



Committee: GO
Committee Review: Completed
Staff: Ludeen McCartney-Green, Legislative Attorney
Purpose: Final action – vote expected
Keywords: n/a

AGENDA ITEM #13
March 22, 2022
Action

SUBJECT

Bill 35-21, Prevailing Wage Requirements – Construction Contracts – Amendments
Lead Sponsor: Councilmember Hucker and Co-Lead Sponsor: Councilmember Jawando
Co-Sponsors: Councilmembers Glass, Rice, Albornoz, Katz, Riemer, and Navarro

EXPECTED ATTENDEES

Ash Shetty, Director, Office of Procurement
Grace Denno, Manager, Office of Procurement
Megan Greene, Associate Attorney of the Office of the County Attorney
Aseem Nigam, Director, DHCA
Frank Demarais, Deputy Director, DHCA
Nancy Feldman, Fiscal Manager, Department of Finance

COUNCIL DECISION POINTS & COMMITTEE RECOMMENDATIONS

- Government Operations & Fiscal Policy Committee recommended approval (3-0) of Bill 35-21, as amended.
- Council adopted an amendment (Amendment #3) on February 15, 2022, by a 5-4 vote, followed by a 5-4 vote to table the Bill (Councilmembers Friedson, Navarro, Rice, and Riemer opposed).
- Council unanimously adopted a motion to take the bill off the table on March 1, 2022; followed by a motion for reconsideration and postponement of the vote on reconsideration by a 7-2 vote (Councilmembers Friedson and Navarro opposed).
- Currently, **three issues remain for the Council's consideration:**
 - (1) whether to expand prevailing wage requirements to certain projects involving payments in lieu of taxes (PILOTs) (Amendment #4, which Councilmember Jawando is proposing in lieu of his Amendment #3);
 - (2) if so, how to grandfather in certain in-progress projects (Amendment #5); and
 - (3) whether to impose a local hiring mandate upon certain County-financed construction contracts.
- Action - vote expected.

DESCRIPTION/ISSUE

- Bill 35-21 would:
 - (1) amend definitions related to construction and prevailing wage threshold;
 - (2) adopt the State prevailing wage law regarding the contract threshold limit;
 - (3) apply prevailing wage requirements to [[certain public-private partnerships]] construction contracts that receive payment in lieu of taxes;
 - (4) amend the definition of a county financed construction contract;

- (5) require construction contracts to include local hiring requirements;
- (6) specify violations of the local hiring mandate;
- (7) authorize the Department to adopt regulations; and
- (8) generally amend the law regarding applicability to prevailing wage requirements.

SUMMARY OF KEY DISCUSSION POINTS

- The GO Committee (3-0) approved the following amendments:
 - lower the prevailing wage threshold limit from \$500,000 to \$250,000, or apply the State’s prevailing wage threshold to construction contracts, or whichever dollar threshold is lower;
 - expand the scope of construction to include rehabbing, repaving, pavement milling, and mechanical systems service contract;
 - define the types of “mechanical systems service contract” that should receive prevailing wage rates, i.e. HVAC, refrigeration, electrical, plumbing, and elevator systems;
 - adopt the federal prevailing wage threshold of \$2,500 or more for mechanical systems service contracts
- In addition, the GO Committee reserved for discussion at the full Council two amendments:
 - Whether the Council should adopt amendment #3 that would apply prevailing wage requirements to payment in lieu of taxes (PILOTs) construction projects?
 - Whether the Council would amend the Bill in its current form to remove the “requirement” for a local hiring mandate?
- The remaining issues include whether the Council will reconsider final action on Amendment #3, and whether it will adopt Amendments ## 4 and 5.
- The local hiring mandate remains a key discussion point.

This report contains:

Staff Report	Pages 1-19
Bill 35-21	©1
Legislative Request Report	©8
Fiscal Impact Statement	©10
Department of Finance – Analysis	©13
Economic Impact Statement	©17
RESJ Impact Statement	©25
Councilmember Jawando’s Amendments	©30
County Executive Memorandum	©34
Public Testimony	
Larry Stafford	©41
Terriea Smalls	©43
Yummy Carroll	©44
Thomas Bello	©45
Chris Madello	©46
Victoria Leonard	©47
Lorie Craig	©48
Kurt Snyder	©49
Gustavo Torres	©51

Jason Ascher	©53
Laura Wallace	©54
Marcus Jackson	©56
Shruti Bhatnagar	©61
Gerard Waites	©62
Roger Manno	©81
MD Labor & Industry – Prevailing Wage Rates Sheet	©82
Enacted Bill 26-21, PILOT – Affordable Housing – Amendments	©89
Executive Branch Response to Bill 35-21	©95
Types of PILOT Agreements	©99

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M E M O R A N D U M

March 17, 2022

TO: County Council

FROM: Ludeen McCartney-Green, Legislative Attorney

SUBJECT: Bill 35-21, Prevailing Wage Requirements – Construction Contracts – Amendments

PURPOSE: Action – Council Vote Expected

<p>Government Operations and Fiscal Policy Committee recommendation (3-0): enact Bill 35-21 with amendments.</p>

Bill 35-21, Prevailing Wage Requirements – Construction Contracts – Amendments, sponsored by Lead Sponsor Councilmember Hucker and Co-Lead Sponsor Jawando, was introduced on October 12, 2021. The Council held a public hearing on the Bill with 13 speakers on November 2, 2021. A Government and Operations and Fiscal Policy Committee (GO) worksession was held on January 13, 2022. The full Council held worksessions on February 15 and March 1. At this time, **three issues remain for the Council's consideration** (as described more fully beginning at page 10 of this memorandum):

- (1) whether to expand prevailing wage requirements to certain projects involving payments in lieu of taxes (PILOTs);
- (2) if so, how to grandfather in certain in-progress projects; and
- (3) whether to impose a local hiring mandate upon certain County-financed construction contracts.

Bill 35-21 would:

- (1) amend definitions related to construction and prevailing wage threshold;
- (2) adopt the State prevailing wage law regarding the contract threshold limit;
- (3) apply prevailing wage requirements to [[certain public-private partnerships]] construction contracts that receive payment in lieu of taxes;
- (4) amend the definition of a county financed construction contract;
- (5) require construction contracts to include local hiring requirements;
- (6) specify violations of the local hiring mandate;
- (7) authorize the Department to adopt regulations; and
- (8) generally amend the law regarding applicability to prevailing wage requirements.

BACKGROUND

The Prevailing Wage law regulates the hours of labor, rates of pay, conditions of employment, obligations of employers, and subcontracts for public works in Maryland. In 2009, the County passed its first prevailing wage law patterned after the Federal Davis-Bacon Act, which was enacted in 1931 to cover federally funded construction contracts valued at more than \$2,000 that would pay employees the prevailing wage rate as determined by the U.S. Secretary of Labor.

The purpose of the Maryland Prevailing Wage Law, as described by the Court of Special Appeals, is to avoid labor unrest by stabilizing wage rates for public works projects and to prevent wage rates in the private sector from being undercut by large public works projects. *See Barnes v. Commissioner of Labor & Industry*, 45 Md. App.396, cert. denied 288 Md. 731 (1980), *aff'd*, 290 Md. 9 (1981). In essence, the law was established to prevent unfair bidding practices and wage competition.

Chapter 11B, Section 33C of the County's Prevailing Wage Law requires a contractor to pay an employee the basic hourly wage rate as determined by the Commissioner of Labor and Industry¹ for a County financed construction contract that is \$500,000 or greater. Any public works contract valued at less than \$500,000 is not required to pay prevailing wages. In addition, the prevailing wage does not include school construction projects.² A county financed construction contract, under County Code 11B, states:

County financed construction contract means a contract for construction work that is awarded by the County or where County funds are used to finance all or part of the cost of the contract.

According to the Office of Procurement, the County has approximately 100 existing construction contracts that are subject to the current prevailing wage law. This is **separate** from service contracts for routine maintenance that fall under the living wage requirement law. The living wage and the prevailing wage are not the same concept.

