



COUNCIL REPORT

DATE: August 30, 2022

CATEGORY: Public Hearing

DEPT.: City Manager's Office

TITLE: **Introduce Ordinances to Add Article III, Responsible Construction, and Article IV, Wage Theft, to Chapter 42 of the Mountain View City Code and Adopt a Resolution Amending the Master Fee Schedule**

RECOMMENDATION

1. Introduce an Ordinance of the City of Mountain View Adding Article III, Responsible Construction, to Chapter 42 of the Mountain View City Code, to be read in title only, further reading waived, and set a second reading for September 13, 2022 (Attachment 1 to the Council report).
2. Introduce an Ordinance of the City of Mountain View Adding Article IV, Wage Theft, to Chapter 42 of the Mountain View City Code, to be read in title only, further reading waived, and set a second reading for September 13, 2022 (Attachment 2 to the Council report).
3. Adopt a Resolution of the City Council of the City of Mountain View Amending the City of Mountain View Master Fee Schedule, to be read in title only, further reading waived (Attachment 3 to the Council report).

BACKGROUND

Inclusion of Wage Protections in Council Priority Work Plan

During the process of setting the Fiscal Year 2019-20 through Fiscal Year 2020-21 City Council Major Goals, advocates from the Santa Clara County Wage Theft Coalition (Coalition) requested that Council consider adding a project to develop and implement ordinances to prevent wage theft and promote responsible construction, citing the impact of wage theft in the region and in Mountain View. The coalition consists of 35 community organizations, grassroots groups, and nonprofits committed to responding to the ongoing crisis of wage theft and defending workers' rights through policy advocacy, community organizing, outreach, and education.

In May 2019, the City Council adopted the Fiscal Year 2019-20 through Fiscal Year 2020-21 City Council Major Goals, which included a project to develop and consider ordinances to address wage theft and responsible construction as part of the City Council's "Community for All" goal.

Proposed Strategies and Council Study Session Feedback

At its October 26, 2021 meeting, the City Council held a Study Session to provide input on the recommended strategies for the development of Wage Theft and Responsible Construction Ordinances to enhance wage protections for workers in the City of Mountain View (Attachment 4 to the Council report). The strategies presented at the Study Session are summarized below.

Wage Theft Ordinance Framework Presented at October 2021 Study Session

At the Study Session, staff proposed that the City's business license process be used to connect with Mountain View employers to communicate and seek compliance with State wage and hour laws. As part of this process, all businesses would be required to submit an affidavit attesting that the business does not have any unsatisfied labor law judgments or orders. Failure to submit an affidavit would result in administrative compliance orders and citations imposing administrative penalties. Submittal of a false attestation may be subject to administrative, civil, or criminal penalties depending on the circumstances. The City would investigate potentially false attestations on a complaint basis.

Responsible Construction Ordinance Framework Presented at October 2021 Study Session

At the Study Session, staff proposed that the City's building permit process be used to achieve wage protections for workers employed in construction projects. This approach would add submittals at two stages of the building process from owners, contractors, and subcontractors on projects at and above 15,000 square feet. The first submittal would be a Pay Transparency Acknowledgement form at the beginning of the permit application process certifying that all applicable labor laws will be adhered to and that a notice outlining workers' rights will be posted at visible locations on the job site. The second submittal would be a Pay Attestation form before reaching the end of the project, certifying that the project complied with State wage laws and that a notice of workers' rights was posted. The penalties and complaint-based enforcement approach were proposed to be similar to the enforcement approach and consequences for the Wage Theft Ordinance, as summarized above.

Council Direction

During the October 26, 2021 Study Session, the City Council directed staff to explore the following options in the further development of Responsible Construction and Wage Theft Ordinances:

- Explore exempting sole proprietors from completing the wage theft affidavit;
- Explore options for tying compliance with the Responsible Construction Ordinance to permitting through posting a bond or withholding a building permit or a Certificate of Occupancy;
- Explore including other items in the Responsible Construction pay acknowledgment and transparency certification requirements, such as unpaid payroll taxes, Workers' Compensation insurance coverage, and contractor/subcontractor licensing;
- Consider expanding the categories of those who would be covered by the ordinances to include day workers; and
- Maximize opportunities for outreach and education to achieve awareness of and encourage compliance with the ordinances.

ANALYSIS

Purpose and Approach

The purpose of the Responsible Construction and Wage Theft Ordinances is to help ensure accountability and compliance with existing State wage and hour laws, enhance the protection of workers' rights, and support the City's existing Minimum Wage Ordinance. Staff has conducted extensive outreach and research and assessed a range of considerations in order to develop ordinances that will most effectively accomplish this important purpose.

