



PROCLAMATION CALLING A SPECIAL MEETING OF THE BERKELEY CITY COUNCIL

In accordance with the authority in me vested, I do hereby call the Berkeley City Council in special session as follows:

**Tuesday, May 2, 2023
6:00 PM**

SCHOOL DISTRICT BOARD ROOM - 1231 ADDISON STREET, BERKELEY, CA 94702

JESSE ARREGUIN, MAYOR

Councilmembers:

DISTRICT 1 – RASHI KESARWANI
DISTRICT 2 – TERRY TAPLIN
DISTRICT 3 – BEN BARTLETT
DISTRICT 4 – KATE HARRISON

DISTRICT 5 – SOPHIE HAHN
DISTRICT 6 – SUSAN WENGRAF
DISTRICT 7 – RIGEL ROBINSON
DISTRICT 8 – MARK HUMBERT

This meeting will be conducted in a hybrid model with both in-person attendance and virtual participation. For in-person attendees, face coverings or masks that cover both the nose and the mouth are encouraged. If you are feeling sick, please do not attend the meeting in person.

Live captioned broadcasts of Council Meetings are available on Cable B-TV (Channel 33) and via internet accessible video stream at http://berkeley.granicus.com/MediaPlayer.php?publish_id=1244.

*Remote participation by the public is available through Zoom. To access the meeting remotely: Join from a PC, Mac, iPad, iPhone, or Android device: Please use this URL: <https://cityofberkeley-info.zoomgov.com/j/1612900378> . If you do not wish for your name to appear on the screen, then use the drop down menu and click on "rename" to rename yourself to be anonymous. To request to speak, use the "raise hand" icon by rolling over the bottom of the screen. To join by phone: Dial **1-669-254-5252** or **1-833-568-8864 (Toll Free)** and enter Meeting ID: **161 290 0378**. If you wish to comment during the public comment portion of the agenda, Press *9 and wait to be recognized by the Chair.*

Please be mindful that the meeting will be recorded and all rules of procedure and decorum apply for in-person attendees and those participating by teleconference or videoconference.

To submit a written communication for the City Council's consideration and inclusion in the public record, email council@cityofberkeley.info.

This meeting will be conducted in accordance with the Brown Act, Government Code Section 54953 and applicable Executive Orders as issued by the Governor that are currently in effect. Any member of the public may attend this meeting. Questions regarding this matter may be addressed to Mark Numainville, City Clerk, (510) 981-6900. The City Council may take action related to any subject listed on the Agenda. Meetings will adjourn at 11:00 p.m. - any items outstanding at that time will be carried over to a date/time to be specified.

Preliminary Matters

Roll Call:

Action Calendar

The public may comment on each item listed on the agenda for action as the item is taken up. For items moved to the Action Calendar from the Consent Calendar or Information Calendar, persons who spoke on the item during the Consent Calendar public comment period may speak again at the time the matter is taken up during the Action Calendar.

The Presiding Officer will request that persons wishing to speak line up at the podium, or use the "raise hand" function in Zoom, to determine the number of persons interested in speaking at that time. Up to ten (10) speakers may speak for two minutes. If there are more than ten persons interested in speaking, the Presiding Officer may limit the public comment for all speakers to one minute per speaker. Speakers are permitted to yield their time to one other speaker, however no one speaker shall have more than four minutes. The Presiding Officer may, with the consent of persons representing both sides of an issue, allocate a block of time to each side to present their issue.

Action items may be reordered at the discretion of the Chair with the consent of Council.

Action Calendar – Scheduled Public Comment Period

During this public comment period, the Presiding Officer will open and close a comment period for each Action item on this agenda (excluding any public hearings, appeals, and/or quasi-judicial matters). The public may speak on each item. Those who speak on an item during this comment period may not speak a second time when the item is taken up by Council.