PURPOSE

The purpose of this bill is to expand the applicability of the County's prevailing wage law for construction contracts by lowering the threshold value of a covered contract from \$500,000 to \$250,000. This change would align the County with current State law recently passed over a Governor's veto— House Bill 37 and Senate Bill 35, (*Procurement – Prevailing Wage – Applicability*).³ By lowering the minimum contract value for the prevailing wage requirement and expanding the definition of construction, an increased number of local projects, including maintenance and services contracts directly related to construction, would be required to provide prevailing wages.

¹ See Prevailing Wage Sheet. < <https://www.dllr.state.md.us/PrevWage/web/content/PWRequestRates.aspx>>

² The County is preempted by State law. See, In *McCarthy v. Board of Education of Anne Arundel County*, 280 Md. 634 (1977). School construction contracts that are funded by 50% or more State funds are subject to the State Prevailing Wage Law. However, school construction contracts awarded by the County Board of Education generally contain less than 50% State funding.

³ <https://mgaleg.maryland.gov/mgawebsite/Legislation/Details/SB0035>

SPECIFICS OF THE BILL

Under Section 11B-33C, if amended, the prevailing wage contract value threshold limit would decrease from \$500,000 to \$250,000. Further, the Bill would expand the definition of “construction” to include “service contracts” related to construction that provide ongoing maintenance to existing facilities to upkeep equipment, components, or systems.

In addition, this Bill would clarify the law’s applicability for public-private partnership construction contracts where the County provides funding assistance over \$5 million dollars for economic development projects with an exclusion for certain affordable housing developments or developments with more than 20 Moderately Price Dwelling Units (MDPU). Lastly, the Bill would also implement a local hiring mandate for a County financed construction contract that would require the contractor and all subcontractors to fill at least 51% of new jobs with County residents and submit timely reports to ensure compliance.

There are several local jurisdictions that have passed legislation to lower the prevailing wage threshold, including Anne Arundel County, Baltimore County, and Baltimore City.

PUBLIC HEARING

All 13 speakers supported and commended the introduction of Bill 35-21. There were several oral and written testimonies that requested to amend the Bill’s definition of “service contracts” and narrow the classification to specifically include mechanical service contracts. The Council received written testimony from one speaker, Progressive Maryland, who suggested amending the local hiring mandate to include “best efforts” for the reporting requirement. ©41.

SUMMARY OF GO WORKSESSION

The GO Committee held a worksession on January 13. Participating in the discussion were Councilmembers Hucker and Jawando, Procurement Director Ash Shetty, Procurement Manager Grace Denno, Associate County Attorney Megan Greene, Senior Legislative Attorney Bob Drummer, and Legislative Attorney Ludeen McCartney-Green.

The Committee discussed the purpose and the specific provisions of the Bill. The Committee recommended by a 3-0 vote the following amendments:

- strike “service contracts” from the definition of construction and expanded construction to include resurfacing, pavement milling, and mechanical systems service contracts.
- add the definition of mechanical systems service contract.
- lower the prevailing wage threshold limit to \$250,000 or the state’s prevailing threshold limit, which is lower.
- adopt a federal threshold for a mechanical systems service contract

The Committee held a detailed discussion on whether to amend the Bill to require prevailing wages for PILOT construction projects (Councilmember Jawando’s Amendment #3). The Committee requested Council staff inquire from County Executive staff the impact a

prevailing wage requirement for PILOTs would have on existing economic development projects and needed a fiscal impact statement for further consideration (an extension was requested by OMB until December 7; however, Council did not receive a FIS by the stated deadline). The Committee decided to reserve the remaining discussion on PILOTs for full Council. Secondly, Council staff briefed the Committee on the legal hurdles with a local hiring mandate provision. The Committee also decided to bring the issue to full Council for further discussion.

Provided below, are the discussion topics and specific amendments adopted by the GO Committee:

1. Should the Committee amend the language related to the County’s Prevailing Wage threshold limit?

The Maryland General Assembly passed in the 2021 Session - House Bill 37 and Senate Bill 35, *Procurement – Prevailing Wage – Applicability*.⁴ The state bill lowered the prevailing wage threshold from \$500,000 to \$250,000 – this passage provides the opportunity for the County to amend and align its prevailing wage with the State. Lowering the prevailing wage means that a substantial number of local construction projects that are currently not required to pay prevailing wages would be required to do so under the Bill’s new threshold limit. If the State increases or lowers the threshold limit in the future, the County law would remain consistent with the State law. The County Executive supports lowering the threshold limit. ©34.

Councilmember Jawando’s Amendment #1 proposes a similar change by lowering the County’s prevailing wage threshold to \$250,000, or the state’s threshold limit, whichever is lower. See ©30, However, unlike Bill 35-21, the amendment does not distinctly tie it to the state’s threshold limit. Similarly, Baltimore County’s threshold is \$300,000 and Anne Arundel County’s threshold is \$250,000, but neither is tied solely to the State’s threshold. The state has the authority to raise the threshold in the future; therefore, this amendment provides an alternative approach by *not* solely aligning the bill language to mirror the state’s current threshold limit; instead, the language provides for whichever amount is lower.

Decision Point: Whether the Committee should adopt the bill as introduced with the prevailing wage threshold aligned with the State’s prevailing wage threshold or in the alternative adopt Councilmember Jawando’s amendment?

Committee Recommended (3-0): to amend lines 40-41 and adopt Councilmember Jawando’s Amendment # 1 by lowering the prevailing wage to \$250,000 or the State’s prevailing wage threshold limit, whichever is lower.

County funds means any:

- (1) funds directly appropriated by the County; or
- (2) grant funding for construction under Section [20-75](#) that cumulatively exceeds ~~[\$500,000]~~ \$250,000 or the prevailing wage threshold limit, whichever is lower.

⁴ <https://mgaleg.maryland.gov/mgaweb/Legislation/Details/SB0035>

2. Should the definition for “construction” include “service contracts”?

a. Construction

County Code § 11B-1 defines *construction* as “the process of building, altering, repairing, improving, or demolishing any structure or building, or other improvements of any kind to any real property. Construction does *not* include the routine operation, repair, or maintenance of existing structures, buildings, or real property.” On average, the County has 100 existing construction-related projects under the current definition.

Bill 35-21 seeks to expand the scope of prevailing wage for construction projects to include the process of rehabbing, routine operation, repair, and service contracts for existing structures, buildings, or real property. The Office of the County Attorney (OCA) opined, if the definition of construction is amended, the defined term “service contract” should be removed because it may cause conflicting legal interpretation because 1) it is already defined in Chapter 11B; and 2) it includes all maintenance service jobs, including, but not limited to, custodial services, landscaping, snow removal, window washing, or street cleaning. These jobs are generally classified under the living wage law, and the definition, as introduced, would change the classification of the traditional service jobs to construction-related services.

The Living Wage law is codified at §11B-33A of the County Code, also called wage requirement law. It requires certain businesses that provide services to the County to pay employees working on a County contract a minimum living wage currently set at \$15.40 per hour. The Living Wage Law does not apply to construction contracts. Therefore, the Bill’s definition should be amended to ensure it captures construction-related jobs rather than the broad definition that includes service jobs classified under the living wage requirement law. With the expansion of the definition of construction, the Office of Procurement predicts this would include an additional 30-40 maintenance service contracts that would be paid under the labor category of prevailing wage instead of the wage requirement rate.

For the reasons above, Councilmember Hucker proposed a friendly amendment to strike “service contracts” and replace with “mechanical systems service contracts.” The County Executive also supports this amendment. ©34.

Amend line 9, as follows:

Construction means the process of building, altering, repairing, improving, rehabbing, or demolishing any structure or building, or other improvements of any kind to any real property, including routine operation, repair, and ~~[[services contracts for]]~~ mechanical systems service contracts of existing structures, buildings, or real property. [Construction does not include the routine operation, repair, or maintenance of existing structures, buildings, or real property.]

Decision Point: Whether to amend the definition of construction by striking “service contracts” and replacing with “mechanical systems service contracts”?

Committee Recommendation (3-0): to adopt an amendment by narrowing service contracts to specifically mechanical service system contracts for the definition of construction.