Staff's outreach has included ongoing conversations with the members of the Wage Theft Coalition to understand what they are seeing as impacts on workers in Mountain View and the region and explore their suggested approaches to enhance worker protections. Staff's research includes a review of the few ordinances in place in neighboring jurisdictions, including the cities of Sunnyvale and Milpitas. Staff has also reviewed how the State's Division of Labor Standards Enforcement (DLSE) processes and reports on wage theft claims. In addition, staff has examined existing City processes to determine the most feasible way to implement wage protection requirements.

Staff has synthesized this outreach, research, and analysis to identify key considerations and develop an approach that is within the City's authority and expertise; uses existing City mechanisms to communicate ordinance requirements and impose consequences; recognizes the limits of staff capacity; and is consistent with best practices in other cities. These considerations have informed staff's exploration of options and the development of proposed ordinance terms, including: implementation mechanisms, wage protection requirements, covered employers, consequences for noncompliance, and enforcement methods.

Follow Up on Council Direction

Following the October 2021 Council Study Session, staff continued conversations with representatives from the Coalition to learn more about their ideas for strengthening enforcement and expanding who would be covered by the proposed ordinances. Staff also sought additional information from the DLSE about its database to assess whether it could be easily and reliably used to verify ongoing wage theft claims in Mountain View as part of the City's enforcement process. In addition, staff continued to convene a cross-departmental team to explore options and refine the legal and operational parameters and processes for the responsible construction and wage theft ordinances.

Staff's findings and recommended changes to the proposed ordinance terms resulting from this follow-up work are discussed below, responding to the key questions raised at the Council Study Session related to: exempting businesses with no employees from the Wage Theft Ordinance requirements; strengthening the consequences of noncompliance with the Responsible Construction Ordinance, including unpaid payroll taxes, Workers' Compensation insurance coverage, and contractor/subcontractor licensing in the Responsible Construction pay acknowledgment and transparency certification requirements; and revising the covered employers in both ordinances to include day laborers.

Exemption of Businesses with No Employees from the Wage Theft Ordinance Requirements

Within the business license application process, it is possible and reasonable to exempt businesses that do not have employees from the requirement to submit the proposed affidavit. **Staff has included this exemption in the proposed Wage Theft Ordinance.**

Stronger Consequences for Noncompliance with the Responsible Construction Ordinance

The staff team reviewed the options for imposing consequences as part of the building permit process for projects that are not in compliance with the terms of the Responsible Construction Ordinance. Primary considerations included the implications for worker protections; the timeliness of the building permit process; property owners' ability to follow the new

requirements and develop their property; and the staff capacity to administer the form submittals, questions, and investigations related to the Responsible Construction Ordinance requirements. As a result of this additional review, **staff has revised the Ordinance terms to propose that a Certificate of Occupancy may be withheld for the failure to submit the Pay Transparency Certification form or if the City has sustained a complaint of a wage theft judgment that is unpaid and not secured by a surety bond or similar security instrument to ensure payment.**

Exploration of Other Methods to Strengthen Enforcement

Staff met with representatives from the DLSE to learn more about how data provided in their online wage claim database could be utilized by City staff to verify affidavits submitted by applicants or verify the existence of unpaid wage theft judgments in the event of a complaint. Staff learned that the information available via the DLSE database is not always current or complete as some judgments listed as unpaid may be paid in full or may have been discharged. The DLSE advised that the City would need to follow up directly with the DLSE on a case-by-case basis to verify the status of a judgment against a business and provide specific details, such as name, address, and work-site location, to confirm whether a judgment has been made and remains unpaid. Checking with the DLSE to ensure that each business license or building permit applicant has no unpaid wage judgments would require significant additional staff resources and could significantly delay the building permit process. **Consequently, staff recommends that enforcement be conducted on a complaint basis as proposed during the October 2021 Council Study Session.**

Inclusion of Additional Acknowledgments and Attestations in the Responsible Construction Ordinance

Coalition representatives and Council expressed an interest in exploring options to include other items in the Responsible Construction pay acknowledgment and transparency certification requirements, such as unpaid payroll taxes, Workers' Compensation insurance coverage, and contractor/subcontractor licensing. **The existing building permit review and issuance process already confirms that owners, contractors, and subcontractors have adequate Workers' Compensation insurance coverage and have maintained their contractor or subcontractor licensing. Consequently, this does not need to be included in the Responsible Construction Ordinance.** As for unpaid payroll taxes, staff is not aware of an effective way for the City to ascertain that an owner, contractor, or subcontractor has not paid payroll taxes as this information is not included in claims made to the DLSE. For this reason, the City would not have a means for pursuing compliance, and **staff does not recommend including these items in the Responsible Construction Ordinance.**

