



City Council

CONSENT CALENDAR
September 20, 2022

To: Honorable Members of the City Council

From: Mayor Jesse Arreguín, Councilmember Ben Bartlett,
Councilmember Sophie Hahn and Councilmember
Terry Taplin

Subject: Helping Achieve Responsible Development with
Healthcare and Apprenticeship Training Standards
(HARD HATS) Referral

RECOMMENDATION

Refer to the City Attorney and City Manager to draft a HARD HATS Ordinance based on the policy terms outlined below and bring the Ordinance back to Council for action on December 13, 2022.

POLICY COMMITTEE REVIEW AND REVISED POLICY TERMS

On May 16, 2019, the Land Use, Housing & Economic Development Committee approved the following motion: M/S/C (Hahn/Arreguín) to send the item to the full Council with a Positive Recommendation. Vote: All Ayes.

The City Council then subsequently referred the item to the Commission on Labor. After the item was sent to the Commission for review, the COVID-19 pandemic hit. The state of emergency and Shelter-In-Place orders to minimize human contact and the spread of the virus resulted in the suspension of certain non-essential Boards and Commissions for over a year. This effectively stalled work by the commission on this item. To facilitate action on this important policy, the authors have worked with City Department staff (City Manager's Office, City Attorney's Office, Planning, HHCS) and stakeholders (labor representatives, contractors, housing developers) to discuss policy terms for a proposed HARD HATS Ordinance, discussing goals as well as implementation issues. This input has helped inform the draft proposal being submitted for Council action. Further review will be undertaken when this item is formally referred for drafting.

The recommended action is to refer the proposal to the City Attorney and City Manager to draft a HARD HATS Ordinance for adoption. The purpose of the ordinance is to address the shortage of qualified local construction workers, rising labor costs, and set a new bar for labor standards in the local construction industry. These measures are intended to improve the recruitment, training, and retention of skilled construction workers.

The ordinance should include the following elements:

1. Scope:
 - a. The City shall require contractor prequalification for covered General Plan Area projects ("Covered Projects"), which are projects consisting of construction, alteration, demolition, installation, remediation, repair, or

remodel of 50,000 square feet or more of floor area.

- b. All contractors or subcontractors of any tier (“Contractors”) entering into a contract on a Covered Project valued in excess of ½ of one percent of the value of the prime contract for the Covered Project must be prequalified.

2. Apprenticeship:

- a. For purposes of the “Covered Project”, each Contractor shall do at least one of the following (and shall sign a statement certifying that on the Covered Project it will do at least one of the following):
 - i. participate in a joint labor-management apprenticeship program;
 - ii. participate in an apprenticeship program approved by the State of California Division of Apprenticeship Standards that has a graduation rate of 50% or higher and has graduated an average of at least thirty (30) apprentices annually for the five (5) years immediately preceding the Covered Project. The Contractor will also maintain at least the ratio of apprentices required by California Labor Code section 1777.5 for the duration of the Covered Project. Any change in program participation must be immediately provided to the City; or
 - iii. make and require its subcontractors to make hourly contributions to the CAC for every apprenticeable craft hour worked on the Covered Project of at least the apprenticeship contribution rate for the classification of “plumber, pipefitter, steamfitter” in Alameda County.¹
- b. Contributions to an apprenticeship program or the CAC shall not be credited towards compliance with BMC Chapter 13.99 (Minimum Wage).
- c. Upon review of the ordinance after 2 years, the City Council will consider whether to supplement the ordinance with a 180 consecutive day apprenticeship prequalification requirement.

3. Health Care Security:

- a. In order to be prequalified, each Contractor will sign a statement stipulating to and providing documented proof that the Contractor, in addition to the regular hourly wages paid to its construction worker employees (“Covered Construction Workers”), has made Required Health Care Expenditures to or on behalf of each Covered Construction Worker for 180 consecutive days prior to the submission of the prequalification documents, during periods of employment.
 - i. The Required Health Care Expenditure is calculated by multiplying the number of hours worked by the hourly Health Care Expenditure Rate.
 - ii. The Health Care Expenditure Rate shall be determined annually from the “average contribution” based on the City and County of San Francisco Health Service System’s annual 10-County Survey amount for Alameda County for the applicable fiscal year. Such “average contribution” shall be prorated on an hourly basis by dividing the monthly average contribution

¹ See hourly contribution rate for the “plumber, pipefitter, steamfitter” via <https://www.dir.ca.gov/OPRL/pwappwage/wage/21201583.html?VarWageId=21201583>. The form for making contributions is found here: <https://www.dir.ca.gov/DAS/tf/cac2.asp>.

for Alameda County by one hundred and fifty (150), the typical number of hours worked in a month by a construction worker.

