

REGULAR

NUMBER: 65.150

TITLE: AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF MILPITAS ADDING CHAPTER 32 (RESPONSIBLE CONSTRUCTION) TO TITLE III OF THE MILPITAS MUNICIPAL CODE

HISTORY: This Ordinance was introduced (first reading) by the City Council at its meeting of _____, 2020, upon motion by _____ and was adopted (second reading) by the City Council at its meeting of _____, upon motion by _____. The Ordinance was duly passed and ordered published in accordance with law by the following vote:

AYES:

NOES:

ABSENT:

ABSTAIN:

ATTEST:

APPROVED:

Mary Lavelle, City Clerk

Rich Tran, Mayor

APPROVED AS TO FORM:

Christopher J. Diaz, City Attorney

RECITALS AND FINDINGS:

WHEREAS, pursuant to Article XI, Section 7 of the California Constitution, the City of Milpitas may adopt and enforce ordinances and regulations not in conflict with general laws to protect and promote the public health, safety, and welfare of its citizens; and

WHEREAS, the City Council of the City of Milpitas desires to adopt certain provisions requiring certain types of private developers receiving financial assistance from the City and involved in construction, alteration, and/or demolition work within the City, valued in excess of \$500,000, to file disclosure forms with the City confirming their contractors and subcontractors have no unpaid judgments or outstanding violations; and

WHEREAS, the City Council finds that such provisions shall serve the best interests of the citizens of Milpitas by requiring that any work being performed on certain private construction projects in the City be made by responsible construction contractors; and

WHEREAS, this Ordinance is intended to combat wage theft and protect vulnerable worker populations in the City by establishing safeguards for responsible construction practices.

NOW, THEREFORE, the City Council of the City of Milpitas does ordain as follows:

SECTION 1. RECORD AND BASIS FOR ACTION

The City Council has duly considered the full record before it, which may include but is not limited to such things as the City staff report, testimony by staff and the public, and other materials and evidence submitted or provided to the City Council. Furthermore, the recitals set forth above are found to be true and correct and are incorporated herein by reference.

SECTION 2. AMENDMENT OF MILPITAS MUNICIPAL CODE ADDING A NEW CHAPTER 32 TO TITLE III

Title III of the Milpitas Municipal Code is hereby amended by adding a new Chapter 32, “Responsible Construction,” to read as follows:

Chapter 32 - RESPONSIBLE CONSTRUCTION

III-32-1.00 - Title

This Chapter shall be known as the “Responsible Construction Ordinance.”

III-32-2.00 - Authority

This Chapter is adopted pursuant to the powers vested in the City of Milpitas under the laws and Constitution of the State of California, including, but not limited to, the police powers vested in the City pursuant to Article XI, Section 7 of the California Constitution.

III-32-3.00 - Definitions

The following words and phrases, whenever used in this Chapter, shall be construed as defined in this Section:

- (a) “Building permit holder” means a person or entity that has obtained a building permit from the City to undertake a major construction project that has been granted any Financial Assistance. A building permit holder does not include an owner self-performing work on the owner’s residence.
- (b) “City” means the City of Milpitas, California or any agency designated by the City to administer the terms of this Chapter.
- (c) “Covered party” means a developer or building permit holder as defined in this Chapter.

- (d) “Developer” means an entity or person who owns or controls a major construction project that has been granted any Financial Assistance. Developer does not include an owner undertaking work on the owner’s residence.
- (e) “Final judgment” means a judgment, decision, determination, order, or citation, for which there is no pending appeal and the time for filing an appeal has passed, that was issued by:
 - (1) a court of law, an administrative agency authorized to enforce applicable federal, state and local labor standards laws, including but not limited to, the Federal Fair Labor Standards Act, the California Labor Code, the City of Milpitas minimum wage ordinance, and prevailing wage requirements, or
 - (2) an arbitrator, or an arbitration panel.
- (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:
 - (1) 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, that are paid, reduced, charged at less than fair market value, waived, rebated, granted an exception to, or forgiven by the City, as well as any other City tax or fee break programs available to new developments or to a particular sub-category of developments, unless required by state law.
 - (2) 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
 - (3) Any loan or loan guarantee.
- (g) “Major construction project” means a project that will involve construction, alteration, and/or demolition work in excess of \$500,000 within the City.

III-32-4.00 - 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 that has been granted or will be granted Financial Assistance, and prior to awarding any contract to perform work on a major construction project that has been granted or will be granted Financial Assistance, that every contractor and subcontractor performing work on the project in excess of \$50,000 complete and return to the covered party the disclosure form required by this Chapter.
- (b) A covered party shall disqualify a contractor or subcontractor from entering into a contract to perform work, and from performing such work for a covered party, 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. Nothing in this Chapter shall preclude a covered party from disqualifying the contractor or subcontractor for additional reasons.
- (c) A covered party shall file a copy of the completed disclosure form required by this Chapter with the City prior to the contractor or subcontractor performing work on the project.
- (d) A contractor or subcontractor performing work for a covered party 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 a covered party 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.

(f) Upon notification from the City to a covered party that a contractor or subcontractor performing work for a covered party 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, 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.