Exploration of Options to Expand Protections for Day Laborers

Staff heard from Coalition representatives and the City Council that they would like to expand application of the ordinances, to the extent possible, to provide protection to day laborers. The term day laborers refers to workers employed on a temporary or daily basis to perform a variety of services. It is important to note that **entities that do business in Mountain View and hire employees, including day laborers, are subject to existing State wage and hour laws. They would also be subject to the proposed Wage Theft Ordinance through the requirement to apply for a business license.** Day laborers may also be hired by households to provide various services. Hiring a day laborer does not make a household subject to the City's business license requirement; therefore, there is no existing legal, operational framework to implement and enforce wage theft protections in such instances.

To further meet the interests of the City Council and the Coalition to prevent wage theft against day laborers, **staff proposes to conduct a comprehensive education and outreach campaign to explain what wage theft is and how to comply with wage and hour laws. The outreach campaign would also provide information and referral resources for anyone who is a victim of wage theft. In addition, the proposed Responsible Construction Ordinance includes an acknowledgment that day laborers employed as employees are similarly subject to the State's wage and hour laws.** Additional information regarding plans for outreach and education is provided later in this report.

Commenting on the proposed project threshold of 15,000 square feet in the Responsible Construction Ordinance, Coalition representatives requested that the City consider applying the Ordinance to smaller projects, including projects under 5,000 square feet. The stated interest was to extend protections to day laborers who may be hired to work on smaller construction projects. Staff analyzed building permit data over a five-year period from 2017 to 2021 to determine the number and types of projects per year that would be subject to the ordinance based on a lower project threshold. Many building permits issued for projects under 5,000 square feet are for single-family residential, duplex, and small business remodeling or addition projects. A review of these projects indicate that many include plumbing and electrical work that must be performed by certified contractors. Such **contractors working in Mountain View are required to obtain a business license; therefore, any day laborers hired as employees by these contractors would be protected by the proposed City's Wage Theft Ordinance.** Other projects under the 5,000 square foot threshold include City park and facility projects.

Including projects under 5,000 square feet would essentially mean having no threshold and requiring all projects to comply with the Responsible Construction Ordinance. Based on the average number of permits processed over the past five years, this would result in an estimated 3,500 projects per year being subject to the Ordinance, compared to 500 if the project threshold

is kept at 15,000 square feet. A 5,000 square foot project threshold would also subject all property owners, the majority with limited development experience and capacity, to additional steps and complexity, thus extending the permitting process and timelines. This higher volume of projects subject to the Ordinance would require significant additional staff capacity and an inordinate amount of time to administer the building permit process in addition to other daily work.

For the reasons above, **staff recommends maintaining a project threshold of 15,000 square feet. This provides protections to the projects that employ the largest number of workers and keeps Mountain View's proposed Responsible Construction Ordinance consistent with similar ordinances adopted by the City of Milpitas in 2021 and the City of Sunnyvale in 2022.**

Ordinances Proposed for Adoption

Responsible Construction Ordinance

The proposed Responsible Construction Ordinance is described below and summarized in Table 1. It is modeled after the ordinances adopted by the cities of Milpitas and Sunnyvale and would be administered through the building permit process. The ordinance would cover commercial and residential construction projects of 15,000 square feet and above, including new construction and significant additions or modifications. The ordinance exempts projects already covered by prevailing wage requirements. The ordinance requirements would be communicated, administered, and enforced through additional project submittals at two stages in the building permit process.

At the beginning of a project, the owner must submit a **Pay Acknowledgment** form as a condition of the building permit issuance. Through this form, the project owner acknowledges the responsibility of the owner, contractors, and subcontractors to comply with State wage and hour laws and pay any wage theft judgments. The owner further acknowledges that employment of day laborers as employees is subject to State wage and hour laws. Additionally, projects are required to post a notice outlining workers' rights at visible locations at the project site.

At the end of a project, each owner, contractor, and subcontractor (whose work exceeds \$100,000 or 1% of the construction cost of the project, whichever is greater) must submit a **Pay Transparency Certification** as a condition of the issuance of a Certificate of Occupancy. This form attests that written wage statements required under State law were provided to employees (or that they are covered by a valid collective bargaining agreement) and that project owners, contractors, and subcontractors do not have any unpaid wage theft judgments.

