

Memorandum

TO: HONORABLE MAYOR
AND CITY COUNCIL

SUBJECT: PRIVATE DEVELOPMENT
WORKFORCE STANDARDS

FROM: Matt Cano
Kim Walesh

DATE: May 16, 2019

Approved

D. D. S. L.

Date

5/16/19

INFORMATION

BACKGROUND

On March 16, 2018 Mayor Liccardo submitted a memorandum which was agendized for the March 21, 2018 Rules and Open Government Committee. This memorandum was subsequently heard and the recommendation approved at the April 3, 2018 City Council meeting.

The approved recommendation provided direction on four specific items:

- 1) Capital bond measure;
- 2) Best value contracting;
- 3) Community workforce agreements/project labor agreement (PLA); and
- 4) Private development workforce standards.

This informational memorandum provides an update on these items in response to questions raised at the April 30, 2019 City Council hearing. Additionally, while the private development workforce standards ordinance has not yet been brought before Council for approval, this memo provides information regarding the related work that has been completed and/or is ongoing that will inform the future ordinance.

ANALYSIS

The capital bond measure, best value contracting and the PLA are ongoing and in different phases of implementation as described below:

Capital Bond Measure

On April 3, 2018 the Council directed the City Manager to identify a set of the highest-priority capital projects to consider placing before voters as part of a capital bond measure and,

generally, to prepare a capital bond measure for consideration by voters. These efforts contributed to the approval by the voters in November 2018 of Measure T, which provides for \$650 million in funding to support rehabilitation and enhancement of the City's infrastructure. Included in Measure T is \$300 million for neighborhood street repairs as well as \$175 million for vital public safety facilities such as new fire stations and a new police training center.

Staff is in the process of defining projects and setting up administrative processes to ensure proper implementation on Measure T projects. A report will be provided to Council on the status of Measure T on June 25, 2019.

Best value contracting

On April 3, 2018 the Council directed the City Manager and City Attorney to evaluate incorporating a "best-value" contracting concept into the City Charter. The efforts of the City Manager and City Attorney led to Measure S, which the voters approved in November 2018. Measure S amended the City Charter to provide for a number of important modifications to the procurement process for the City's capital projects, including "best-value" contracting.

Since the passage of Measure S, staff from Public Works and the Attorney's Office have been working on a significant ordinance implementing the City Charter changes. Staff anticipates presenting the new ordinance to Council in late June 2019.

Community Workforce Agreements/Project Labor Agreements (PLA)

On April 3, 2018 Council directed the City Manager and the City Attorney to negotiate a PLA between the City and all affected labor unions. Shortly thereafter, staff began negotiations with the Santa Clara and San Benito Counties Building and Construction Trades Council. The negotiations involved complex issues and required the use of significant staff resources. As a result of these efforts, a PLA between the City, the Santa Clara and San Benito Counties Building and Construction Trades Council (BTC) and twenty separate affiliated local unions was executed on March 28, 2019.

The PLA generally applies to city projects over three million in construction value (with some exceptions). Currently Public Works staff is providing training to city project manager on the requirements of the PLA and developing process procedures for staff and contractors in preparation for the first PLA project to begin construction later this calendar year.

Implementation of the PLA requirements, data collection, and analysis is in addition to staff's development of a Local Hire Policy, Disadvantage Business Enterprise Program, and Wage Theft Prevention Ordinance, which are currently Council Priority #1, #3, and #17, respectively. Staff will bring forward analysis and recommendations on the Local Hire Policy and Disadvantage Business Enterprise Program to the Community and Economic Development Committee in late 2019. Staff will begin initial stakeholder outreach on Wage Theft Prevention Policy in summer 2019.

Private Development Workforce Standards

On April 3, 2018 Council directed the City Manager and City Attorney to draft an ordinance to require private development projects that receive a City subsidy to: (1) pay prevailing wages to construction workers and (2) have “goal – good faith effort” requirements for the use of apprentices, local workers and workers from underrepresented populations. This direction requires staff to address numerous complex and challenging policy, legal, administrative and resource issues.

