



Berkeley City Council

ACTION CALENDAR

January 26, 2016

*(Continued from December 15, 2015)*

To: Honorable Mayor and Members of the City Council  
 From: Councilmembers Laurie Capitelli and Darryl Moore  
 Subject: Condition of Approval for Major Development Projects

RECOMMENDATION:

After review by staff, include as a standard condition of approval in all projects that include new construction of greater than 30,000 square feet the following:

A. The applicant shall complete and submit a project Construction Pay Transparency Plan (the 'Plan'), on a form approved by the City for this purpose. The completed Plan shall indicate all of the following:

1. Contractor & Subcontractor List: List portions of construction work broken down by anticipated subcontracts and organized by CSI Division. Provide the complete name and Contractors State License Board license number of entities already under contract to perform the Project or portions of the Project. For each subcontract, provide the estimated percentage of the total Project construction cost to be performed.

2. Notice at the Time of Hire: Any contract(s) with Project prime construction contractor(s) shall require that the prime contractor(s), subcontractors and sub-subcontractors of all tiers provide all employees whose labor is used in connection with the Project with a written notice containing specified information at the time of hire, pursuant to [California Labor Code Section 2810.5](#), insofar as applicable to the performance of Project work and insofar as Project employees are not exempt per Labor Code section 2810.5(c).<sup>1</sup> The contract(s), subcontracts and sub-subcontracts shall attach as Exhibits the templates for such written notice - in various languages - that have been prepared by the state Labor Commissioner ([link](#)).

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<sup>1</sup> Labor Code section 2810.5(c): For purposes of this section, "employee" does not include any of the following:

- (1) An employee directly employed by the state or any political subdivision thereof, including any city, county, city and county, or special district.
- (2) An employee who is exempt from the payment of overtime wages by statute or the wage orders of the Industrial Welfare Commission.
- (3) An employee who is covered by a valid collective bargaining agreement if the agreement expressly provides for the wages, hours of work, and working conditions of the employee, and if the agreement provides premium wage rates for all overtime hours worked and a regular hourly rate of pay for those employees of not less than 30 percent more than the state minimum wage.

3. Itemized Wage Statements (Pay Stubs): Any contract(s) with Project construction prime contractor(s) shall require that the prime contractor(s), subcontractors and sub-subcontractors of all tiers provide all employees whose labor is used in connection with the Project with itemized wage statements ("pay stubs") that are compliant with [California Labor Code Section 226](#). The contract, subcontracts and sub-subcontracts shall include Exhibits that provide the current statutory language of Labor Code Section 226(a) and model itemized wage statements (pay stubs) provided by the Labor Commissioner ([here](#) for employees paid an hourly wage; [here](#) for employees paid on a piece rate basis).

4. Third Party Pay Transparency Attestation: For each construction contractor, subcontractor, or sub-subcontractor whose portion of the work exceeds \$100,000 or one percent (1%) of the value of Project construction, whichever is greater, Applicant shall provide the name, address and telephone number of a firm retained by the Applicant, the Project contractor or subcontractors that shall - prior to issuance of a certificate of occupancy - provide a Certified Public Accountant's attestation that one of the two following conditions has been met:

a. Project construction employees receive Labor Code Section 2810.5-compliant notices and Labor Code Section 226(a)-compliant itemized wage statements; or

b. All Project construction employees meet one or more of the criteria of Labor Code section 2810.5(c).

B. Prior to the issuance of a building permit, an applicant shall submit and obtain approval for the Plan by the Zoning Official or designee.

C. Upon completion of the Project, the applicant shall submit a Construction Pay Transparency Report on a form approved by the City for this purpose. The completed Pay Transparency Report, signed by an authorized representative of the Applicant/Owner, shall indicate the following:

1. Contractor & Subcontractor List: An updated list of the portions of construction and demolition work broken down by subcontracts and organized by CSI Division. Provide the updated & final list of the complete names and Contractors State License Board license number of entities that performed the Project or portions of the Project, including subcontractors of any tier. For each subcontract, provide an updated percentage of the total Project construction cost performed.

2. Updated List of Third Party Pay Transparency Auditor(s): For each construction contractor or subcontractor who meet the criteria of subsection A(4), Applicant shall provide an updated & final list of the name, address and telephone number of the firm(s) retained by the Applicant and/or the Project contractor and/or subcontractors that shall provide a Certified Public Accountant's attestation regarding the Labor Code sections enumerated in A(4) of this section.