- iii. In the case of a Contractor that has employed no Covered Construction Workers for 180 consecutive days prior to the submission of the prequalification documents, said Contractor must have had an ongoing contractual obligation to hire subcontractors during that period that provide Required Health Care Expenditures.
 - b. For purposes of the Covered Project, each Contractor shall make Required Health Care Expenditures to or on behalf of each Covered Construction Worker in addition to their regular hourly wages during periods of employment (and sign a statement certifying that it will do so on the Covered Project). In the case of a Contractor that will employ no Covered Construction Workers on the Covered Project, said Contractor shall make Required Health Care Expenditures on behalf of the Covered Construction Workers employed by its subcontractor(s) in the event said subcontractor(s) fail(s) to make Required Health Care Expenditures in accordance with this ordinance.
 - c. Required Health Care Expenditures may be made to a health plan in which the Covered Construction Worker is enrolled, to a Covered Construction Worker's health savings account, and/or to a Covered Construction Worker in the form of cash at double the rate of the Required Health Care Expenditures.
 - d. Contractors shall maintain accurate records of the Required Health Care Expenditures, and proof of same, and allow the City reasonable access to such records.
 - e. Required Health Care Expenditures shall not be credited towards compliance with BMC Chapter 13.99 (Minimum Wage).
4. Contractor Commitment Statement:
 - a. Each Contractor will sign a statement stipulating that on the Covered Project it will continue to make contributions to an apprenticeship program or the CAC and Required Health Care Expenditures as set forth above for the duration of the Covered Project.
5. Community Benefits Agreement Exception:
 - a. If an otherwise Covered Project is covered by a Project Labor Agreement (or Community Benefits Agreement or similar labor agreement) with the Building and Construction Trades Council of Alameda County, Contractors will be deemed in compliance with the Apprenticeship and Health Care Security provisions of the ordinance as such agreements already require health care coverage and apprenticeship fund contributions. Such agreements also deter unscrupulous contracting practices by bidders and contractors, promote stable construction careers for trade workers, and increase the capacity of local apprenticeship and training programs.
 6. The final ordinance shall contain severability language.

CURRENT SITUATION AND ITS EFFECTS

As the City of Berkeley plans to increase production of housing, commercial buildings, and public facilities, the need for a skilled construction workforce is vital. Shortages of skilled construction workers, particularly residential trade workers, threaten to delay or derail development plans.

The shortages are attributable to factors such as reduced utilization of state-approved apprenticeships, fewer young labor force entrants, dwindling contractor offerings of health and retirement plans, and the related trend of lagging construction productivity growth. These realities have been affecting the land use goals of local jurisdictions. For instance, in San Francisco, many entitled projects with thousands of units awaiting construction are stalled due to skilled labor shortages, diminished contractor productivity, and construction costs that spiked.

The creation and utilization of apprenticeship along with the commitments to paid healthcare act to both recruit and retain an adequate base of construction workers and to be a pipeline for future supervisors and licensed independent contractors. Requiring contractors on major projects in Berkeley to employ apprentices results in a higher volume of apprentice training, and thus, an increase in the construction labor force available to carry out the construction anticipated by the general plan, and especially that targeted by the Housing Element.

BACKGROUND

The City's interests in taking action to redress the inadequate status quo condition of construction workforce development are several:

1. Comply with the RHNA and the General Plan Economic Development & Employment Element. The goals articulated in the General Plan depend on considerably more construction activity than the local supply of skilled construction workers can support. Moreover, construction projects in Berkeley have to compete with projects in other cities that have a similar problem contributing to a serious overall regional imbalance between demand for construction labor and local supply of skilled construction workers. This puts at risk all kinds of essential work, as construction workers are required to build, alter, maintain, and repair homes, schools, offices, retail stores, manufacturing facilities, laboratories, recreational facilities, and infrastructure for utilities and transportation. Setting a high bar for contractor prequalification will encourage employers to provide benefits and training that increase workforce retention and provide financial security.

Berkeley has been assigned a Regional Housing Needs Assessment (RHNA) of roughly 9,000 units of housing to produce over an eight year period, or over 1,100 units per year. Berkeley does not have an adequate supply of construction workers to build over 1,100 housing units per year while also building, altering, and maintaining public and private commercial nonresidential buildings and infrastructure. Only 1,250 construction sector employees lived in Berkeley in 2018.² Applying statewide statistical averages, about 900 of those employees are manual construction, alteration, installation, or repair workers. Given similar needs around the Bay Area and the State of California, Berkeley cannot rely on contractors to reliably import surplus skilled construction workers from other cities. Construction jobs - particularly residential construction jobs - have lost their competitive edge relative to other jobs in the Bay Area regional economy. To meet its General Plan goals, Berkeley should and can create working conditions that will help to overcome the construction labor market's failures to make construction jobs attractive enough to recruit and retain productive trade workers.