In addition, Councilmember Jawando has a proposed amendment for the Committee to consider expanding the definition of construction, even further, to include “resurfacing and pavement milling.” See ©30.

Decision Point: Whether to expand the definition of construction to include Councilmember Jawando’s proposed amendment #2. ©30?

Committee Recommendation (3-0): to adopt an amendment for the definition of construction to include resurfacing and pavement milling.

Amend line 6, as follows:

Construction means the process of building, altering, repairing, improving, rehabbing, resurfacing, pavement milling, or demolishing any structure or building, or other improvements of any kind to any real property, including routine operation, repair, and ~~[[services contracts for]]~~ mechanical systems service contracts of existing structures, buildings, or real property. [Construction does not include the routine operation, repair, or maintenance of existing structures, buildings, or real property.]

b. Mechanical Systems Service Contract Amendments

Definition

A friendly amendment supported by lead sponsor, Councilmember Hucker, to remove the definition of “service contracts” and replace it with the definition of “mechanical systems service contracts.” The definition is amended as described below:

Strike and amend lines 13-27, as follows:

[[Service Contract means a contract for labor services by the County, subject to prevailing wage law, that provides ongoing maintenance of existing facilities to upkeep and preserves equipment, components, or systems.]]

Mechanical Systems Service Contracts means a contract for service of the following systems:

- (a) HVAC systems, including heating, ventilation, and cooling/air-conditioning equipment;
- (b) refrigeration systems;
- (c) plumbing systems, including pipes, tanks, fittings, and other elements that control the water and gas supply, heating, and sanitation of a building;
- (d) electrical systems, including any electrical power and overhead and underground lines, poles, transformers, and other related equipment; or
- (e) elevator systems, including escalators, moving walkways, and other related conveyances.

Decision Point: Whether to amend the bill and adopt the definition for “mechanical service contracts”?

Committee Recommendation (3-0): amend the Bill to strike the definition of “service contracts” and replace it with the definition of “mechanical service contracts.”

Federal Prevailing Wage Threshold

Another amendment supported by Councilmember Hucker is mechanical systems service contracts should be subject to the federal prevailing wage threshold under the McNamara-O’Hara Service Contract Act (41 U.S.C. 6702(a)(2)) rather than applying the State’s prevailing wage threshold of \$250,000.

The McNamara-O’Hara Service Contract Act (SCA) requires contractors and subcontractors performing services on prime contracts in excess of \$2,500 to pay service employees in various classes no less than the wage rates and fringe benefits found in prevailing wages for each locality.⁵ Maryland Prevailing Wage Rate is determined by the State’s Department of Labor for each type of construction job. Each year the rate is set for each county and published on the State’s website. See Montgomery County Prevailing Wage Rates ©82.

In essence, Bill 35-21 would establish two separate prevailing wage thresholds: 1) construction projects subject to the State’s prevailing wage threshold, currently \$250,000 or more; and 2) mechanical system service contracts would need to meet the SCA federal prevailing wage threshold dollar amount, currently \$2,500 or more. The primary reason to establish a separate threshold for mechanical system service contracts is that the total dollar value for mechanical services (HVAC, plumbing, or electrical) is significantly lower than construction contracts, roughly mechanical services contracts can amount to an average of \$5,000 for ongoing building maintenance. The following amendment was proposed for adoption:

Insert lines 64 and 79, as follows:

⁵ <https://www.dol.gov/agencies/whd/government-contracts/service-contracts>.

- (b) *Exclusions.* ~~[[This]]~~ Except as provided in subsection (9), this Section does not apply to a County financed construction contract:

* * *

- (9) This Section applies when a contract dollar threshold of any mechanical systems service contract, as defined in this Chapter, must be in excess of the threshold amount codified at 41 U.S.C. 6702(A)(2), the McNamara-O'Hara Service Contract Act of 1965, as amended.

Council staff had a meeting with Procurement who confirmed there are two types of contracts managed by its Department: 1) prime construction contracts in excess of \$100,000, and 2) informal solicitation contracts valued between \$10,000 - \$100,000. A prime construction contract consists of a general contractor who works directly with the Department and manages the subcontractor's payments for services. The amount of the contract for the service jobs is usually embedded in the prime construction contract total dollar amount.

Alternatively, if there is maintenance work required for a facility or more commonly called a task order for HVAC services, the Office of Procurement would typically enter a multi-year contract with a mechanical company for said services. The proposed amendment to include a separate provision with a federal prevailing wage threshold of \$2,500 for a mechanical services contract would not fall in the realm of a prime or informal construction contract because a contract value below \$10,000 is too low. Instead, the one-time HVAC services would be considered a direct purchase order. A direct purchase order is an informal procurement of construction, goods, or services with a total value of no more than \$10,000.⁶ Usually, a written contract is not required because the amount is under \$10,000 and its frequency is a one-time service. Therefore, to extend Procurement's authority for mechanical system service contracts that may value between \$2,500 - \$10,000, Council staff conferred with OCA and agreed on the option to amend Executive regulations to exclude mechanical service contracts as a direct purchase order. This would provide Procurement the authority to oversee all mechanical systems service contracts above the federal threshold of \$2,500.

Decision Point: Whether to adopt the federal McNamara prevailing wage threshold for mechanical service contracts?

Committee recommendation 3-0: to adopt the amendment to apply the federal prevailing wage threshold for mechanical service contracts subject to amendments to Executive regulations. The Office of Procurement would amend procurement regulations related to direct purchase orders – the amendment would authorize the Department to require written contracts for mechanical service valued between \$2,500 - \$10,000.

⁶ COMCOR 11B.00.01.04.1.9

3. What is the Racial Equity and Social Justice Impact Statement?

OLO anticipates a favorable impact of Bill 35-21 on racial equity and social justice in the County because the number of Black residents employed under county-financed construction projects would increase. OLO anticipates that lowering the contract threshold for the prevailing wage mandate from \$500,000 to \$250,000 could result in an increase in the number of Black-owned firms that secure County construction contracts. ©25.

Although the number of residents in the County would increase for construction contracts if a local hiring mandate were implemented, Council staff believe it is conclusory to determine that only black residents would benefit solely based on the lowering of the prevailing wage threshold.

4. What is the fiscal impact of Bill 35-21, as amended by the GO Committee?

Generally, the Maryland Department of Legislative Services (DLS) has estimated that the impact of prevailing wage on state construction contracts typically increases the costs of a project between 2% and 5%.⁷ DLS has also stated that research has provided some inconsistency and inconclusiveness of the empirical research, however, actual effects may vary by project, with some projects exhibiting higher cost differences and others experiencing negligible differences.

The Department of Finance has researched other expert analyses related to projected costs of prevailing wage on construction contracts and identified Maryland Interagency Commission on School Construction and the State of Virginia estimates 10% - 15%, while research from Hindel and Delman at Michigan State University found affordable housing projects costs up to 6% (includes costs for enforcement of labor and employment laws). ©13

OMB used the same DLS analysis of a potential 2%-5% percent and applied it to the \$32 million in the DOT construction contracts that were previously classified as maintenance contracts, the total estimated costs would be between \$640,000 and \$1.6 million. ©11 Over the next six years, the estimated costs could be \$2.3 million to \$5.8 million.

Baltimore County passed legislation requiring prevailing wage rates for local public works contracts and used the analysis provided by DLS for projected costs.

5. Technical Amendment (Strike Lines 43-54):

The Bill in its current form, lines 43-54, excludes affordable housing developments, including MPDUs, while Amendment #3 will add PILOTs to the prevailing wage requirement. Each provision conflicts with the other; therefore, Council staff recommends striking lines 43-54.

⁷ Fiscal Note for House Bill 61/Senate Bill 259, Procurement - Prevailing Wage – Applicability.
https://mgaleg.maryland.gov/2022RS/fnotes/bil_0001/hb0611.pdf

In addition, the County Executive's November 30 memorandum ©34 states the County already applies prevailing wage to public-private partnerships where the County contributes funding, and the contract meets the monetary threshold of \$500,000 or more; therefore, it would be redundant to include lines 43-54.