3. Certified Public Accountant's Attestation: Applicant shall provide copies of all reports that contain a Certified Public Accountant's attestation that one of the two following conditions has been met:

a. Project construction employees received complete & accurate information per Labor Code Sections 226 and 2810.5; or

b. All Project construction employees meet one or more of the criteria of Labor Code section 2810.5(c).

D. Determination of Construction Pay Transparency Compliance: Prior to approval of a certificate of occupancy for the Project, the Official shall make a finding of compliance and will provide a written determination regarding compliance to the owner. To make a finding of compliance:

1. The Official reviews the information submitted under subsections A and C of this section and determines that the applicant has adequately complied; And

2. The Official has received no information that the Labor Commissioner's Office of the State of California has found violations of Labor Code Sections 226 or 2810.5 regarding construction work performed at the Project, the Official shall not make a finding of compliance.

E. Issuance of a Certificate of Occupancy: The Official or designee may issue a Certificate of Occupancy to the applicant if:

1. The Official has made a finding of Construction Pay Transparency Compliance per subsection D; or

2. The Official has determined that either subsection D(1) or D(2) have not been satisfied, the Official may approve a Certificate of Occupancy upon being presented with evidence of the existence of a Labor Payment or a Lien Release Bond(s) for the Project. The bond shall be in an amount equal to 125 percent of 40 percent of the value of the subcontract(s) for the contractor(s) that did not receive a CPA's attestation or 125 percent of the amount of any Project-related, Labor Commissioner-issued Civil Wage and Penalty Assessment(s) or mechanics lien(s), whichever is greater.

**BACKGROUND:**

The recommended additional Condition of Approval takes a modest step towards incentivizing lead Development and Construction companies to ensure that workers on a major project are not deprived of a fundamental right: disclosure and transparency regarding who their employer is, what their rate of pay is and other legally required information regarding mandatory and voluntary fringe benefits. It merely requires compliance with existing State Labor Code and confirmation of such compliance. Additionally, it attaches assurances that, if such compliance has not been confirmed, applicants will be liable.

Testimony presented to State of California's "Little Hoover" Commission recently stated that existing studies suggest that "the underground economy" is at least a \$10 billion problem in California. Statewide, the construction industry is the industry with the second highest level of labor standards violations (as measured by State Labor Commissioner penalty assessments), surpassed only by the restaurant industry. Deputy Labor Commissioners conducted 985 inspections in the private construction industry in 2012-13, yielding 595 citations that assessed \$5.3 million in penalties. Enforcement actions, however, are dwarfed by the number of contractors and projects in California: Over 300,000 state-licensed contractors performed about \$48 billion worth of private construction work in 2014. The mismatch between the resources of the State and the

scope of the issue of fundamental wage projections through disclosure and transparency requires the involvement of local government police powers.

The construction industry involves unique labor standards compliance challenges. Construction workers who do not receive all of their wages and mandatory benefits are likely to discover that despite the best efforts of State enforcement officials, subcontractors are “judgment proof”: State Labor Commissioner penalty assessments are collected at the rate of about \$0.20 on the dollar. General contractors and Developer/Owners, who do receive City-issued permits and licenses and who benefitted from the construction workers’ labor, disclaim responsibility for making underpaid workers whole. While the City of Berkeley has attempted to strengthen local minimum wage enforcement by exerting the right to suspend or revoke city-issued permits and licenses (BMC 13.99.090), this power exerts little influence over highly mobile construction subcontractors as compared to immobile businesses such as restaurants.

The principal current recourse of construction workers who have been victims of wage theft while working in Berkeley is to file “mechanics liens” on the real property where they worked. Seeing a mechanics lien claim through to completion requires an accumulation of project-specific information (e.g. property parcel number, legal knowledge and financial resources that is scarce amongst unorganized construction workers). It is not surprising that an examination of Mechanics Lien filings in Alameda County reveals that nearly all liens are filed by *contractors or material suppliers*, not workers, despite the reported prevalence of wage theft in the construction industry.

#### ENVIRONMENTAL SUSTAINABILITY

Not applicable.

#### FINANCIAL IMPLICATIONS:

Staff Time.

#### CONTACT PERSON:

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