Action Calendar – New Business

1. Adding BMC Chapter 13.107, Helping Achieve Responsible Development with Healthcare and Apprenticeship Training Standards (HARD HATS) Ordinance From: Mayor Arreguin (Author)

Recommendation:

1. Adopt a first reading of an Ordinance adding Chapter 13.107 to the Berkeley Municipal Code establishing healthcare and apprenticeship standards for private development.
2. Refer the City Manager and Planning Commission if necessary to:
 - a. Include an analysis of the costs of these new healthcare and apprenticeship requirements on private development as part of the Housing Feasibility Study currently underway;
 - b. Based on the findings of the feasibility study, recommend adjustments to impact fees if needed to offset the cost of these new requirements to maintain economic feasibility of projects;
 - c. Bring back to the City Council proposed changes to enabling legislation to enable fee reductions if needed;
 - d. Consider upzoning the C-DMU Downtown Mixed-Use District zoning to allow for an increased number of taller exceptions (at or above 180 feet in height) and explore other zoning modifications to allow for additional density as a way to offset the cost of these new labor standards.
3. Refer to the Fiscal Year 2024 Budget Process funding as determined necessary by the City Manager to fund the implementation of this new law, and direct the City Manager to develop an implementation plan and timeline for this new Ordinance.

Financial Implications: See report

Contact: Jesse Arreguin, Mayor, (510) 981-7100

Public Comment - Items on this agenda only

Adjournment

I hereby request that the City Clerk of the City of Berkeley cause personal notice to be given to each member of the Berkeley City Council on the time and place of said meeting, forthwith.

IN WITNESS WHEREOF, I have hereunto set my hand and caused the official seal of the City of Berkeley to be affixed on this 28th day of April, 2023.



Jesse Arreguin, Mayor

Public Notice – this Proclamation serves as the official agenda for this meeting.

ATTEST:



Date: April 28, 2023

Mark Numainville, City Clerk

NOTICE CONCERNING YOUR LEGAL RIGHTS: *If you object to a decision by the City Council to approve or deny a use permit or variance for a project the following requirements and restrictions apply: 1) No lawsuit challenging a City decision to deny (Code Civ. Proc. §1094.6(b)) or approve (Gov. Code 65009(c)(5)) a use permit or variance may be filed more than 90 days after the date the Notice of Decision of the action of the City Council is mailed. Any lawsuit not filed within that 90-day period will be barred. 2) In any lawsuit that may be filed against a City Council decision to approve or deny a use permit or variance, the issues and evidence will be limited to those raised by you or someone else, orally or in writing, at a public hearing or prior to the close of the last public hearing on the project.*

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<https://berkeleyca.gov/your-government/city-council/city-council-agendas>.

Channel 33 rebroadcasts the following Wednesday at 9:00 a.m. and Sunday at 9:00 a.m.

Communications to the City Council are public record and will become part of the City's electronic records, which are accessible through the City's website. **Please note: e-mail addresses, names, addresses, and other contact information are not required, but if included in any communication to the City Council, will become part of the public record.** If you do not want your e-mail address or any other contact information to be made public, you may deliver communications via U.S. Postal Service to the City Clerk Department at 2180 Milvia Street. If you do not want your contact information included in the public record, please do not include that information in your communication. Please contact the City Clerk Department for further information.

Any writings or documents provided to a majority of the City Council regarding any item on this agenda will be made available for public inspection at the public counter at the City Clerk Department located on the first floor of City Hall located at 2180 Milvia Street as well as posted on the City's website at <https://berkeleyca.gov/>.

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<https://berkeleyca.gov/your-government/city-council/city-council-agendas>

and may be read at reference desks at the following locations:

City Clerk Department - 2180 Milvia Street, First Floor
Tel: 510-981-6900, TDD: 510-981-6903, Fax: 510-981-6901
Email: clerk@cityofberkeley.info

Libraries: Main – 2090 Kittredge Street,
Claremont Branch – 2940 Benvenue, West Branch – 1125 University,
North Branch – 1170 The Alameda, Tarea Hall Pittman South Branch – 1901 Russell

COMMUNICATION ACCESS INFORMATION:

This meeting is being held in a wheelchair accessible location.

To request a disability-related accommodation(s) to participate in the meeting, including auxiliary aids or services, please contact the Disability Services specialist at (510) 981-6418 (V) or (510) 981-6347 (TDD) at least three business days before the meeting date.

Please refrain from wearing scented products to this meeting.



Captioning services are provided at the meeting, on B-TV, and on the Internet. In addition, assisted listening devices for the hearing impaired are available from the City Clerk prior to the meeting, and are to be returned before the end of the meeting.