Strike lines 43-53, as follows:

County funds means any:

- (1) funds directly appropriated by the County; or
- (2) grant funding for construction under Section [20-75](#) that cumulatively exceeds the [\$500,000] prevailing wage threshold limit; ~~or~~
- (3) public-private partnership where the County funds a cumulative value of over \$5,000,000 in assistance. This subsection does not apply to a construction contract for:
 - (a) any affordable housing development projects by the Housing Opportunity Commission;
 - (b) any non-profit or for-profit housing developer that receives funding or loans from the County's Housing Initiative Fund or Housing Opportunity Fund; or
 - (c) any residential housing development where there are at least 20 units that require moderately priced dwelling units as defined in Chapter 25A.]]

Decision Point: Whether the Council should strike lines 43-54? Committee and full Council agreed to remove lines 43-54.

COUNCIL SESSION – FEBRUARY 15

As reported out of the GO Committee, Chair Navarro, recommended Bill 35-21, as amended for Council action. However, there were three issues that remained for full Council discussion – (1) whether the Council should adopt an amendment to apply prevailing wage requirements to payment in lieu of taxes (PILOTs) construction projects; (2) if so, how to grandfather in pending projects; and (3) whether the Council should amend the Bill, in its current form, to remove the “requirement” for a local hiring mandate? (Due to time constraints, this issue was not raised for discussion at the Council session).

Councilmember Jawando introduced Amendment #3 ©30, which would amend the definition for county financed construction contracts so that the prevailing wage requirement would apply to projects that receive PILOTs.

Amendment #3

Payment in Lieu of Taxes or PILOTs means a payment determined by the Director of Finance that requires a property owner to pay the County an amount equivalent to local real property taxes owed in exchange for tax payment relief. This applies to a qualifying development with more than 3 stories above ground.

County financed construction contract means a contract for construction work that is awarded by the County or where County funds are used to finance all or part of the cost of the contract[[]], including payment in lieu of taxes.

Council Vote (5-4): The full Council initially voted to adopt Amendment #3 but, as described below, subsequently, voted to reconsider the amendment.

Procedural Action – Motion to Table

Councilmember Friedson moved to table the bill until more information is received from interested stakeholders, the affordable housing community, and the Executive Branch to better understand the potential impact of the amendment to existing projects in the pipeline. The Council voted 5-4 to lay the bill on the table.

COUNCIL SESSION – MARCH 1

Council President Alborno made a series of motions that would enable the full Council to continue discussion related to Amendment #3 (PILOT amendment), which was previously adopted by the Council with a 5-4 vote. See above Council Session – February 15.

First, there was a Motion to Take the Bill from the table, which the Council unanimously approved by 9-0. Second, there was a Motion for Reconsideration of the adopted PILOT amendment (Amendment #3), but the vote on the motion for reconsideration was postponed until March 22. The motion to reconsider and postpone prevailed by a 6-3 vote.

Postponing the vote, essentially, allows the Council the opportunity to gather additional information to determine the impact of Amendment #3 before final action.

Further, a motion for reconsideration provides the Council with a few options – it suspends the original vote on Amendment #3 while additional information is sought. The Council now has the following options regarding Amendment #3: 1) keep the adopted PILOT amendment; 2) vote against the PILOT amendment; or 3) offer an amendment to the amendment.

Once the Council decides upon Amendment #3, it may consider the remaining issues of how to grandfather in existing projects and whether to include a local hiring mandate.

ISSUES AND AMENDMENTS FOR FULL COUNCIL DISCUSSION

1. Remaining Issue #1: Applicability to PILOTs

General Information about PILOTs. For the purpose of general discussion and to understand the concept and nuances with payment in lieu taxes agreements, Council staff has identified the following main points:

- A PILOT is an operating subsidy that reduces annual operational costs (property taxes) after the project is completed. It is a direct benefit to the property owner.
- A PILOT does not provide construction funding, but it can be built into the pro forma for the costs of the building or rehabilitating units. This can also allow an organization that is going to maintain ownership to meet their ongoing operating expenses, including debt. It can also increase the value of a property when it changes ownership as the owner will not be paying the full property tax bill.
- A PILOT agreement can be executed at different times in the development, acquisition, or agreement to sustain affordable units.
- The agreement often requires the commitment from the property owner to provide reduced rent over a certain period of time, (e.g. 15 years).
- A PILOT agreement for developments that include rental properties.
- Organizations with PILOT agreements may be large organizations that are non-profit or for-profit (such as HOC, MHP, developers at WMATA or in Enterprise Zones), medium-sized organizations (such as faith-based organizations or organizations serving seniors or people who have exited homelessness), or small organizations that may have only a few scattered units.

Recent Legislation Enacted by Council related to PILOTs

PILOTs are regulated by state and County law. State law authorizes the County to use PILOTs to negotiate agreements for two types of developments: 1) a property leased from a government agency that would otherwise be subject to a tax levy, i.e. high-residential units near transit stations, e.g., WMATA projects; or 2) low-and moderate-income housing.⁸

In 2020, the Council passed (7-2), Bill 29-20, *Taxation – Payments in Lieu of Taxes – WMATA property – Established*,⁹ to require the Director of Finance to offer PILOTs for residential or commercial high-rise buildings constructed by a private developer on property leased from the WMATA at the metro station. **When Bill 29-20 was under consideration by the Joint GO-PHED Committee on September 23, 2020, the Committed rejected an amendment to require the use of prevailing wages for WMATA projects (4-1, Jawando opposed). Therefore, the**

⁸ Tax-Property Article of the Maryland Code, Sections 7-501, 7-503, 7-505, and 7-506.1.

⁹Montgomery County Council – LIMS – Council Legislation – Bill 29-20.

<https://apps.montgomerycountymd.gov/ccllims/BillDetailsPage?RecordId=2668&fullTextSearch=WMATA>

Council did not require WMATA projects to be subject to the county's prevailing wage requirements when it recently considered the issue.

Subsequently, in December 2021, the Council enacted Bill 26-21, *Taxation – Payments in Lieu of Taxes – Affordable Housing – Amendments*, which provides that the Director of Finance must authorize an automatic PILOT that exempts 100% of real property taxes that would otherwise be levied for certain qualified housing developments, including developments owned and controlled by: (1) Housing Opportunities Commission (HOC); (2) a non-profit housing developer if at least 50% of the dwelling units are affordable; and (3) non-profit housing developer if all units are subject to Section 8 Project-Based Rental Assistance.¹⁰ Effective March 28, 2021, Bill 26-21 will require the Department to exempt 100% of the property taxes for those developments. ©89

Executive Branch Response to the PILOT Amendment (Amendment #3). Council staff prepared and submitted a set of questions to the Executive Branch, the responses to the questions would provide Councilmembers with information related to the impact or any potential ramifications of the adopted amendment #3. ©95

Procedural Action - Motion to Reconsider

Pending before the Council is the motion to reconsider Amendment #3 under Council Rule 10. Below are options regarding Amendment #3:

1. Adopt the Motion for Reconsideration (Voids Amendment #3)

If the Council elects to adopt the motion for reconsideration, then Amendment #3 would no longer be adopted.

2. Reject the Motion for Reconsideration (Sustains Amendment #3)

If the Council elects to reject the motion for reconsideration, Amendment #3 would remain in Bill 35-21.

3. Proposed Amendments by Councilmember Jawando

In lieu of Amendment #3, Councilmember Jawando intends to propose an alternative amendment, referred to as Amendment #4, followed by, Amendment #5. ©32.

Amendment #4 seeks to provide an exclusion for only a subset of PILOTs. Under the amendment, HOC properties, developments with at least 50% or more affordable units, and Section 8 rental-based housing would be excluded from the prevailing wage requirement. This would address concerns raised by Montgomery Housing Alliance (MHA) ©84 and Making Homes Possible (MHP) ©82 regarding potential unintended negative impacts the amendment could have on efforts to address affordable housing needs in the County.