An employee entitled to payment under a wage theft judgment may submit a complaint to the City Manager or their designee. A complaint received prior to issuance of a Certificate of Occupancy will be reviewed by the City, and a Certificate of Occupancy will only be issued if the City finds the complaint is not sustained. If the complaint is sustained, an aggrieved owner, contractor, or subcontractor may appeal the decision. An appeal fee of \$250 is proposed for Council adoption. Payment of the fee would be required to accompany a written request for appeal. A sustained complaint will prevent issuance of a Certificate of Occupancy unless the wage theft judgment is paid or secured by a surety bond, notarized accord under State law allowing for installment payments of the judgments, or similar security instrument.

It is a violation of the proposed ordinance to fail to submit the Pay Transparency Certification form or submit a false form. A Certificate of Occupancy will be withheld if the Pay Transparency Certification is not submitted or the City has sustained a complaint of an unpaid wage theft judgment that is not secured by a surety bond or similar security instrument to ensure payment in full.

The Building Inspection Division is able to incorporate the Pay Acknowledgment and Transparency Certification Forms into the building permit process; however, there is not sufficient staff capacity to administer the compliance process. Staff will evaluate additional resource needs and options for engaging a hearing officer to administer the appeal process and for staff time to investigate and research complaints of unpaid wage judgments and return to Council with a recommendation for additional resources, as appropriate.

The proposed ordinance has an effective date of January 1, 2023. An update to the Building Code to reference the Responsible Construction Ordinance will be incorporated into the Building Code Ordinance that will come to Council later this year.

Table 1: Summary of Responsible Construction Ordinance Terms

<p style="text-align: center;"><u>Covered Projects</u></p> <ul style="list-style-type: none">• 15,000 square feet and above.• Commercial and residential.• New construction, significant additions/modifications.• Exempts projects already covered by prevailing wage requirements.• Owners, contractors, and subcontractors over \$100,000 or 1% of construction value. <p style="text-align: center;"><u>Requirements</u></p> <ul style="list-style-type: none">• Pay Acknowledgment <u>at beginning</u> of process as condition of Building Permit.• Post notice of employee rights at project site.• Pay Transparency Certification <u>at end</u> as condition of Certificate of Occupancy.• Forms attest that the business does not have any unpaid wage theft judgments. <p style="text-align: center;"><u>Enforcement</u></p> <ul style="list-style-type: none">• Failure to submit forms or a sustained complaint that is unpaid or uncured results in withholding of Certificate of Occupancy.• Complaint-driven; complaints must be received before issuance of Certificate of Occupancy.• Owner can appeal or cure (through paying the judgment or posting a bond). <p style="text-align: center;"><u>Resources Needed</u></p> <ul style="list-style-type: none">• Administered by the Building Inspection Division and the City Manager’s Office with support from the City Attorney’s Office.• Will assess staff resources needed and may require additional staffing.• Funding for outreach materials.
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Wage Theft Ordinance

The proposed Wage Theft Ordinance would be administered in conjunction with the business license application and renewal process. It would require all businesses operating in Mountain View that are required to have a business license to submit an affidavit attesting that the business has either not been found in violation of wage and hour laws or has complied with any wage theft judgments. Business operators without employees are exempt from completing an affidavit.

Failure to submit an affidavit, or submitting a false affidavit, would be subject to administrative citations, fines, and penalties and may be punishable as an infraction. Due to limited resources, the affidavits for the estimated 4,600 business operators that would be subject to the Wage Theft affidavit requirement would not be individually verified by staff; rather, the City would investigate complaints received alleging an attestation contained false information.

While the Finance and Administrative Services Department can include the Wage Theft affidavit requirement in conjunction with the business license application and renewal process, there is not sufficient staff capacity currently to administer the compliance process. Staff will evaluate additional resource needs and options once the ordinance goes into effect and return to Council at a later date with a recommendation for additional resources as appropriate.

The proposed ordinance has an effective date of January 1, 2023.

A summary of the key terms in the Wage Theft follows in Table 2 below.

Table 2: Summary of Wage Theft Ordinance Terms

<p style="text-align: center;"><u>Covered Businesses</u></p> <ul style="list-style-type: none">• Businesses required to have a business license.• Exempts business owners without employees. <p style="text-align: center;"><u>Requirements</u></p> <ul style="list-style-type: none">• Affidavit submitted with Business License.• Attests that the business has not been found in violation of wage and hour laws or has complied with any final judgments or orders. <p style="text-align: center;"><u>Enforcement</u></p> <ul style="list-style-type: none">• Failure to submit an affidavit or submitting a false affidavit may be subject to administrative citations, fines, and penalties and may be punishable as a criminal infraction.• Complaint-driven. <p style="text-align: center;"><u>Resources Needed</u></p> <ul style="list-style-type: none">• Administered by FASD.• Will assess staff resources needed and may propose additional staffing.• Funding for outreach materials.
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Recent Stakeholder Outreach