Office of the Mayor

ACTION CALENDAR
May 2, 2023

To: Honorable Members of the City Council

From: Mayor Jesse Arreguín

Subject: Adding BMC Chapter 13.107, Helping Achieve Responsible Development with Healthcare and Apprenticeship Training Standards (HARD HATS) Ordinance

RECOMMENDATION

- 1) Adopt a first reading of an Ordinance adding Chapter 13.107 to the Berkeley Municipal Code establishing healthcare and apprenticeship standards for private development.
- 2) Refer the City Manager and Planning Commission if necessary to:
 - a) Include an analysis of the costs of these new healthcare and apprenticeship requirements on private development as part of the Housing Feasibility Study currently underway;
 - b) Based on the findings of the feasibility study, recommend adjustments to impact fees if needed to offset the cost of these new requirements to maintain economic feasibility of projects;
 - c) Bring back to the City Council proposed changes to enabling legislation to enable fee reductions if needed;
 - d) Consider upzoning the C-DMU Downtown Mixed-Use District zoning to allow for an increased number of taller exceptions (at or above 180 feet in height) and explore other zoning modifications to allow for additional density as a way to offset the cost of these new labor standards.
- 3) Refer to the Fiscal Year 2024 Budget Process funding as determined necessary by the City Manager to fund the implementation of this new law, and direct the City Manager to develop an implementation plan and timeline for this new Ordinance.

CURRENT SITUATION AND ITS EFFECTS

On September 20, 2022, the City Council approved a referral to the City Attorney and City Manager to draft a HARD HATS Ordinance for adoption.¹ 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. This ordinance is intended to improve the recruitment, training, and retention of skilled construction workers, ensuring larger projects within the City are awarded to contractors that participate in high quality, industry-proven apprenticeship programs, and that apprentices working under such contracts are competently trained. This ordinance also requires contractors to cover healthcare expenses.

¹ *The recommended action included the City Attorney and City Manager returning the Ordinance back to council for action on December 13, 2022. Additional time was needed to allow for Council to meet with city staff and developers to address questions raised, allow staff to review the legal terms and elements of the ordinance, and collaborate to ensure success for the community and for our city staff.*

Together, these policies will increase the pool of labor available to complete current and future projects.

The following compares elements included in the September 2022 referral with those in the new Ordinance:

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.

Included in Ordinance:

a. Prequalification requirements are laid out in Section 13.107.050(a), which requires Contractors to submit a statement and prequalification documents showing that they meet the requirements of the Ordinance.

b. In conversations with stakeholders, this will not be included.

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.²
 - b. Contributions to an apprenticeship program or the CAC³ shall not be credited towards compliance with BMC Chapter 13.99 (Minimum Wage).

² 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>.

³ California Apprenticeship Council

- 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.

Included in Ordinance:

a) As stipulated in 13.107.040 Apprenticeship Requirements, the City outlines the appropriate language to describe compliance in line with this element. For element a.iii, contractors will be given an option to make hourly contributions on a monthly basis, and, in the case Contractors do not have Covered Construction Worker employees, require them to show a contractual obligation with subcontractors that matches this standard. Furthermore, any Applicant/Permittee will be required to ensure this Apprenticeship requirement will be included during a contract's performance of the Covered Project.

b) Section 13.107.050(d) states that health care expenditures shall not be credited towards minimum wage compliance.

c) Upon review and discussion with staff and stakeholders, this apprenticeship pre-qualification requirement was removed for administrative simplicity and replaced with an apprenticeship hiring or fee 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 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).

Included in Ordinance:

- a) As stipulated in 13.107.050 Health Care Expenditures, the City outlines the appropriate language to describe compliance in line with this element, including requiring Contractors to sign and submit an attestation of compliance, as well as documenting proof of themselves and subcontractors making Health Care Expenditures. To eliminate the unfair application of this provision for contractors who do not have regularly permanent Covered Construction Workers, the City stipulates they will need to show a contractual obligation with its subcontractors matches this standard.
 - b & c) In section c) of 13.107.050, Contractors are provided flexibility in paying towards Required Health Care Expenditures. The City stipulates payments may be provided in one of many ways, including health plans, health savings accounts (HSAs), and/or cash at one and a half the rate of the Health Expenditure Rate. Any Applicant/Permittee will be required to ensure this Health Care requirement will be included during the performance of the Covered Project.
 - d) The City added requirements in section 13.107.060 Required Applicant/Permittee and Contractor Statements and 13.107.090 Retention of Records that will facilitate the documentation, submission, and retention of statements certifying compliance with the City, as well as access to relevant records for authorized City representatives for the purpose of monitoring compliance.
 - e) Section e) of 13.107.050 complies with this element.
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.

