



Memorandum

TO: HONORABLE MAYOR
AND CITY COUNCIL

FROM: Kim Welsh
David Sykes

SUBJECT: SEE BELOW

DATE: November 25, 2013

Approved

Date

12/4/13

COUNCIL DISTRICT: 3

**SUBJECT: REVIEW OF PROPOSED LEASE REQUIREMENTS FOR CITY HALL
RETAIL AND CONVENTION CENTER PLAZA COFFEE KIOSK AND
MODIFICATION OF APPLICATION OF LIVING WAGE POLICY**

RECOMMENDATION

- A. Authorize the City Manager to negotiate two proposed lease agreements that do not include living wage and labor peace requirements:
- 1) City Hall Retail Space on Fourth Street; Don Imwalle Jr. as Master Tenant/Developer, City as Landlord.
 - 2) San Jose McEnery Convention Center Plaza Coffee Kiosk; Starbucks Coffee as Tenant, City as Landlord.
- B. Adopt a resolution approving modifications to the City's Living Wage Policy, Council Policy 3-3, to clarify living wage and labor peace requirements do not apply to leases, property agreements, operating agreement and concession agreements in which the City is Landlord, that do not provide City funds or City subsidies or involve direct services to the City or services that the City would normally provide to residents.

OUTCOME

Clarification of the City's living wage policy will facilitate: (1) consistency in the application of the policy going forward; (2) proceeding with the City Hall Retail and Convention Center Coffee Kiosk leases; and (3) removal of a competitive market objection thus encouraging private investment and expanding services and amenities to the downtown core.

BACKGROUND

Wage Policies

The City Council's wage policies, first established twenty-four years ago, set minimum rates which contractors/vendors are required to pay their respective employees. These policies are implemented through the City's authority to contract; the policies require certain contracts into which the City enters to contain contractual provisions requiring workers to be paid a certain wage rate. By including contract provisions requiring minimum compensation requirements, it helps to ensure equitable and sufficient wages for residents of the City and region.

Prevailing Wage

The City Council adopted its first Prevailing Wage Policy in October 1988. Under the Policy, City contracts for the construction, alteration, demolition, or repair work for City public works construction projects must contain requirements that workers are paid not less than a prevailing wage.

In February 1989, the City's Prevailing Wage Policy was expanded to include certain direct City services: residential street sweeping, convention center food services, parking lot management services, janitorial/custodial services, and City maintenance contracts in excess of \$1,000. In October 1989, the Policy was expanded further to require the payment of prevailing wages to City housing projects, both new construction and rehabilitation involving more than eight dwelling units.

The California Department of Industrial Relations (DIR) determines and publishes the general prevailing wage of per diem wages. When there is no DIR established prevailing wage rate, the City's Office of Equality Assurance (OEA) performs a wage survey and establishes its own prevailing wage rate(s). The City's OEA is responsible for implementing, monitoring, and enforcing the Policy.

The City's Policy is broader than State law. Under State law, prevailing wage applies to public works projects. A public works project is defined as a project that is paid for in whole or in part with public funds. Projects that are paid for exclusively with private funds are not public works projects for purposes of prevailing wage and are not subject to prevailing wage requirements under State law. Under State law, the issue of where the construction occurs is not relevant to whether prevailing wage is applicable. Under State law, the relevant issue is whether public funds are involved. A few examples are provided below to highlight the differences between the City's Policy and State law.

Regarding construction of tenant improvements on City property, where the tenant pays all costs associated with the improvements and the City provides no public funds, City staff has historically required prevailing wage. The Airport concession agreements, for example, have been subject to prevailing wage requirements. However, the City has not always been consistent in applying the Policy, which has led to a number of anomalies such as development agreements.

Under a 3 dash agreement, a developer generally uses private money to pay for 100% of the cost of constructing improvements that it will dedicate to the City upon completion. A 3 dash

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agreement does not contain any prevailing wage requirements. On the other hand, parkland dedication agreements, which are another form of a development/developer agreement, involve the developer paying 100% of the cost of constructing a park that it will dedicate to the City upon completion. The City includes prevailing wage requirements in parkland dedication agreements. In recent years, the City has moved toward interpreting the City's Prevailing Wage Policy as it applies to public works construction projects consistent with State law.

The California Supreme Court recently confirmed the right of a Charter City to determine whether to require prevailing wages to municipal contracts. In light of passage of SB 7, which would curtail state funding to municipalities who do not provide for prevailing wages in municipal contracts, the City Attorney's Office is preparing an ordinance for Council to consider which would align the City's Prevailing Wage Policy with State law.