2. Reduce demand-side pressure on Berkeley's — and the region's — affordable housing supply. Homebuilding is supposed to reduce the number of people waiting in line for housing they can afford. But when the homebuilding industry itself generates excessive very low and low wage construction employment, that just increases the number of people needing

² U.S. Census Bureau LEHD Origin-Destination Employment Statistics, Version 7, Residence Area Characteristics.

subsidies from the taxpayer. Low wage employment is in fact a problem in both the residential +and commercial construction markets. Fifty-five percent of Alameda County construction workers' households are Extremely Low Income, Very Low Income, or Low Income.³

3. Promote jobsite health & safety. Construction trade workers experience exceptionally high rates of serious injury on the job, especially on sites with inadequately trained workers. One of every five serious workers' compensation insurance claims which involve death, permanent total disability or major permanent partial disability - is related to a construction employee, despite the fact that construction jobs account for less than one out of every 25 California jobs. For a working life in construction, the risk of fatal injury is approximately one death per 200 full-time-equivalent employees according to a recent study in the American Journal of Industrial Medicine. A policy that promotes apprenticeship training and higher construction compensation rates will likely reduce the occurrence of non-fatal and fatal injuries on General Plan Area major projects.

A recent Canadian study of workers' compensation claims from 58,837 construction companies found that unionization was associated with a 25% lower incidence of lost-time allowed injury claims, a 23% lower incidence of musculoskeletal lost-time allowed injury claims, and a 16% lower incidence of lost-time allowed critical injury claims. In California too, employers of lower paid construction workers make more serious and non-serious workers compensation claims.⁴

Contractors that invest in their workforce are incentivized to invest in worker health & safety training and in jobsite safety practices in order to reduce the likelihood of injury to their workforce and increase productivity. We expect that this prequalification policy will lead to lower rates of injury - including fatal occupational injury - on major construction project sites.

4. Promote worker retention by incentivizing provision of health insurance and investment in training.

Construction employer contributions towards training and health insurance are essential. In order to address housing affordability through increased housing supply, California communities must address broken development and construction systems. A 2020 survey of Bay Area city officials measured the degree to which officials agreed on what factors constrain the creation of new housing. Two-thirds of survey respondents said that construction workforce availability is a constraint, ranking fourth highest among 16 specific potential constraints, just behind "financing/funding for affordable housing" and *ahead* of "land suitability."⁵

Construction workers who live in Alameda County are uninsured at rates 3-4 times higher than the rate of non-construction workers.⁶ Incentivizing the provision of health insurance will reduce the number of residents who currently go without and will increase worker retention in the field of residential construction.

³ Analysis of U.S. Census, ACS 2015-2019 Microdata.

⁴ Workers Compensation Insurance Rating Bureau "Relativity Review Sheets," various years.

⁵ Association of Bay Area Governments. Memorandum: "Summary of Local Jurisdiction Survey Results," March 12, 2020, page 5. Downloaded 3/26/2021 via mtc.legistar.com/gateway.aspx?M=F&ID=6b572dad-e960-4c4f-8bff-27a5650bc534.pdf

⁶ Analysis of U.S. Census, ACS 2015-2019 Microdata.

California residential building was strongest when apprenticeship training was strongest. For example, during the 1970s, when California was producing housing at the average annual rate of 200,000 units, the state reported an average of 9,000 carpenter apprentices. California residential builders utilized apprentices every bit as much as commercial builders, according to a 1976 U.S. Bureau of Labor Statistics report.⁷ Between 1973 and 1982, more than 11,000 carpenter apprentices statewide completed their programs. These carpenters were the core of California's trained and skilled residential construction workforce through the 1980s, when housing production continued at a strong pace. De-unionization and the recession of the early 1990s, however, led to sharply reduced utilization of apprentices by residential contractors. Carpenter apprenticeship completions fell by 50 percent between 1996-2005 compared to 1973-1982.⁸ Because apprenticeship programs provide a living wage and long-term employment through benefits and ongoing training, promoting apprenticeship in the residential market will retain workers in the residential space and allow their employers to build more housing stock.

5. Address inequality as residential developer profit margins continue to increase while labor wages and benefits have remained stagnant.