Included in Ordinance:

- a) As stipulated in 13.107.060 Required Applicant/Permittee and Contractor Statements, the City outlines the appropriate language in line with this element. The ordinance stipulates any Applicant/Permittee must sign and submit to the City a declaration describing compliance with the Apprenticeship and Health Care expenditures requirements within seven (7) days of receipt of permit issuance for the Covered Project. In addition, the Applicant/Permittee shall sign and submit to the

City a declaration that it will comply with the Apprenticeship and Health Care Expenditures in this ordinance during the duration of the Covered Project (“Contractor Prequalification Questionnaire”) no later than seven (7) calendar days before their first day of work on the Covered Project. Furthermore, each Contractor must sign and submit to the permittee a statement certifying they complied with the requirements of this ordinance within 30 calendar days of completing their work on the Project. Prior to the issuance of a certificate of occupancy for the Covered Project, the permittee shall sign and submit to the City a certification that All Contractors on the Covered Project are in compliance.

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.

Included in Ordinance:

- a) As stipulated in 13.107.111 Implementation and Enforcement, section b. *Community Benefits Agreement Exception*, the City outlines the appropriate language in line with this element.

6. The final ordinance shall contain severability language.

Included in Ordinance:

- a) As stipulated in 13.107.114 Severability, the City outlines the appropriate language in line with this element.

IMPLEMENTATION, ADMINISTRATION, ENFORCEMENT, OUTCOMES AND EVALUATION

The ordinance has been revised to require declarations which must be submitted to a designated City department. Council will discuss and determine what department(s) that may be the implementing departments (i.e. Planning, HHCS Labor Standards Enforcement).

This ordinance with the exception of receiving submitted declarations and verifying receipt by deadlines, would largely be self-enforcing through complaints or private right of action, with some exceptions. Exceptions include:

- Prior to issuance of a certificate of occupancy for the Covered Project, the permittee shall sign and submit to the City a certification that all Contractors on the Covered Project satisfied the Apprenticeship and Health Care Expenditures requirements of this ordinance (“Permittee Certification of Compliance”); and
- The City shall issue permits for the Covered Project only where Applicant meets the requirements of this Ordinance and submits the Applicant Commitment Statement.

The City may revoke or modify the applicable permits for the Covered Project pursuant to Section 23.404.080 where Applicant or any Contractor is out of compliance with the conditions of the permit and this Ordinance.

Developers will be made aware of this ordinance during the entitlement process. The City shall publish and make available to Contractors a notice in English, Spanish, and any other primary languages as determined by City staff, for posting by Contractors in the workplace informing workers of their rights under this ordinance.

A Contractor shall give written notification to each current Covered Construction Worker and to each new Covered Construction Worker at time of hire of their rights under this ordinance. The notification shall be in English and Spanish, and any other primary languages as determined by City staff, and must be posted prominently in areas at the work site where it will be seen by all Covered Construction Workers. Failure to post such notice shall render the Contractor subject to administrative citation, pursuant to the provisions of this ordinance. The City is authorized to prepare sample notices and a Contractor's use of such notices shall constitute compliance with this subsection.

The City may take appropriate enforcement action to ensure compliance with this ordinance, including issuing an administrative citation pursuant to Chapter 1.28 of the Berkeley Municipal Code. The City may issue a citation with respect to any Contractor or Applicant/Permittee that submitted a false or misleading prequalification questionnaire; has not, in fact, complied with the Apprenticeship and/or Health Care Expenditures requirements of this ordinance; and/or has not submitted a Contractor Prequalification Questionnaire.

In the event that any person identifies a Contractor or permittee on a Covered Project not complying with this ordinance as required, the person may file a complaint with the City. Complaints shall be made on a form prepared by the City and made available through the City's website. Upon receipt of such a complaint, the City shall investigate the complaint and, if a violation is found, issue a citation to the Owner and/or the Contractor. The citation will give the Contractor ten (10) days to correct the violation.

If a Contractor subject to a citation does not correct the violation within ten (10) days, the City shall issue a penalty of \$1,000 per calendar day for the first calendar week, doubling for each successive week and capping out at \$5,000 per calendar day.

If the Contractor has received a citation under this Ordinance, or has otherwise been penalized under this Ordinance, within the prior twelve (12) months, the penalty shall be \$2,000 per calendar day for the first calendar week, doubling for each successive week and capping out at \$8,000 per calendar day. In this event, the prime contractor shall be jointly and severally liable for the penalty.

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 24 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 24 months from their most recent violation.