Living Wage

The City Council adopted its Living Wage Policy in November 1998, to require a livable wage for workers employed by employers who are awarded certain service contracts or who receive direct financial assistance by the City. The Policy also includes employee retention and harmonious labor and management relations in certain instances.

The Living Wage Policy mandates a minimum level of compensation for workers employed by contractors, subcontractors, and vendors who are awarded certain City service and labor contracts with an expenditure of \$20,000 or more and fall under certain categories of services. Leases are generally exempt from the Policy but leases are to be reviewed on a case-by-case basis and the Policy is to be included to the extent it is not constrained. Additionally, recipients who receive direct monetary financial assistance of \$100,000 or more are also covered. Although City maintenance contracts typically fall under the purview of prevailing wage requirements, certain services such as landscape maintenance services and facility and building maintenance are subject to living wage because living wage is higher than prevailing wage.

Effective July 1, 2013, contractors are required to provide twelve days of compensated time off per year for full time workers and six days of compensated time off for part time workers. Paid holiday, paid sick days, paid vacation and paid personal days are allowed to count toward the twelve or six required days. Currently, the living wage rate is \$15.78 per hour if the covered employer provides health benefits. If the covered employer does not provide health benefits, the living wage rate is \$17.03 per hour.

Employee Retention

Employee retention requirements apply to contracts subject to the Policy that are over the amount of \$50,000 and provide for the continuation of a service currently provided by another contractor. Employee retention applies to the following contracts: food services; janitorial and custodial services; shuttle transportation; parking lot management; Citywide residential street sweeping; operation, programming and maintenance of recreational facilities; and any other service or labor determined to meet the intent of the Policy.

Service Disruption/Labor Peace

Service Disruption and Labor Peace requirements are intended to ensure that contractors and vendors are good employers, provide a good work environment without encroaching on a contractor's ability to conduct business, and comply with federal, state and City employment policies. Contractors who are subject to the Policy are required to submit a plan or program that demonstrates a good work environment and prevents disruption in services due to disputes with its employees.

The City's OEA is responsible for implementing, monitoring, and enforcing the Policy.

City Hall Retail and Convention Center Leases

San Jose City Hall Retail

San Jose City Hall is a landmark building that reflects the City's distinction as one of the country's major cities. The total building area of City Hall is approximately 530,000 square feet, which includes approximately 6,000 square feet of retail space that faces Fourth Street. The original intent of the space was to activate the area with food service tenants that would be supportive of City Hall employees and the surrounding downtown community. Since opening in 2005, the City Hall retail space has remained vacant. The first significant challenge to leasing the space has been the unfinished interior condition, which was the result of cost saving measures during construction of the building.

In 2006, a local developer, Don Imwalle Sr., was willing to master lease the space, finish the interior build out with his own funds, and then lease it to retail and food service tenants. City staff determined that the deal represented a favorable financial solution to the vacancy and presented it to Council. At the time, City Council determined to impose both prevailing wage for the construction of the build out and labor peace requirements for the tenant(s). Unfortunately, competitive market conditions prevented the developer and his prospective tenants from accepting the condition of labor peace and the lease did not move forward.

Presently, Don Imwalle Jr., the son of the original developer, has expressed interest to develop the approximate 6,000 square foot City Hall Retail space. The cost to finish the City Hall Retail space is high, but the agreement structure provides for the Developer to bare all costs with no City funds or subsidy. Once the space is occupied and activated, it will provide amenities to City employees and the surrounding businesses and begin to generate revenue for the City as originally intended. Mr. Imwalle has expressed financing concerns regarding the inclusion of any wage policies in the agreement, except prevailing wage for construction.

San Jose McEnery Convention Center Plaza Coffee Kiosk

The San Jose McEnery Convention Center recently underwent a \$130 million renovation and expansion and reopened to the public on October 10, 2013. The new Convention Center offers 125,000 square feet of additional flexible ballroom and meeting room space. It increases the facility's space to 550,000 square feet of usable space, making San Jose more competitive as a meetings and events destination.

The Convention Center, located in the Downtown core with its own parking garages, is connected to two hotels and within walking distance of five additional hotels, multiple visual and performing arts facilities and restaurants.

The Convention Center is managed by Team San Jose, an innovative public/private partnership, to foster increased use of the Convention Center, increased hotel room nights, and increased visitors to Downtown. Team San Jose approached the City several months ago regarding a coffee kiosk on the Convention Center Plaza. They believed a coffee retailer would allow conventioners to linger in the Downtown rather than leaving after an event at the Convention Center. An active kiosk would also help activate the new plaza with other visitors, Downtown residents, and employees. In Spring 2013, the Public Works Department issued a Request for Proposals (RFP) to seek out potential coffee vendors/retailers to design, build, operate, and maintain a coffee café on the Convention Center Plaza. The RFP included prevailing wage requirements for the construction of the coffee café. No potential vendors/retailers/operators responded to the RFP.