Staff held meetings with wage advocates and members of the business and developer communities to present the draft Responsible Construction and the Wage Theft Ordinances and seek feedback. Since meeting with the stakeholders, staff has revised the proposed Wage Theft Ordinance to remove the originally drafted five-year durational period for which business operators would need to acknowledge compliance with wage and hour laws and any final wage theft judgments. This strengthens the wage protections for workers because it requires acknowledgment of compliance regardless of when a final judgment may have been issued. The meetings are summarized below.

- Staff met online with members of the **Chamber Business Issues and Public Policy Committee** on August 10, 2022. Approximately nine people attended the meeting and did not voice any objections to the proposed ordinances.
- Staff met online with wage theft advocates on August 12, 2022. Organizations represented included the **Mountain View Day Worker Center, Working Partnerships USA, UA Local Union 393, the Wage Theft Coalition, and the South Bay Piping Industry**. Staff received questions related to outreach and education, clarification on the provision to exempt sole proprietors from the Wage Theft Ordinance, and discussion about the City exploring a wage theft contracting policy as a possible next step separate from the draft Wage Theft and Responsible Construction Ordinances to cover Public Works-related projects.
- Staff held an online meeting for **developers** on August 12, 2022, which was attended by two developers. They provided positive feedback regarding the exemption of projects subject to prevailing wage requirements. They also expressed their preference for the posting of a bond to cover any unpaid wage judgments over the withholding of a final Certificate of Occupancy.
- Staff also reached out to a representative from the **Building Industry Association Bay Area (BIA)** to seek feedback on the proposed Responsible Construction Ordinance. The BIA expressed their concern that the ordinance is a solution in search of a problem, and it is not supported by historical data that shows that wage theft is prevalent in construction projects in Mountain View. The BIA also asked for clarification on whether the ordinance would be included in the Housing Element as a potential constraint to meeting housing production goals.

Outreach and Education and Other Next Steps

Following the introduction of the Responsible Construction and the Wage Theft Ordinances, staff will return to the City Council on September 13, 2022 for ordinance adoption, with an effective date of January 1, 2023. This will provide time for staff to develop the required forms needed for the business license and building permit processes and to include the Wage Theft Ordinance requirements in the business license renewal mailings, which are sent annually in the fall. During the months leading up to the January 2023 effective date, staff will also develop materials and conduct community outreach and engagement to promote awareness of the new ordinances and encourage compliance. The outreach plan includes:

- Developing a flyer for projects to post at job sites;
- Developing flyers and cards in multiple languages summarizing workers' rights for distribution to community-based organizations and partners and to day laborers for their own reference and use;
- Conducting resident outreach through the City's communications channels; and
- Developing a page on the City's website with information about wage theft, the City's ordinances, FAQs, and links to State, County, and community resources.

CONCLUSION

Consistent with the Council's October 2021 direction, staff has prepared draft ordinances for Responsible Construction and Wage Theft that provide protections for workers in Mountain View, building on the City's Minimum Wage Ordinance and using the City's business license and building permit processes as existing mechanisms to implement the ordinances. If adopted, the ordinances would take effect on January 1, 2023, following a period of extensive outreach and education.

FISCAL IMPACT

Staff time associated with incorporating the requirements into the business license and building permit processes, as well as time and materials associated with outreach, can be absorbed within existing staff capacity and budgeted resources; however, the staff time needed to investigate and enforce claims is yet unknown and may require additional staffing in the future.

ALTERNATIVES

1. Provide modifications to the Responsible Construction Ordinance or the Wage Theft Ordinance prior to their introduction.
2. Direct staff to explore additional modifications and postpone introduction of the ordinances.
3. Consider modifying the effective date of the ordinances to a later date (currently January 1, 2023).
4. Provide other direction.

PUBLIC NOTICING

Agenda posting. The Council's agenda is advertised on Channel 26, and the agenda and this report appear on the City's website. Agenda posting and email notification of this meeting were provided to stakeholders who have submitted comments on this item or that participated in the City's outreach meetings.

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City Manager

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- Attachments:
1. Ordinance Adding Article III, Responsible Construction, to Chapter 42 of the Mountain View City Code
 2. Ordinance Adding Article IV, Wage Theft, to Chapter 42 of the Mountain View City Code
 3. Resolution Amending the City of Mountain View Master Fee Schedule
 4. October 2021 Study Session Memorandum