If the Repeat Offender again violates the Ordinance as determined by the City or the Superior Court, then the Applicant/Permittee 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

In creating a new system of receiving and reviewing documents to ensure compliance and oversight, the City will need a budget for creating and ultimately conducting an implementation plan. The referral made to the City Manager to create a process for estimating this budget shall include an allocation of funds for staffing and operational needs. Following approval of the relevant recommendation the City Manager will incorporate this budget into an implementation plan for this ordinance.

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.

CONTACT PERSON

Jesse Arreguín, Mayor	(510) 981-7100
Anthony Rodriguez, Senior Legislative Assistant	(510) 981-7102

Attachments:

1. Proposed Ordinance
2. September 11, 2022 HARD HATS Referral

ORDINANCE NO.

ADDING CHAPTER 13.107 TO THE BERKELEY MUNICIPAL CODE ESTABLISHING HEALTHCARE AND APPRENTICESHIP STANDARDS FOR PRIVATE DEVELOPMENT

BE IT ORDAINED by the Council of the City of Berkeley as follows:

Section 1. That Chapter 13.107 is hereby added to the Berkeley Municipal Code as follows:

ESTABLISHING HEALTHCARE AND APPRENTICESHIP STANDARDS FOR PRIVATE DEVELOPMENT

13.107.010 Title

13.107.020 Purpose

13.107.030 Definitions

13.107.040 Apprenticeship Requirements

13.107.050 Required Health Care Expenditures

13.107.060 Required Applicant and Contractor Statements

13.107.070 Notice and Publishing

13.107.080 Retaliation Prohibited

13.107.090 Retention of Records

13.107.110 City Access

13.107.111 Implementation and Enforcement

13.107.112 City Undertaking Limited Promotion of General Welfare

13.107.113 No Preemption of Higher Standards

13.107.114 Severability

13.107.010 Title.

This Ordinance shall be known as the Helping Achieve Responsible Development with Healthcare and Apprenticeship Training Standards (“HARD HATS”) Ordinance.

13.107.020 Purpose.

The purpose of this Chapter is to address the shortage of qualified construction workers, rising labor costs, and to refine labor standards in the local construction industry. These measures are intended to improve the recruitment, training, and retention of skilled construction workers.

The requirements of this Chapter ensure that larger projects within the City are awarded to contractors that participate in high quality, industry-proven apprenticeship programs, and that apprentices working under such contracts are competently trained.

The requirements of this Chapter also enhance the good health of construction workers working in the City, thereby increasing the pool of labor available to complete current and future projects, including City public works projects for which the City contracts on a regular basis.

Together, the requirements of this Chapter will help promote the retention and growth of a skilled labor pool in the construction industry that can live as well as work in the City.

13.107.030 Definitions.

"Applicant" shall mean any individual, person, firm, partnership, association, joint venture, corporation, entity, combination of entities or authorized representative thereof, who undertakes, proposes and/or applies to the City for, a Covered Project.

"Apprenticeable Craft or Trade" is defined in California Labor Code section 1777.5.

"Contractor" shall mean contractors or subcontractors of any tier that have contracted to perform work on the Covered Project in excess of ½ of one percent of the total Cost of the Covered Project.

"Cost of the Covered Project" shall mean the amount determined by the Chief Building Official for purposes of setting the building permit fee in accordance with the most recent building valuation date specified in the building permit fees section of the resolution establishing fees and charges as adopted by the City Council.

"Covered Project" shall mean a private development project within City limits consisting of construction, alteration, or demolition of 50,000 square feet or more of floor area which has not received its final permits, variances, approvals and/or other entitlements by the effective date of this ordinance.

"Covered Construction Worker" shall mean construction workers employed by the Contractor for the duration of the Covered Project.

"City" shall mean the City of Berkeley and any implementing department or official.

"Health Care Expenditures" shall mean the amount calculated by multiplying the number of hours worked by a Covered Construction Worker on the Covered Project by the hourly Health Care Expenditure Rate.

"Health Care Expenditure Rate" shall mean the rate determined annually from the City of Berkeley Health and Dental Plan Monthly Premium Rates in for the Kaiser HSA-Qualified Deductible HMO Plan for the applicable fiscal year. The Health Care Expenditure Rate shall be prorated on an hourly basis, and arrived at by dividing the total monthly premium for the Kaiser HSA-Qualified Deductible HMO Plan by one hundred and fifty (150), the typical number of hours worked in a month by a construction worker.