¹⁰ Montgomery County Council – LIMS – Council Legislation – Bill 26-21.
<https://apps.montgomerycountymd.gov/ccllims/BillDetailsPage?RecordId=2717&fullTextSearch=26-21>

For further context, it is important to identify there are nine different types of PILOTs agreements used in the County (e.g. WMATA, HOC, Affordable Housing – Automatic and Discretionary, Section 8 Rental-Based, Enterprise Zones, MPDUs, Group Homes, and Affordable Elderly Housing). See Nine Types of PILOT Agreements ©99. Amendment #4 would exclude most of the affordable housing PILOTs, the remaining PILOTs (Enterprise Zones, MPDUs, Group Homes, or Affordable Elderly Housing) are considered by DHCA as very few and do not pose a substantial impact; however, for the few PILOT agreements that are not excluded, DHCA would still need to monitor the maintenance and service agreements that include mechanical system service contracts with a value over \$2,500 to ensure compliance with prevailing wages.

In addition, Amendment #4 revises the definition of payment in lieu of taxes to include both: (1) qualified developments as defined in Section 52-24A of the Code applicable to properties leased from WMATA, and (2) qualified housing developments under Section 52-24 of the Code, applicable to an owner of an affordable housing residential building eligible for real property tax relief.

Amendment #4

Strike and Amend lines 58-62, as follows:

Payment in Lieu of Taxes or PILOT means an authorized payment made by the owner of a qualifying development or qualified housing development instead of paying the County real property tax, including real property tax levied under a special area taxing law, that would otherwise be due.

Amend lines 34-37, as follows:

County financed construction contract means a contract for construction work that is awarded by the County or where County funds are used to finance all or part of the cost of the contract. A county financed construction contract includes a construction contract that receives in whole or in part a payment in lieu of taxes under Sections 52-24(b) or 52-24A, unless the qualified housing development:

- (1) does not exceed four (4) stories above ground level; or
- (2) is provided under Section 52-24(c).

Decision Point: Whether the Council should amend the Bill and adopt Councilmember Jawando's Amendment #4 that would exclude certain PILOT affordable housing projects from the prevailing wage requirements?

2. Remaining Issue #2 – Transition/Grandfathering Clause

If the Council decides to adopt Amendment #4 to require prevailing wage for certain PILOTs), Councilmember Jawando intends to propose, Amendment #5, an amendment to include a “transition clause.” The transition clause would clarify that all prior construction contracts where County funds were appropriated or granted, or PILOT projects that have an approved plan by the Planning Board prior to the passage of Bill 35-21, would be exempt from this legislation, including, for example, Strathmore Squares, the high-rise residential development at Grosvenor.

Amendment #5

Insert line 146, as follows:

Sec 2. Transition. Section 1 of this Act must not apply to: (1) a county-financed construction contract if, prior to the effective date of this Act the contract was executed; or (2) a property for which a preliminary plan, a site plan, or a sketch plan was approved by the Planning Board prior to the effective date of this Act, if the property is, or becomes, a qualifying housing development under Section 52-24 or a qualifying development under Section 52-24A.

Decision Point: Whether to amend the Bill to include a transition clause that will exempt certain county finance construction projects and construction projects that would receive a payment in lieu of taxes agreement?

3. Remaining Issue #3 - Local Hiring Mandate – Legal Challenges

Bill 35-21 requires a local hiring mandate where “at least 51% of the new jobs to complete the County financed construction project that exceeds the prevailing wage threshold limit must be filled by a Montgomery County resident.” It also provides a waiver by the Director of the Office of Procurement upon a showing of good faith effort by the Contractor if they are unable to meet the hiring standard. The purpose of the provision is to enrich equitable hiring to reflect the demographics of the community, keep local income taxes in the County to maintain economic stability, establish a reliable pipeline for local workers.

However, despite its well-intended purpose, the provision *may* be fraught with legal challenges. As a result of this type of discrimination against nonresidents, **local hire requirements have been subject to legal challenges and have been held by courts to violate certain constitutional provisions.**

Under the U.S. Constitution Privilege and Immunities Clause Article IV, the federal law prohibits a government entity from establishing a residency requirement that excludes other citizens from different jurisdictions, unless it can provide a “substantial” reason for the discriminatory legislation. As part of any justification offered for the discriminatory provision, “nonresidents must somehow be shown to constitute a peculiar source of the evil at which the statute is aimed.” *See, United Bldg. & Constr. Trades Council v. Mayor & Council of Camden*, 465 U.S. 208, 261 (1983). In *Camden* and similarly situated cases, the Supreme Court has struck

down the residency requirement provision because it did not contain evidence of substantial, legitimate reasons for the mandate.

In 2011, D.C. implemented a local hiring mandate that required 51% or more workers on a government contract to be a resident of the District. According to the Washington Times, an audit in 2018 revealed that the District had challenges enforcing the mandate, and contracts valued over 300,000 up to \$5 million failed to adhere to the local hiring requirement.¹¹ Local jurisdictions, including D.C., have tried to justify the mandate by arguing it is designed to “retain local income taxes” or “reduce local unemployment rates.” The District was unable to substantiate these reasons and the Court considered this as an insufficient rationale¹².

The Maryland Court of Appeals has not opined on the legality of a local hiring requirement **The Office of the County Attorney has opined the provision may face legal challenges and has advised it would most likely not survive judicial scrutiny if challenged.**

Administrative Concerns

Council staff contacted Housing Opportunities Commission who identified that it would be a hardship to satisfy a 51% threshold for local hiring mandate. Most of HOC’s contracts are related to the renovation of existing housing and construction of new housing – these are large projects that require firms or general contractors to be available, offer competitive bidding, and price efficiency. While HOC uses County-based firms there is not enough to maintain the scope of its inventory of projects.

Procurement and DHCA have also stated concerns with this provision. ©40

For the reasons described above, Council staff recommends the Council consider striking the local hiring mandate provision (lines 94-134) due to legal and administrative concerns.

a. What, if any, legal implications would Bill 35-21 have if enacted with the local hiring mandate provision?

If the Council decides to preserve the local hiring mandate and a court upholds the challenge, then under Md. Local Gov’t § 1-202, a court will likely sever the provision from the law and retain the remaining parts of the legislation.

Currently, Baltimore City, Baltimore, and Anne Arundel County have all enacted prevailing wage legislation and included a local hiring provision. Each county passed its prevailing wage law in 2021 and has not yet faced a legal challenge.

b. Is there an alternative approach or possible amendments to preserve the concept of local hiring?

The Council may consider a few options if it chooses to keep the local hiring requirement, including:

1. Best Efforts Approach

¹¹ <https://www.washingtontimes.com/news/2018/jun/25/washington-dc-construction-firms-cheat-first-source/>

¹² [Metro. Wash. Chapter v. District of Columbia, 57 F. Supp. 3d 1 \(D.D.C. 2014\)](#)

Amend the Bill to allow contractors to use a “best efforts” approach when trying to hire local workers instead of requiring a mandate. This language would survive a potential violation of the Privileges and Immunities Clause or Equal Protection Clause. This best-effort approach is similar to the provision in Anne Arundel County’s prevailing wage law.

Amend the Bill by adding a prescriptive list that includes specific and measurable targets to determine whether the contractor used “best efforts” and were those efforts reasonable. Some options to define best efforts would include, posting a job position online and in local newspapers, marketing and offering positions at local job fairs, and other marketing strategies. This prescriptive list would provide further guidance for the Director of Procurement to assess whether the best efforts were met or at least reasonable by the contractor.

Amend the provision by reducing the local hiring requirement from 51% to 25% - this would align and be consistent with 52.24A.00.03.b of the Montgomery County Code, which requires 25% of jobs for projects with PILOT agreements be filled by Montgomery County residents. See OCA comments related to this amendment. See ©14 In addition, lowering the threshold provides a lower bar where a contractor is more likely to meet the compliance rate and reduce the potential for violations.

Further, amend to provide the Director with the authority to establish regulations to strengthen enforcement and procurement monitoring of this provision because local hire programs may vary in the type of enforcement mechanisms and there is not a “one-size” fits all approach.

Amend line 93 -100, as follows:

(3) [[require]] make best efforts to hire at least [[51%]] 25% of the new jobs to complete the County financed construction contract that exceeds the prevailing wage threshold limit must be filled by Montgomery County residents [[who reside in the County]].

(A) Waiver. The Director may waive or reduce the requirement of paragraph (d)(3) of this subsection if [[it]] the Director finds that best efforts to comply have been made by the contractor.