Since there were no proposers, Team San Jose received City authorization to directly contact Starbucks for the Convention Center Plaza. Starbucks expressed interest and the Office of Economic Development is under negotiations to open a kiosk on the plaza of the Convention Center.

The proposed agreement is at market rate with no City funds or subsidy. Starbucks has expressed concerns regarding the inclusion of any wage requirements including labor peace provisions, except prevailing wage for construction.

ANALYSIS

Two private sector entities have expressed interested in investing in Downtown San Jose.

Imwalle Properties Inc.

In 2006, Don Imwalle, Jr., after joining his late father's firm of Imwalle Stegner, formed what is now Imwalle Properties Inc. (Imwalle Properties). The company owns and manages over 400,000 square feet of retail properties in the Bay Area and has developed 80 projects totaling over 1.1 million square feet. Imwalle Properties has extensive experience in adaptive reuse of existing commercial structures ranging from contaminated gas station sites to historic downtown retain buildings.

Starbucks

With more than 18,000 stores located in 62 countries, Starbucks is the premier roaster and seller of specialty coffee in the world. The stores have become neighborhood-gathering places for friends and family. Their customers enjoy quality service, an inviting atmosphere, and an exceptional cup of coffee.

City's Wage Policies

The City Manager's Office believes the Living Wage Policy should not apply to these two proposed lease agreements for the following reasons:

1. Neither transaction involves City funds or a City subsidy. The City Hall Retail space and the Convention Center Plaza Coffee Kiosk shall be fully built-out and finished at the sole expense of the respective Developer and Tenant. Lease payments to the City will be at market rate.
2. Both leases would function as private leases on City property, with the City as the landlord, and would serve predominantly public purposes. The City has no role in the operation of either business, or products and services provided.
3. Both Imwalle Properties and Starbucks have indicated to City staff that imposing any wage policy requirements in the leases, except prevailing wage for construction, creates financial and competitive hardships in the operation of their respective businesses.

Proposed Living Wage Policy Modification and Clarification

In addition to these two specific situations mentioned above, the City Manager's Office proposes the following modification and clarification to the Living Wage Policy.

Any lease in which the City is Landlord where the City provides no public funds or subsidies and is not for direct services to the City or services that the City would normally provide to residents, shall not be subject to living wage requirements including labor peace provisions.

This modification would alleviate any ambiguities and inconsistencies in the interpretation of the Policy going forward. It would also remove long-standing private sector objections, which could lead to private investment and expansion of services and amenities available to San Jose residents and visitors.

Should Council not concur with the proposed Policy modification, staff recommends to exempt the Imwalle Properties and Starbucks lease agreements from living wage and labor peace requirements. These two entities believe they should be able to have a high degree of certainty and predictability in the risks and economic exposures they are assuming in these lease agreements with the City. They strongly believe there would be much less certainty and predictability if the City were able to increase the wages of its employees and thus increase its operating costs and altering the economic relationship. In these agreements, Imwalle Properties and Starbucks are not contracting with the City to provide services; the City has no role in their respective operations.

Lastly, the recommendation will not impact the living wage applications at the San Jose Airport because activities at the airport are covered by a Municipal Code Ordinance.

EVALUATION AND FOLLOW-UP

Staff will pursue finalization of the proposed lease terms and return to Council for review in April 2014.

PUBLIC OUTREACH/INTEREST

- Criterion 1:** Requires Council action on the use of public funds equal to \$1,000,000 or greater. **(Required: Website Posting)**
- Criterion 2:** Adoption of a new or revised policy that may have implications for public health, safety, quality of life, or financial/economic vitality of the City. **(Required: E-mail and Website Posting)**
- Criterion 3:** Consideration of proposed changes to service delivery, programs, staffing that may have impacts to community services and have been identified by staff, Council or a Community group that requires special outreach. **(Required: E-mail, Website Posting, Community Meetings, Notice in appropriate newspapers)**

The subject agreement does not meet any of the above criteria; however, this memorandum will be posted on the City's website for the December 17, 2013 Council agenda.

COST SUMMARY/IMPLICATIONS

The ability to complete the above referenced leases will allow revenue generation that will be detailed once the proposals are finalized.

COORDINATION

This memorandum has been coordinated with the City Manager's Budget Office, the City Attorney's Office, and the Public Works Department.

CEQA

Not a Project. File No. PP10-068(c), Municipal Code or Policy change that involves no changes in the physical environment.

/s/
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