



CITY OF MILPITAS AGENDA REPORT (AR)

Item Title:	Introduce Ordinance No. 65.150 Regarding Responsible Construction
Category:	Leadership and Support Services
Meeting Date:	10/6/2020
Staff Contact:	Christopher J. Diaz, City Attorney 408-586-3040 Steve McHarris, City Manager 408-586-3059
Recommendation:	Following the reading of the title by the City Attorney, move to waive the first reading beyond the title and Introduce Ordinance No. 65.150 adding Chapter 32 (Responsible Construction) to Title III of the Milpitas Municipal Code.

Background:

At the August 4, 2020, City Council meeting, the City Council unanimously agreed to direct staff to return with a draft Responsible Construction Ordinance as requested by Mayor Rich Tran and Councilmember Anthony Phan. In general, the draft Responsible Construction Ordinance would impose certain provisions requiring private developers receiving financial assistance from the City 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 wage theft or other judgments or outstanding violations. It also requires that if any unpaid wage theft violations develop during the course of the project, the private developer ensure the payment of any unpaid wage theft violation by their contractor or subcontractor as further detailed below.

Analysis:

The Responsible Construction Ordinance would impose on any "Covered Party," as defined in the Ordinance to include any private developer or building permit holder receiving financial assistance from the City (with the exception of any owner working on their own residence), the requirement that it ensure that any contractor or subcontractor performing work in excess of \$500,000 on a "Major Construction Project," as defined in the Ordinance, disclose:

- any wage theft violations in the five years prior;
- 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 in the five years prior;
- 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;
- any liability for failing to maintain worker's compensation insurance, or any fraudulent activity related to worker's compensation insurance, in the five years prior;
- any liability 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;
- any liability for failing to pay any payroll taxes during the five years prior;

- any liability for violating any laws relating to human trafficking during the five years prior;
- 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;
- whether any judgments, decisions, determinations, orders, or citations have been issued against the contractor or subcontractor by 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 or prevailing wage requirements, an arbitrator, or an arbitration panel 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; and
- 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.

In addition to the disclosure requirements detailed above, a "Covered Party" is also required to disqualify any contractor or subcontractor who refuses to complete the disclosure form and/or temporarily bar them from working on the project if the disclosure form is not submitted or contains false statements.

The Ordinance also indicates that a "Covered Party" shall also ensure any unsatisfied final wage theft judgement which occurs during the course of the project is paid, or the City has the ability to suspend or revoke their building permit subject to state law limitations, and subject to any appeal.

In order to enforce the Ordinance, it imposes a fine of up to \$1,000 for each violation. The Ordinance also provides the right for a private party to bring a civil action against any "Covered Party", contractor or subcontractor for any violations. Finally, the City has the right to require the Covered Party to re-pay any City financial assistance provided if they are found to have an unsatisfied judgment.

It is important to note that staff is currently not trained in investigating potential complaints of non-compliance and the disclosure requirements outlined in the ordinance nor is staff time dedicated to handle potential complaints. It would require extensive resources to learn and understand the body of work related to the Ordinance. Therefore, prior to adoption of the Ordinance, staff had intended to contract with the City of San Jose for responding to complaints of non-compliance, which may require funding. The City of San Jose Office of Equality Assurance has over 20 years of experience with various construction-related wage compliance issues. However, at this time San Jose has not adopted a similar ordinance nor does it have an anticipated date of adoption so staff will need to explore other contractual options for enforcement. Staff has also not conducted robust outreach on this ordinance. Thus, staff is recommending bringing back additional information related to enforcement program and costs and community outreach, prior to ordinance adoption.

Policy Alternative:

Alternative 1: The City Council could choose not to introduce the Ordinance.

Pros: The City will not need to develop an enforcement program and incur associated costs for enforcement.

Cons: If the City Council does not introduce the Ordinance, the Responsible Construction Ordinance provisions will not become law in Milpitas in the future.

Reason not recommended: The City Council directed that the Ordinance return at a future City Council meeting, and staff is bringing this Ordinance forward per the City Council's request.

Alternative 2: Do not require additional information about enforcement and outreach efforts prior to adoption of the Ordinance.

Pros: The City will be able to move forward on this Ordinance in an expeditious manner.

Cons: The enforcement program and associated costs have not been determined. The City has also not engaged in stakeholder outreach.

Reason not recommended: Staff still needs to explore enforcement options, determine associated costs as well as conduct stakeholder outreach which may inform the Ordinance as currently written and prompt additional staff recommendations for effective enforcement of the Ordinance upon adoption.

Fiscal Impact:

Introduction and adoption of the Ordinance in itself would not lead to any financial impact; however, enforcement of the Ordinance would lead to a financial impact on the City in terms of staff time or other costs if the City opts to delegate enforcement to a neighboring agency pursuant to a contractual arrangement.

California Environmental Quality Act:

The introduction and adoption of this Ordinance is not a project subject to the California Environmental Quality Act (CEQA) as it can be seen with certainty that the project does not have the potential to result in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment, and is more akin to a administrative activity of the government intended to ensure wage laws are followed in the City pursuant to CEQA Guideline 15378.

Recommendation:

Following the reading of the title by the City Attorney, move to waive the first reading beyond the title and introduce Ordinance No. 65.150 adding Chapter 32 (Responsible Construction) to Title III of the Milpitas Municipal Code.

Attachment:

Ordinance No. 65.150 for introduction