According to the State of California's 2014 Affordable Housing Cost Study and Economic Census data specific to California's construction industry, construction labor wages and benefits account for only 15% of total project costs.⁹ Meanwhile, since 1992 the industry's basis for profitability has increased 50% more than either construction labor or materials. Despite this increase in profitability, there is still a disconnect between construction workers and apprenticeship and health insurance plans, resulting in a shrinking supply of labor. This has constrained the construction industry's ability to expand in response to the rising construction needs of California and its many cities.

California residential contractors offer fringe benefits at low rates to building trades workers. Only one third of construction workers are policyholders for employment-based health insurance, compared to over half of all other employed male civilian workers, according to data from the Annual Social and Economic Supplement of the U.S. Bureau of Labor Statistics' Current Population Survey (CPS). California construction workers' rate of coverage under any employer- or union-provided health insurance ranks 35th among the states, proximate in rank to Alabama, Colorado, Louisiana, Nevada, and Virginia.

The under-performance of California contractors in providing health care security to employees constrains the supply of skilled construction labor. A peer-reviewed study in 2010 found that only 35 percent of blue-collar construction workers who are not covered by collective bargaining agreements had health insurance paid for at least in part by an employer. This same study found that health insurance funded through collectively bargained employer contributions to plans that are portable within the construction industry increased industry-retention rates by up to 40 percent compared to baseline retention rates of

⁷ U.S. Department of Labor, Bureau of Labor Statistics, Bulletin 1911, "Industry Wage Survey: Contract Construction September 1973," Washington, D.C.: 1976. See Tables 28 & 46. Downloaded via <http://fraser.stlouisfed.org>.

⁸ Littlehale, Scott. (2019). *Rebuilding California: The Golden State's Housing Workforce Reckoning*. Smart Cities Prevail. pp. 23-25. Downloaded 3/26/2021 via https://www.smartcitiesprevail.org/wp-content/uploads/2019/01/SCP_HousingReport.0118_2.pdf

⁹ Lantsberg, Alex. (2017). *The Value of Linking Good Construction Jobs to California's Housing Reforms*. Pp. 4-5. Downloaded 3/26/2021 via http://smartcitiespre.wpengine.com/wp-content/uploads/2017/03/SCP_HousingReport.0314.pdf

construction workers without any health insurance coverage.¹⁰ A City policy to prequalify residential contractors based on their investment in workers' health care security will promote a greater, more stable supply of skilled construction labor.

Thus, it is in the City of Berkeley's economic interest to support a pipeline of skilled workers to accomplish the construction objectives and policies of the Berkeley General Plan. More specifically, the policy will promote the following Plan goals:

- 1) Ensure that Berkeley has an adequate supply of decent housing, living wage jobs, and businesses providing basic goods and services.
- 2) New housing will be developed to expand housing opportunities in Berkeley to meet the needs of all income groups.

To increase the prospects for successful implementation and build-out goals of the Plan, it is advised that the City adopt the aforementioned construction workforce development ordinance, known as the HARD HATS Ordinance.

OUTREACH OVERVIEW AND RESULTS

In 2019, the Labor Commission held a public hearing on the Council's previous referral and gathered public input. The 2019 Council referral led to a public hearing before the Labor Commission. Subsequently the Building and Construction Trades Council of Alameda County has provided further input leading to the current proposal. Additionally, the author met with local housing developers and contractors to present the proposed policy terms and get input on how it may impact residential construction. The authors also met extensively with the City Attorney's office and City Department staff to get input on the proposal around legality, implementation and enforcement.

RATIONALE FOR RECOMMENDATION

The City of Berkeley, along with numerous neighboring cities, school districts, special districts and the state of California plans to increase production of housing, commercial buildings, and/or public facilities. Shortages of skilled construction workers, however, will likely prevent many cities from achieving these goals.

This local workforce development ordinance will require contractors to utilize apprentices from state-approved training programs or make CAC contributions; and offer employees an hourly contribution, in addition to the employee's regular hourly wage, paid to a health plan, to an employee savings account, and/or to an employee in the form of cash. The policy will help stabilize regional construction markets; and enhance productivity of the construction workforce Berkeley needs to meet its General Plan's build-out goals.

IMPLEMENTATION, ADMINISTRATION AND ENFORCEMENT

The City Manager and City Attorney will draft the ordinance which will be enforced by the City or through private right of action, consistent with the terms below.