(a) Any of the following may be considered to determine compliance with best efforts, including proof of:

(1) job posting, electronically or print, in a local newspaper;

(2) participation at a local job fair;

- (3) subscription with a local job bank; or
- (4) other related marketing strategies intended to attract local workers.

(B) For the proper implementation and enforcement necessary to carry out the purposes of this Section, the Director may adopt regulations and amend regulations in accordance with this Section.

2. Request a Study.

The Council can require the Executive to establish a task force or hire an independent consultant to study and provide the Council a report on specific local hiring practices related to construction contracts in the County subject to prevailing wage. This study could include: 1) the average percentage of local workers on construction projects; 2) whether the demand on local hiring influences bid prices; 3) the amount of County income tax revenue lost by the hiring of non-County residents; 4) identify resources locally available to support local hiring, i.e. list of community-based organizations (CBOs); or 5) identify different methods for effective enforcement; etc. The purpose of the study would be to evaluate the practicality and effectiveness of implementing or legislating a local hiring mandate in the future.

3. Lower the local hiring mandate percentage and implement a one-year sunset clause.

In addition to reducing the local hiring percentage, the Council could couple it with implementing a *one-year* sunset clause. The November 30 memorandum from the County Executive supports a sunset clause. ©34. This will allow the Director to evaluate and assess the effectiveness and compliance rate with the mandate. Several courts have ruled against certain jurisdictions that implemented a mandate but failed to evaluate whether it legitimately justified the discriminatory reason.

Decision Point: Whether to remove or revise the local hiring mandate provision?

Next Step: Roll call vote on whether to enact Bill 35-21 as amended by the GO Committee and full Council.

This packet contains:	<u>Circle #</u>
Bill 35-21	1
Legislative Request Report	8
Fiscal Impact Statement	10
Department of Finance – Analysis	13
Economic Impact Statement	17
RESJ Impact Statement	25
Councilmember Jawando’s Amendments	30

County Executive Memorandum	34
Public Testimony	
Larry Stafford	41
Terriea Smalls	43
Yummy Carroll	44
Thomas Bello	45
Chris Madello	46
Victoria Leonard	47
Lorie Craig	48
Kurt Snyder	49
Gustavo Torres	51
Jason Ascher	53
Laura Wallace	54
Marcus Jackson	56
Shruti Bhatnagar	61
Gerard Waites	62
Roger Manno	81
MD Labor & Industry – Prevailing Wage Rates Sheet	82
Enacted Bill 26-21, PILOT – Affordable Housing – Amendments	89
Executive Branch Response to Bill 35-21	95
Types of PILOT Agreements	99

\\F:\LAW\BILLS\2135 Prevailing Wage Requirements - Construction Contracts - Amendments\Action Memo 2.Docx

Bill No. 35-21
Concerning: Prevailing Wage
Requirements – Construction
Contracts- Amendments
Revised: 2/16/2022 Draft No. 6
Introduced: October 12, 2021
Expires: April 12, 2023
Enacted: _____
Executive: _____
Effective: _____
Sunset Date: None
Ch. _____, Laws of Mont. Co. _____

COUNTY COUNCIL FOR MONTGOMERY COUNTY, MARYLAND

Lead Sponsor: Councilmember Hucker and Co-Lead Sponsor: Councilmember Jawando
Co-Sponsors: Councilmembers Glass, Rice, Alborno, Katz, Riener and Navarro

AN ACT to:

- (1) amend definitions related to construction and prevailing wage threshold;
- (2) adopt the State prevailing wage law regarding the contract threshold limit;
- (3) apply prevailing wage requirements to [[certain public-private partnerships]]
construction contracts that receive payment in lieu of taxes;
- (4) amend the definition of a county financed construction contract;
- (5) require construction contracts to include local hiring requirements;
- (6) specify violations of the local hiring mandate;
- (7) authorize the Department to adopt regulations; and
- (8) generally amend the law regarding applicability to prevailing wage requirements.

By amending

Montgomery County Code
Chapter 11B, Contracts and Procurement
Sections 11B-1 and 11B-33C

Boldface

Underlining

[Single boldface brackets]

Double underlining

[[Double boldface brackets]]

* * *

Heading or defined term.

Added to existing law by original bill.

Deleted from existing law by original bill.

Added by amendment.

Deleted from existing law or the bill by amendment.

Existing law unaffected by bill.

The County Council for Montgomery County, Maryland approves the following Act:

Sec 1. Sections 11B-1 and 11B-33C is amended as follows:

11B-1. Definitions.

Unless the context indicates otherwise, the following terms have the following meanings:

* * *

Construction means the process of building, altering, repairing, improving, rehabbing, resurfacing, pavement milling or demolishing any structure or building, or other improvements of any kind to any real property, including routine operation, repair, and mechanical systems service contract ~~[[service contract]]~~ for maintenance of existing structures, buildings, or real property. [Construction does not include the routine operation, repair, or maintenance of existing structures, buildings, or real property.]

* * *

Mechanical Systems Service Contract means a contract for service of the following systems:

- (a) HVAC systems, including heating, ventilation, and cooling/air conditioning equipment;
- (b) refrigeration systems;
- (c) plumbing systems, including pipes, tanks, fittings, and other elements that control the water and gas supply, heating, and sanitation of a building;
- (d) electrical systems, including any electrical power and overhead and underground lines, poles, transformers, and other related equipment; or
- (e) elevator systems, including escalators, moving walkways, and other related conveyances.

[[Service Contract means a contract for labor services by the County, subject to prevailing wage law, that provides ongoing maintenance of existing facilities to upkeep and preserves equipment, components, or systems.]]

* * *

11B-33C. Prevailing Wage Requirements — Construction Contracts.

(a) *Definitions.* In this Section, the following words have the meanings indicated:

* * *

Construction means work defined in Section [11B-1\(c\)](#).

County financed construction contract means a contract for construction work that is awarded by the County or where County funds are used to finance all or part of the cost of the contract~~[[.]],~~ including payment in lieu of taxes agreement.

County funds means any:

- (1) funds directly appropriated by the County; or
- (2) grant funding for construction under Section [20-75](#) that cumulatively exceeds ~~[\$500,000]~~ \$250,000 or the prevailing wage threshold limit, whichever is lower.

[[3)] public-private partnership where the County funds a cumulative value of over \$5,000,000 in assistance. This subsection does not apply to a construction contract for:

(A) any affordable housing development projects by the Housing Opportunity Commission;

(B) any non-profit or for-profit housing developer that receives funding or loans from the County's Housing

Initiative Fund or Affordable Housing Opportunity Fund;
or

(C) any residential housing development where there are at
least 20 units that require moderately-priced dwelling
units as defined under Chapter 25A.]]

Employee means a laborer, apprentice, journeyman, or mechanic employed by a contractor or subcontractor on a County financed construction contract.

Payment in Lieu of Taxes or PILOTs means a payment determined by the
Director of Finance that requires a property owner to pay the County an
amount equivalent to local real property taxes owed in exchange for tax
payment relief. This applies to a qualifying development with more than
3 stories above ground.

Prevailing wage means the hourly wage rate set by the State Commissioner of Labor and Industry for State-funded construction contracts in the County.

Prevailing wage threshold limit means the minimum dollar amount for
a construction contract subject to the State prevailing wage law under §
17-202 of the State Finance and Procurement Article of the Maryland
Code, as amended.

(b) *Exclusions.* [[This]] Except as provided in subsection (9), this Section
does not apply to a County financed construction contract:

- (1) of less than [\$500,000] \$250,000 or the prevailing wage
threshold limit, whichever is lower;
- (2) that is subject to a Federal or State prevailing wage law;
- (3) awarded without competition under Section [11B-14](#);

- (4) with a public entity;
- (5) to the extent that the contractor is expressly precluded from complying with this Section by the terms of any Federal or State law, contract, or grant;
- (6) entered into as a bridge contract under Section [11B-42](#);
- (7) entered into as a cooperative procurement under Section [11B-40](#); or
- (8) which results from an emergency procurement under Section [11B-16](#).
- (9) This Section applies to a mechanical systems service contract with a contract value in excess of the threshold amount codified at 41 U.S.C. 6702(A)(2), the McNamara-O'Hara Service Contract Act of 1965, as amended.