"Joint Labor-Management Apprenticeship Program" shall mean an apprenticeship program jointly managed and administered by both a union and contractor or contractor association, and (i) approved by the State of California's Division of Apprenticeship Standards; (ii) registered with the U.S. Department of Labor; or (iii) registered with a State Apprenticeship Agency granted authority by the U.S. Department of Labor to register apprenticeship programs for federal purposes, pursuant to 29 CFR Part 29.

“Project Labor Agreement” shall mean a pre-hire collective bargaining agreement with one or more labor organizations that establishes the terms and conditions of employment for a specific construction project.

“Repeat Offender” shall mean an Applicant, Contractor, or entity that has received three or more violations of this Chapter within the last 24 months.

13.107.040 Apprenticeship Requirements

a. During the duration of the Covered Project, each Contractor shall 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 start of construction date on 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 hourly contributions on a monthly basis to the California Apprenticeship Council for every hour worked by any Covered Construction Worker in any Apprenticeable Craft or Trade on the Covered Project of at least the apprenticeship contribution rate for the classification of “plumber, pipefitter, steamfitter” in Alameda County.

b. A Contractor without Covered Construction Worker employees shall comply with this Section by showing a contractual obligation that its subcontractors comply with this subdivision.

c. Contributions to an apprenticeship program or the California Apprenticeship Council shall not be credited towards compliance with BMC Chapter 13.99 (Minimum Wage).

d. Applicant shall ensure that the Apprenticeship requirement in this Section is included in all contracts for the performance of the Covered Project.

13.107.050 Health Care Expenditures

a. *Prequalification:* In order to be prequalified, each Contractor will sign and submit to the City a statement stipulating to and providing documented proof that the Contractor and its subcontractors, must have provided Health Care Expenditures to or on behalf of each Covered Construction Worker for the 180 consecutive day period prior to the submission of the prequalification documents. This requirement is in addition to the regular hourly wages paid to its employees.

In the case of a Contractor that has employed no Covered Construction Workers for the 180 consecutive day period prior to the submission of the prequalification documents, said Contractor shall show a contractual obligation that its subcontractors will provide Health Care Expenditures to or on behalf of each Covered Construction Worker for the duration of the covered project.

b. *Covered Project Duration*: For purposes of the Covered Project, each Contractor shall make Health Care Expenditures to or on behalf of each Covered Construction Worker, in addition to their regular hourly wages, during periods of employment on the Covered Project (and sign a statement certifying that it will do so).

In the case of a Contractor that will employ no Covered Construction Workers on the Covered Project, said Contractor shall show a contractual obligation that its subcontractors will provide Health Care Expenditures on behalf of each Covered Construction Worker for the duration of the Covered Project. A Contractor shall make Health Care Expenditures on behalf of the Covered Construction Workers employed by its subcontractors in the event said subcontractors fail to make required Health Care Expenditures.

c. Health Care Expenditures may be made to: (1) a health plan in which the Covered Construction Worker is enrolled at the Health Care Expenditure Rate; (2) a Covered Construction Worker's health savings account at the Health Care Expenditure Rate; and/or (3) a Covered Construction Worker in the form of cash at one and a half (1.5) times the rate of the Health Care Expenditure Rate.

d. Health Care Expenditures shall not be credited towards compliance with BMC Chapter 13.99 (Minimum Wage).

e. The Applicant shall ensure that the Health Care Expenditures requirements in this Section are included in all contracts for the performance of the Covered Project.

13.107.060 Required Applicant and Contractor Statements

A declaration must be signed by the Applicant at the time of permit issuance for the Covered Project, attesting to compliance with this Chapter under penalty of perjury ("Applicant Declaration"). By signing the Applicant Declaration, the Applicant commits to ensuring that all Contractors on the Covered Project have and will comply with the Apprenticeship and Health Care Expenditures requirements of this ordinance, including by ensuring that all contracts for the performance of the Covered Project so require, requiring all Contractors complete the statements established by this Section, and submitting all Contractor statements to the City within seven (7) days of receipt.

Prior to executing their contract for the Covered Project, but no later than seven (7) calendar days before their first day of work on the Covered Project, each Contractor will sign and submit to the Applicant a statement stipulating that on the Covered Project it will comply with the Apprenticeship and Health Care Expenditures as set forth in this chapter during the duration of the Covered Project, and that it has met the Health Care Expenditures prequalification requirements ("Contractor Prequalification Questionnaire").