With the PLA recently completed, staff turned its focus on the complex and challenging issues raised by the direction to develop a private development workforce standards ordinance. The following is a summary of the issues:

- Whether prevailing wages need be included in the ordinance is unclear. Chapter 14.09 of the San Jose Municipal Code states the City will follow State prevailing wage law. With some exceptions, State prevailing wage law already requires the payment of prevailing wages whenever a project – public or private – is “paid for in whole or in part out of public funds. . . .” In other words, prevailing wages are already required when the City gives a “subsidy.”
- Staff needs to analyze whether the “subsidy/workforce standards” rubric raises any potential National Labor Relations Board (NLRB) or Employee Retirement Income Security Act (ERISA) preemption issues, and, if so, carefully draft the ordinance to avoid – or at least minimize – the risk of any such challenges.
- Staff needs to analyze whether the “subsidy/workforce standards” rubric raises any equal protection, commerce clause, privileges and immunities clause or other constitutional issues. If so, the ordinance will need to be carefully drafted to avoid, or at least minimize, the risk of any such challenges.
- The direction would include “goals/good faith efforts” in the areas of local hire, use of apprentices and hiring of disadvantaged workers. Staff needs to analyze and determine a process for monitoring a developer’s compliance with the goals and good-faith efforts. The analysis will need to include determining who would have this responsibility and what level of additional resources would be necessary to accomplish the task.
- The direction includes a reference to “targeted hiring of disadvantaged workers” procedures used by the VTA and Santa Clara County CWA. Staff needs to analyze those policies and determine how best to incorporate them (if at all) into the draft ordinance.
- The direction included no enforcement or remedies provisions for a developer’s violation of the requirements. Staff needs to analyze and determine what remedy and enforcement provisions will be most effective, and what resources will be necessary to enforce the remedies.

- The direction regarding what is *not* a “subsidy” is generally very cumbersome and complex, especially the reference to fee or tax reductions applied uniformly across an entire specified subcategory of projects. Staff is analyzing whether there is a simpler, more straightforward process for reaching the same result.
- The direction regarding what is *not* a “subsidy” includes items that can’t be implemented. For example, the direction referring to fee or tax reductions applied uniformly across an entire specified subcategory of projects would have the “parties” negotiating and agreeing on a list of potential consultants. This process is not compatible with the City’s procurement requirements.

Downtown Highrise Incentive

Work on the Downtown Highrise Incentive program is informing how the City can approach the provisions for a fee or tax reduction applied uniformly across an entire specified subcategory of project. Under these provisions financing or construction of the subcategory of development would need to be deemed “infeasible” through completion of a feasibility study by an appropriate consultant.

The current Downtown Highrise Incentive requires projects to have pulled building permits by July 31, 2018, and scheduled final inspection for eighty percent of the residential units within the downtown highrise structure on or before December 31, 2020. There are several projects that are close to being ready to move forward but would likely not make this deadline. Within the Housing Crisis Workplan, adopted by the City council on June 12, 2018, staff proposed to extend the incentive on Construction Taxes (50% reduction) that requires building permits by July 31 to align with the provisions of the Inclusionary Housing Ordinance exemption, which require a project to receive a Certificate of Occupancy prior to June 30, 2021. This was assumed to give several of the highrise projects on the verge of moving forward additional time to pull building permits.

In August 2018, staff engaged Keyser Martson and Associates (KMA) to build upon the work completed for the Cost of Development Study Session in April 2018, to produce a feasibility analysis that provides an understanding of the development economics of high-rise apartment development in downtown San Jose based on current market conditions, and the extent to which incentives are needed to increase the likelihood that projects of this type can be financed and built in the near term. Staff coordinated with representatives from Working Partnerships USA to ensure that consideration of any changes to the Incentive would be consistent with the provisions of agreement pertaining to fee or tax reduction applied uniformly across an entire specified subcategory of development.

Staff included the draft report as a reference document when presenting the broader Housing Crisis Workplan update on March 19, 2019. At that time, Council directed staff to:

1. Update the High-Rise Residential Incentive Analysis completed in September 2018.
2. Return to the Council with recommendations based on the updated findings of the Analysis including the following:
 - a. Temporary tax and fee reductions or exemptions for residential high-rise projects demonstrated to be infeasible under the current tax and fee structures.
 - b. Allowing fees to be paid at the time of certificate of occupancy.

Staff is working with KMA to verify the analysis that was completed at that time and update any assumptions that have changed. In addition, staff is completing developer outreach to ensure that the assumptions contained in the analysis are consistent with market realities. Staff will return to Council in June 2019 with an updated analysis and recommendation on the Downtown Highrise Incentive. The Council discussion and action in June will provide valuable feedback to the City Manager and City Attorney in the drafting of a future ordinance which lays out the process to determine whether fee reductions in certain project categories are classified as a subsidy.

Summary and Next Steps

Economic Development staff and Public Works staff continues to work with the City Attorney's Office to analyze any inconsistencies between the provisions as described in Council's direction, and other provisions already included in the Municipal Code and will return with further discussion on this proposed ordinance to Council in late 2019.

/s/
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