* * *

[(d)] (e) *Contract requirements.* Each contract covered by this Section must:

- (1) require the contractor and subcontractor to comply with this Section; [and]
- (2) specify that an aggrieved employee, as a third-party beneficiary, may by civil action recover the difference between the prevailing wage for the type of work performed and the amount actually received, with interest and a reasonable attorney's fee[.] ; and
- (3) require at least 51% of the new jobs to complete the County financed construction contract that exceeds the

prevailing wage threshold limit must be filled by
Montgomery County residents who reside in the County.

(A) *Waiver.* The Director may waive or reduce the
requirement of paragraph (d)(3) of this subsection if
it finds that a good faith effort to comply has been
made by the contractor.

[(e)] (f) *Reporting Requirement.* For each quarter of the finance
construction contract, the contractor must submit a report to the
Department, on a form designated by the Director, with the
following:

- (1) the number of employees needed for the contract;
- (2) the number of current employees transferred;
- (3) the number of new job openings created;
- (4) the number of job openings listed in the department;
- (5) describe efforts made to fill the open positions with local
County residents;
- (6) the total number of Montgomery County residents hired
for the reporting period and for new hires;

(A) *Name;*

(B) *Last four numbers of their social security number;*

(C) *Job title;*

(D) *Address; and*

(E) *Hire date.*

[(f)] (g) *Violations.*

125 (1) If the Director determines that a contractor has not made
 126 best efforts or reported as required under this section, the
 127 Director shall issue a written decision detailing the bases
 128 for the determination.

129 (2) A contractor may appeal a written decision of the Director
 130 that the contractor violated a provision of this section to
 131 the Department within 10 working days after receiving a
 132 copy of the decision.

133 (3) If the contractor does not appeal the Director's decision
 134 within 10 working days after receipt, the decision of the
 135 Director is deemed final and not appealable.

136 [(g)] (h) Untimely Reporting. If a contractor is late in submitting reports
 137 required to be submitted under this section, the County may
 138 postpone payments due under the contract until the required
 139 reports are submitted.

140 [(h)] (i) * * *

141 [(i)] (j) * * *

142 [(j)] (k) * * *

143 (l) * * *

144 (m) * * *

145 (n) * * *

LEGISLATIVE REQUEST REPORT

Bill 35-21

Prevailing Wage Requirements – Construction Contracts - Amendments

DESCRIPTION:	Bill 35-21 would: <ol style="list-style-type: none">(1) amend definitions related to construction and the prevailing wage threshold;(2) adopt the State prevailing wage law regarding the contract threshold limit;(3) apply prevailing wage requirements to certain [[public-private partnerships]] payment in lieu taxes construction agreements;(4) require construction contracts to include a local hiring requirement;(5) specify violations of the local hiring mandate;(6) authorize the Department to adopt regulations; and(7) generally amend the law regarding applicability to prevailing wage requirements.
PROBLEM:	The county law, currently, excludes certain types of construction from the prevailing wage requirements. In addition, the County's prevailing wage threshold limit of \$500,000 is more than the State's new lower threshold of \$250,000, which limits the number of workers who would qualify for prevailing wages.
GOALS AND OBJECTIVES:	This bill will expand the prevailing wage requirements to include additional County financed construction projects at a lower dollar amount. Provide for service contracts that have been excluded from prevailing wages; include [[public partnership]] payment in lieu of taxes where County funds are funded in part or whole. Require a local hiring mandate to increase jobs locally in the County.
COORDINATION:	Office of Procurement, Department of Housing and Community Development, and Department of Finance
FISCAL IMPACT:	Office of Management and Budget
ECONOMIC IMPACT:	Office of Legislative Oversight
RACIAL EQUITY AND SOCIAL JUSTICE IMPACT:	Office of Legislative Oversight
EVALUATION:	
EXPERIENCE ELSEWHERE:	Anne Arundel and Baltimore County
SOURCE OF INFORMATION:	Ludeen McCartney Green, Legislative Attorney

**APPLICATION
WITHIN
MUNICIPALITIES:** N/A

PENALTIES: N/A

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Fiscal Impact Statement
Bill 35-21 Prevailing Wage Law (PWL) Amendments

1. Legislative Summary.

Bill 35-21 as amended would:

1. alter definitions related to construction and prevailing wage requirements;
2. adopt the State prevailing wage law regarding the contract threshold limit;
3. apply prevailing wage requirements to certain public-private partnerships;
4. require construction contracts to include local hiring requirement;
5. specify violations of the local hiring mandate;
6. authorize the Department to adopt regulations; and
7. generally, amend the law regarding applicability to prevailing wage requirements.

Due to vagueness in the existing law, some construction contracts had been classified as maintenance contracts. The Administration corrected this application of the law last year. As a result of the amendments, Bill 35-21 now clarifies County law to conform with existing practice regarding construction projects.

2. An estimate of changes in County revenues and expenditures regardless of whether the revenues or expenditures are assumed in the recommended or approved budget. Includes source of information, assumptions, and methodologies used.

No change in County revenues is expected.

The Maryland General Assembly's non-partisan Department of Legislative Services (DLS) uses a consistent methodology for assessing the impacts of prevailing wage requirements for multiple pieces of proposed legislation. Their analysis concludes that construction projects required to pay prevailing wages have higher labor costs of approximately 10 percent and higher total project costs of between two to five percent. After enacting similar changes, Baltimore County and Anne Arundel County governments reported a similar impact on costs. DLS also reports that there is no automatic effect on total State capital expenditures, but the cost of some public work projects may increase. As a result, fewer projects may be funded in a given year.

The Montgomery County Department of Transportation (DOT) estimates that \$32 million is expended annually on construction contracts that had been previously classified as maintenance contracts. These contracts are for multi-year terms. Thus, any change in costs as a result in the change of classification, should they materialize, will occur over the next several years.

In addition to the clarification of the definition of "construction", the amended Bill also adds "mechanical systems service contracts" to the Prevailing Wage Law. As this type of work requires, in most cases, specific Maryland licenses for both contractors and employees, competition from out-of-state or out-of-region firms will be negligible. Therefore, this change will have minimal impact on expenditures.

3. Revenue and expenditure estimates covering at least the next 6 fiscal years.

No direct change to County revenue is expected over the next six years.

When the two to five percent potential increase identified by DLS is applied to the \$32 million in DOT construction contracts previously classified as maintenance contracts, the total **estimated annual cost** of this policy could be between \$640,000 and \$1.6 million. Considering the expiration schedule for existing contracts and the \$192 million in estimated expenditures over the next six years for this work, the total estimated additional cost **for the next six years** using the DLS analysis, could range from \$2.3 million to \$5.8 million.

4. An actuarial analysis through the entire amortization period for each Bill that would affect retiree pension or group insurance costs.

The legislation does not affect retiree pension or group insurance costs.

5. An estimate of expenditures related to the County's information technology (IT) systems, including Enterprise Planning (ERP) systems.

The legislation would not result in any IT-related expenditures.

6. Later actions that may affect future revenue and expenditures if the bill authorizes future spending.

The legislation does not authorize future spending.

7. An estimate of the staff time needed to implement the Bill.

No additional staff time is expected as this Bill does not increase the number of contracts.

8. An explanation of how the addition of new staff responsibilities would affect other duties.

Current staff in Procurement and department Contract Administrators (i.e., DGS, DOT, DHCA) will manage the increased number of construction contracts that are subject to this Bill.

DOT's Contract Administrators and administrative staff were already preparing for the additional PWL documentation resulting from classification of more contracts as requiring prevailing wage compliance.

9. An estimate of costs when an additional appropriation is needed.

No additional appropriation would be needed until Fiscal Year 2024.

10. A description of any variable that could affect revenue and cost estimates. Inflationary increases, or lack thereof, that are impacting all labor costs could alter the estimates.

Procurement's compliance auditing contract (CCMI) cost increase is contingent on how many contracts are ultimately added.