Within 30 calendar days of completing their work on the Project each Contractor must sign and submit to the Applicant a statement certifying that it complied with the Apprenticeship and Health Care Expenditures requirements of this Chapter ("Contractor Satisfaction Statement").

Prior to issuance of a certificate of occupancy for the Covered Project, the Applicant shall sign and submit to the City a certification that all Contractors on the Covered Project satisfied the Apprenticeship and Health Care Expenditures requirements of this ordinance ("Applicant Certification of Compliance").

13.107.070 Notice and Posting

- a. The City shall publish and make available to Contractors a notice in English, Spanish, and any other primary languages as determined by City staff, for posting by Contractors in the workplace informing Covered Construction Workers of their rights under this chapter (“Sample Notice”).
- b. A Contractor shall give written notification to each current Covered Construction Worker and to each new Covered Construction Worker at time of hire of their rights under this chapter. The notification shall be in English and Spanish, and shall also be posted prominently in areas at the work site where it will be seen by all Covered Construction Workers. Failure to post such notice shall render the Contractor subject to administrative citation, pursuant to the provisions of this Chapter. A Contractor’s use of the City’s Sample Notices shall constitute compliance with this subsection.

13.107.080 Retaliation Prohibited

A Contractor shall not discharge, reduce the compensation of, discriminate against, or take any adverse employment action against a worker, including discipline, suspension, transfer or assignment to a lesser position in terms of job classification, job security, or other condition of employment, reduction of hours or denial of additional hours, informing another employer that the person has engaged in activities protected by this chapter, or reporting or threatening to report the actual or suspected citizenship or immigration status of an employee, former worker or family member to a federal, state or local agency, for making a complaint to the City, participating in any of the City’s proceedings, using any civil remedies to enforce their rights, or otherwise asserting their rights under this chapter. Within one hundred twenty (120) days of a Contractor being notified of such activity, it shall be unlawful for the Contractor to discharge any workers who engaged in such activity unless the Contractor has clear and convincing evidence of just cause for such discharge.

13.107.090 Retention of Records

Applicants and Contractors shall maintain the following records for the Covered Project at least three (3) years after receiving approved final inspection:

- 1) Applicant Declaration;
- 2) Contractor Prequalification Questionnaires;
- 3) Contractor Satisfaction Statement certifying compliance with the Health Care Expenditures and Apprenticeship requirements (Sections 13.107.040 and .050) of this Chapter;
- 4) Records reflecting Contractors’ compliance with the Health Care Expenditures and Apprenticeship requirements (Sections 13.107.040 and .050) of this Chapter, including records of names of all Covered Construction Workers, dates those workers worked for the Contractor, and Health Care Expenditures the Contractor made to or on behalf of those workers; and
- 5) Applicant Certification of Compliance.

13.107.110 City Access

Applicant and Contractors shall permit access to Covered Project work sites and relevant records for authorized City representatives for the purpose of monitoring compliance with this chapter and investigating worker complaints of noncompliance. Access to records will be provided within a reasonable amount of time of the City's request, but no longer than 30 days. Failure to provide access to records may be subject to City enforcement as permitted in Section 13.107.111.

13.107.111 Implementation and Enforcement

a. Issuance and Revocation of Permits

The City shall issue permits for the Covered Project only where an Applicant meets the requirements of this Ordinance and submits the Applicant Declaration. The City shall include conditions of approval requiring compliance with this Chapter for all permits issued for Covered Projects. The City may revoke or modify the applicable permits for the Covered Project pursuant to Section 23.404.080 where Applicant or any Contractor is out of compliance with this Ordinance.

b. Community Benefits Agreement Exception

If an otherwise Covered Project is covered by a Project Labor Agreement (or community workforce agreement or similar labor agreement) with the local Building and Construction Trades Council that already requires health care expenditures and apprenticeship fund contributions, Contractors will be deemed in compliance with this Chapter.

c. Collective Bargaining Agreement Exception

A Contractor that is signatory to a valid collective bargaining agreement with a labor union that requires participation in a joint labor-management apprenticeship program and the provision of health care expenditures to all construction craft employees shall be deemed in compliance with this Chapter.

d. City Enforcement.

