separate ordinance, *Ehrlich v. City of Culver City*, 12 Cal.4th 854 (1996).

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Moreover, imposing conditions on building permits would not interfere with or impair the operation of the technical building codes. As noted above, the City is not precluded from imposing limits on building permits that otherwise relate to the public health and welfare. The proposed Ordinance here does not impose more stringent *technical* requirements, and as such is ancillary to the technical building standards themselves. We therefore believe that the proposed Ordinance would be lawful and consistent with, rather than conflicting with, the building codes. *Cf. Bldg. Indus. Ass'n v. City of Livermore*, 45 Cal.App.4th 719 (1996).

We look forward to working with City staff on the question of expanding the reach of the Wage Theft Policy and developing the Responsible Construction Ordinance.

Very truly yours,

/s/ Eileen B. Goldsmith

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