III-32-5.00 - Disclosure Form

(a) The disclosure form required by this Chapter shall be completed by each contractor and subcontractor, as specified in Section III-32-4.00(a), on a form provided by the City. The completed disclosure form shall be verified by a representative of the contractor or subcontractor under penalty of perjury.

(b) In the disclosure form, the contractor or subcontractor shall confirm the following facts regarding its past performance and work history and its current qualifications:

- (1) Name, address, and telephone number
- (2) Responsible managing officer
- (3) Contractor state license number
- (4) Name and location of the project
- (5) Project owner or developer
- (6) Party who retained the contractor or subcontractor to perform work on the project
- (7) Approximate date the contractor or subcontractor is scheduled to commence work on the project
- (8) Whether the contractor or subcontractor has 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 during the five years prior to completion of the disclosure form.
- (9) Whether the contractor or subcontractor has been subject to any citations or penalties imposed by the U.S. Department of Labor, the California Department of Industrial Relations, the California Labor Commissioner's Office, or the California Division of Occupational Safety and Health during the five years prior to completion of the disclosure form.
- (10) Whether the contractor or subcontractor has been subject to any cause findings by the California Department of Fair Employment and Housing or the U.S. Equal Employment Opportunity Commission for the laws enforced by those agencies during the five years prior to completion of the disclosure form.
- (11) Whether the contractor or subcontractor has been found liable for failing to maintain worker's compensation insurance or for engaging in fraudulent activity related to worker's compensation insurance during the five years prior to completion of the disclosure form.
- (12) Whether the contractor or subcontractor has 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 U.S. Department of Labor, the California Department of Industrial Relations, the California Department of Fair Employment and Housing, or the U.S. Equal

Employment Opportunity Commission during the five years prior to completion of the disclosure form.

- (13) Whether the contractor or subcontractor has been found liable by any court or administrative agency for failing to pay any payroll taxes during the five years prior to completion of the disclosure form.
- (14) Whether the contractor or subcontractor has been found liable, admitted guilt, or been found guilty by any court or administrative agency for violating any laws relating to human trafficking during the five years prior to completion of the disclosure form.
- (15) Whether the contractor or subcontractor has 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 during the five years prior to completion of the disclosure form.
- (16) Whether any judgments, decisions, determinations, orders, or citations, that a) require the payment of money by the contractor or subcontractor, b) have not been fully satisfied, and c) are no longer subject to appeal, have been issued against the contractor or subcontractor by:
 - (1) a court of law, an administrative agency authorized to enforce applicable federal, state and local labor standards laws, including but not limited to, the Federal Fair Labor Standards Act, the California Labor Code, the City of Milpitas minimum wage ordinance, and prevailing wage requirements, or
 - (2) an arbitrator, or an arbitration panel.
- (17) Whether enforcement of any unsatisfied judgments, decisions, determinations, orders, or citations issued against the contractor or subcontractor have been stayed by court order or operation of law.

III-32-6.00 - 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 Chapter 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 Chapter and such investigators shall be provided with jobsite access and 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.
- (e) Upon notification from the City to a covered party that a contractor or subcontractor refuses to provide the City with jobsite access and the right to inspect payroll records and interview workers that are required by this Chapter, 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.

III-32-7.00 - Retaliation Prohibited

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

III-32-8.00 - Guarantee Against Wage Theft

(a) A covered party shall be jointly responsible for satisfying any final judgment 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 unsatisfied final judgment, the covered party shall provide the City, within 30 days of the City's notice, with proof that the final judgment has been satisfied. If the covered party fails to provide such proof, the City may, in addition to pursuing any other remedies, and after first consulting with the City Attorney's Office, suspend or revoke any building permit issued to the covered party, pursuant to, and in compliance with, Section II-1-8.05 of the Milpitas Municipal Code.

(c) A covered party whose building permit has been suspended or revoked due to failure to satisfy a final judgment may request an appeal pursuant to the provisions of Section 5 of Chapter 20 of Title I (Standard Procedures) of the Milpitas Municipal Code.

III-32-9.00 - Enforcement

(a) A covered party, or contractor or subcontractor performing work for a covered party, shall be subject to a civil fine payable to the City of up to \$1,000 for each violation of this Chapter.

(b) Any person injured by a violation of this Chapter may bring a civil action against a covered party, or contractor or subcontractor performing work for a covered party, for damages in any court of competent jurisdiction.

(c) Any person who contends that a contractor or subcontractor is performing work for a covered party for which a disclosure form is required by this Chapter 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.

(d) Any person who contends that a contractor or subcontractor performing work for a covered party for which a disclosure form is required by this Chapter 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) If a covered party is found to have an unsatisfied final judgment, then in addition to any other penalties, the City may require the covered party 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.

SECTION 3. SEVERABILITY

The provisions of this Ordinance are separable, and the invalidity of any phrase, clause, provision or part shall not affect the validity of the remainder.

SECTION 4. EFFECTIVE DATE AND POSTING

In accordance with Section 36937 of the Government Code of the State of California, this Ordinance shall take effect thirty (30) days from and after the date of its passage. The City Clerk of the City of Milpitas shall cause this Ordinance or a summary thereof to be published in accordance with Section 36933 of the Government Code of the State of California.