The City may take appropriate enforcement action to ensure compliance with this Chapter, including issuing an administrative citation pursuant to Chapter 1.28 of the Berkeley Municipal Code. The City may issue a citation to any Contractor, Applicant or entity that has not complied with the requirements of this Chapter, including but not limited to, the following violations:

- (1) failing to post the required notice (Section 13.107.070);
- (2) refusing or not providing timely access to records or work sites (Section 13.107.110);
- (3) failing to submit or submitting a false or misleading Applicant Declarations, Contractor Prequalification Questionnaires, Contractor Satisfaction Statements, and/or Applicant Certificates of Compliance; and/or
- (4) failing to comply with the Apprenticeship and/or Health Care Expenditures requirements of this Chapter.

The fine shall vary based on the provisions of this Chapter violated, but may be up to a maximum of \$5,000/month per Covered Construction Worker during the period of the violation.

In the event that any person identifies a Contractor or Applicant on a Covered Project not complying with this ordinance as required, the person may file a complaint with the City. Complaints shall be made on a form prepared by the City and made available through the City's website. Upon receipt of such a complaint, the City shall investigate the complaint and, if a violation is found, issue a citation to the Applicant and/or the Contractor. The citation will give the Applicant and/or Contractor ten (10) days to correct the violation.

If a Contractor subject to a citation does not correct the violation within ten (10) days, the City shall issue a penalty of \$1,000 per calendar day for the first calendar week, increasing to \$2,500 per calendar day for successive calendar weeks.

If the Contractor has received a citation or has otherwise been penalized under this Ordinance, within the prior twelve (12) months, the penalty shall be \$2,000 per calendar day for the first calendar week, increasing to \$3,500 per calendar day for successive calendar weeks. If a subcontractor receives a citation under this Ordinance, the prime contractor shall be jointly and severally liable for the penalty.

d. Private Right of Action.

A Covered Construction Worker, or a joint labor-management committee established pursuant to the federal Labor Management Cooperation Act of 1978 (29 U.S.C. sec. 175a) on a Covered Construction Worker's behalf, may bring a civil action in a court of competent jurisdiction against the Contractor (and in the case of a Repeat Offender, the Applicant or Contractor who contracted with the Repeat Offender) violating this Chapter and, upon prevailing, shall be awarded reasonable attorneys' fees and costs and shall be entitled to such legal or equitable relief as may be appropriate to remedy the violation including, without limitation, the payment of Health Care Expenditures that may have been unlawfully withheld and/or injunctive relief. Nothing in this chapter creates a private right of action or otherwise authorizes legal action against the City, its officers, agents, or employees, for failure to enforce these provisions.

e. 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 received three or more violations of the Ordinance within the last 24 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 24 months from their most recent violation. The City shall provide a notice of Repeat Offender designation through personal service, or by registered mail, postage prepaid, addressed to the person or entity's address on file with the City.

If the Repeat Offender again violates the Ordinance as determined by the City or the Superior Court, then the Applicant 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.

Any person or entity shall be entitled to appeal the City's decision to place it on the Repeat Offender List by filing a written notice of appeal with the City Manager within ten days from the date the notice of Repeat Offender designation is mailed. The appeal shall clearly and concisely set forth the grounds upon which it is based. If the permittee files a timely request for appeal, a

hearing shall be held before the City Manager or their designee. The decision of the City Manager or their designee shall be final.

13.107.112 City Undertaking Limited Promotion of General Welfare

In undertaking the adoption and enforcement of this Chapter, the City is undertaking only to promote the general welfare. The City is not assuming, nor is it imposing on its officers and workers, an obligation for breach of which it is liable in money damages to any person who claims that such breach proximately caused injury. This Chapter does not create a legally enforceable right by any member of the public against the City.

13.107.113 No Preemption of Higher Standards

The purpose of this chapter is to ensure minimum labor standards. This chapter does not preempt or prevent the establishment of superior employment standards or the expansion of coverage by ordinance, resolution, contract, or any other action of the City.

13.107.114 Severability

If any part or provision of this Chapter, or the application of this Chapter to any person or circumstance, is held invalid, the remainder of this Chapter, including the application of such part or provision to other persons or circumstances, shall not be affected by such a holding and shall continue in full force and effect. To this end, the provisions of this Chapter are severable.

Section 2. Effective Date

The effective date of this ordinance shall be January 1, 2024.

Section 3. Copies of this Ordinance shall be posted for two days prior to adoption in the display case located near the walkway in front of the Maudelle Shirek Building, 2134 Martin Luther King Jr. Way. Within 15 days of adoption, copies of this Ordinance shall be filed at each branch of the Berkeley Public Library and the title shall be published in a newspaper of general circulation.



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

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