Developers should be made aware of this ordinance during the entitlement process. The City should also attach conditions to zoning permits requiring compliance with the ordinance. Lack of compliance with the HARD HATS ordinance could result in compliance and revocation

¹⁰ Littlehale, Scott. (2019). *Rebuilding California: The Golden State's Housing Workforce Reckoning*. Smart Cities Prevail. pp. 23-25. Downloaded 3/26/2021 via https://www.smartcitiesprevail.org/wp-content/uploads/2019/01/SCP_HousingReport.0118_2.pdf

proceedings for entitlements if a verified complaint is brought to the City's Planning Department or Code Enforcement Division.

1. Precondition for Building Permits

As a condition of a zoning entitlement, the City shall issue building permits only where all Contractors meet the prequalification requirements of this Ordinance and submit all required documentation demonstrating compliance. The implementing departments (HHCS, Planning) must verify compliance prior to building permit being issued.

The City may revoke or suspend the applicable building permit where any Contractor is out of compliance with this Ordinance.

2. City Enforcement

While a Covered Project is underway, the City shall issue a citation or stop work order with respect to any Contractor that submitted a false or misleading prequalification questionnaire and/or has not, in fact, complied with the prequalification requirements herein. In the event of a stop work order, such Contractor shall permanently abandon the Covered Project and leave the work site within twenty-four (24) hours of notice by the City.

In the event that any person identifies a Contractor on a Covered Project that submitted a false or misleading prequalification questionnaire and/or has not, in fact, complied with the prequalification requirements herein, the person may file a complaint with the City. Upon receipt of such a complaint, the City shall investigate the complaint and, if a violation is found, issue a citation or stop work order to the Contractor within ten (10) days of the original complaint. In the event of a stop work order, such Contractor shall permanently abandon the Covered Project and leave the work site within twenty-four (24) hours of notice by the City.

If a Contractor subject to a stop work order remains on the Covered Project, the City shall issue a penalty of \$1,000 per day for the first week, doubling for each successive week. If the Contractor has received a citation or stop work order under this Ordinance, or has otherwise been penalized under this Ordinance, within the prior twelve (12) months, the penalty shall be \$2,000 per day for the first week, doubling for each successive week. In that event, the prime contractor shall be jointly and severally liable for the penalty.

3. Private Right of Action for Required Health Care Expenditures

The Ordinance will provide for a private right of action on behalf of Covered Construction Workers who should have received, but did not receive, Required Health Care Expenditures to which they were entitled on a Covered Project. A labor union or a joint labor-management cooperation committee may also bring such a private action on behalf of a Covered Construction Worker who should have received, but did not receive, Required Health Care Expenditures to which they were entitled on a Covered Project.

Persons may file such claims directly against the prime contractor and/or applicable subcontractor in the Superior Court for the County of Alameda. In addition to costs and other expense shifting provisions provided in the Code of Civil Procedure, a prevailing plaintiff shall be entitled to reasonable attorney fees.

4. Private Right of Action for Injunctive Relief

In addition to any other enforcement mechanism available to the City or any member of the public, the Ordinance will provide for a private right of action for a Covered Construction Worker,

a labor union, or a joint labor-management cooperation committee, to seek injunctive relief compelling compliance with the Ordinance and assessment of the penalties therein. Persons may file such claims directly against the prime contractor and/or applicable subcontractor in the Superior Court for the County of Alameda. In addition to costs and other expense shifting provisions provided in the Code of Civil Procedure, a prevailing plaintiff shall be entitled to reasonable attorney fees.

5. Repeat Offender List

The City shall review the complaints filed under this Ordinance on a monthly basis to determine if any person or entity has been associated with three or more violations of the Ordinance within the last 12 months. Any such person or entity shall be placed on a public list available on the City of Berkeley's website and shall be prohibited from working on Covered Projects for a period of 12 months from their most recent violation.

If the Developer or any Contractor contracts with a person or entity for a Covered Project who is named on the public list ("Repeat Offender"), and the Repeat Offender again violates the Ordinance as determined by the City or the Superior Court, then the Developer or Contractor who contracted with the Repeat Offender shall be jointly and severally liable for any and all penalties, damages, or other financial obligations incurred by the Repeat Offender.

FISCAL IMPACTS OF RECOMMENDATION

Costs associated with administering the prequalification compliance documentation.

ENVIRONMENTAL SUSTAINABILITY

No negative impact. The use of a skilled and trained workforce is a green building practice which improves the quality and environmental performance of construction.

OUTCOMES AND EVALUATION

It is expected that the City Council will refer to the City Manager and City Attorney to create a policy requiring contractors to utilize apprentices from state-approved apprenticeship training programs, and to offer employees employer-paid health insurance plans or a cash alternative adequate to fund high-quality health insurance coverage, consistent with the directives herein.

CONTACT PERSON

Mayor Jesse Arreguín

510-981-7100