Estimates for Public Private Partnerships (P3) were not included in this analysis.

11. Ranges of revenue or expenditures that are uncertain or difficult to project.

The impact of the local hiring requirement is difficult to determine as a similar policy contained in the "WMATA PILOT" Bill has not yet affected a construction contract. Similar enactments by other Maryland counties all occurred over the past year. As a result, there are not similar contracts to base an estimate on for this provision.

In addition, the impact on wage inflation is difficult to predict at the current time due to the lingering impacts of the COVID-19 pandemic. Wage inflation could grow at a rate higher than over the past two decades.

12. If a bill is likely to have no fiscal impact, why is that the case.

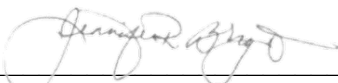
Not applicable.

13. Other fiscal impacts or comments.

Not applicable.

14. The following contributed to and concurred with this analysis:

Avinash G. Shetty, Director, Procurement
Pam Jones, Division of Operations, Procurement
Grace Denno, Division of Business Relations and Compliance, Procurement
John Gibala, PWL Program Manager, Procurement
Melissa Garner, Department of Transportation
Pamela Parker, Department of Environmental Protection
Derrick Harrigan, Office of Management and Budget



Jennifer R. Bryant, Director
Office of Management and Budget

2/14/2022

Date

Department of Finance Bill 35-21 Prevailing Wage Analysis

2/7/2022

This is an addendum to the original Fiscal Impact Statement (FIS) to respond to amendments proposed at the Government Operations (GO) Committee on January 13, 2022.

Summary

Regarding Bill 35-21, the Department of Finance investigated the potential impact of requiring that public-private partnerships (PPPs) and projects negotiating payment-in-lieu-of-tax agreements (PILOTs) pay prevailing wages and of expanding the definition of construction to include various maintenance service contracts. Council staff provided the Department of Finance with a specific list of PPPs of particular concern such as Viva White Oak and Wall Park. Currently only projects on land leased from WMATA and projects providing certain levels of dedicated affordable housing are eligible for PILOTs.

The Department of Finance found the following.

- General impacts of prevailing wages to the cost of construction projects
 - The Maryland Department of Legislative Services utilizes the same analysis of the impacts of prevailing wage requirements for multiple pieces of proposed legislation. Their analysis concludes that projects required to pay prevailing wages have higher labor costs of approximately 10%, and higher total project costs of between 2% to 5%.
 - A study by the Maryland Interagency Commission on School Construction of recent school projects with dual bids from the same contractors at both prevailing wages and market wages found that total construction costs may be between 10% and 15% higher. An analysis by the State of Virginia of the potential impact of their new prevailing wage legislation also reported that total construction costs may be between 10% and 15% higher.
 - A study by researchers Hindel and Delman at Michigan State University found that California's prevailing wage requirements for affordable housing projects added up to 6% to project costs. However, the authors theorized that much of this increase in cost is due to enhanced efforts to enforce labor and employment laws. The authors advanced a hypothesis that the true impact of prevailing wage (as opposed to labor fraud) was an increase of zero to 3.3% to project costs.
- PILOTs
 - The impact of Councilmember Jawando's amendment #3 to affordable housing construction supported by the Department of Housing and Community Affairs (DHCA) is not yet identifiable because of needed clarification pertaining to the amendment's meaning and intent. DHCA staff cannot determine whether amendment #3 as written extends the exemption from prevailing wage to affordable housing projects utilizing PILOTs, or if it contradicts the exemption for affordable housing projects contained in Bill 35-21 as originally proposed. Approximately 90% of DHCA affordable housing lending for new construction uses local funds such as the Housing Initiative Fund, often accompanied by a PILOT; these projects supported by local funds are not currently required to pay prevailing wages. If Bill 35-21 is ultimately amended in such a way as to

require that affordable housing projects receiving PILOTs pay prevailing wages it would increase construction costs to an unknown extent. Depending on the impact, this could increase the amount of public subsidy required to achieve the same number of units each year or decrease the total number of affordable units DHCA lending could support. Clarification of the intent of text amendment #3 is required.

- *On 2/3/2022 Finance Department Staff met with Council's staff regarding the above analysis. Staff stated that they understand the intent of amendment #3 to require all projects including affordable housing projects to pay prevailing wages. As stated above, this could increase the per-unit cost of affordable housing, reducing the total number of units supported at existing budget levels or requiring an increased public subsidy. Detailed quantification of the impact to affordable housing development in Montgomery County would most appropriately come from DHCA.*
- The Department of Finance does not believe the legislation will impact PILOT projects on land leased from WMATA in ways that have foreseeable financial implications for Montgomery County. The County's participation in these projects is limited to the PILOT, foregoing all real estate tax revenue for 15 years; all other direct financial transactions are between the developer and WMATA. Thus, a requirement to pay prevailing wages could reduce the profits of such projects (or make them infeasible) and reduce the amount WMATA receives in lease payments but would have no estimable impact to County revenues within a reasonable forecastable horizon.
- As currently written, Amendment #3's definition of PILOTs added to lines 56 to 59 of Bill 35-21 may inaccurately state that the contractor constructing the improvements pays property taxes. This potential inaccuracy may alter the desired outcome of adding PILOTs to the definition of county financed construction added to lines 34 to 36. Only property owners pay real estate taxes, thus this language should be changed to improve accuracy.
- The requirement that at least 51% of new jobs exceeding the prevailing wage thresholds on County financed construction projects be filled by Montgomery County residents (line 92) appears to be inconsistent with 52.24A.00.03.b of the Montgomery County Code, which requires that 25% of jobs for projects with PILOT agreements be filled by Montgomery County residents. This inconsistency should be addressed.
- PPPs
 - The Office of Procurement has already provided Council Staff with an assessment of the impact to traditional PPPs of the proposed legislation and its amendments.
 - The specific projects of particular concern are not traditional PPPs managed by the Office of Procurement and thus that agency has no way to implement or monitor a requirement that these projects pay prevailing wage. As these projects are the result of directly negotiated agreements between the County and the developer, further input is required with the Office of the County Attorney, the agencies managing the PPPs, and the Office of Procurement to determine if and how the legislation might affect those projects and then the logistics for monitoring the requirement.

- Service contracts
 - The Office of Management and Budget and the Office of Procurement are in the final stages of review of their estimate of the impact of redefining various service contracts as construction contracts, requiring they pay prevailing wage. These agencies anticipate transmitting this analysis to Council Staff imminently and the Department of Finance did not attempt to further duplicate this effort.

Department Staff Interviewed

- Grace Denno; Chief, Division of Business Relations and Compliance; Office of Procurement
- Derrick Harrigan; Fiscal and Policy Analyst; Office of Management and Budget
- Pofen Salem; Chief, Division of Finance and Administration; Department of Housing and Community Affairs
- Francis “Frank” Demarais; Deputy Director; Department of Housing and Community Affairs

Resources Reviewed

- Maryland Department of Legislative Services prevailing wage analysis; see the appendix attached to the following recent bills
 - https://mgaleg.maryland.gov/2021RS/fnotes/bil_0007/hb0037.pdf
 - https://mgaleg.maryland.gov/2017RS/fnotes/bil_0000/hb1210.pdf
- IAC Report on the Impact of Prevailing Wages, December 31, 2020.
 - <https://iac.mdschoolconstruction.org/wp-content/uploads/2020/12/Prevailing-Wage-2020-12-21.pdf>
- Fairfax County Council Presentation on Prevailing Wage, October 26, 2021; (see slide 3 for summary of State of Virginia Analysis of potential cost impacts).
 - <https://www.fairfaxcounty.gov/boardofsupervisors/sites/boardofsupervisors/files/assets/meeting-materials/2021/oct26-legislative-prevailing-wage-presentation.pdf>
- Should Prevailing Wages Prevail, Hindel & Delman, British Journal of Industrial Relations, January 2022
 - <https://onlinelibrary.wiley.com/doi/abs/10.1111/bjir.12663>

Economic Impact Statement

Office of Legislative Oversight

Bill 35-21

Prevailing Wage Requirements – Construction Contracts – Amendments

SUMMARY

The Office of Legislative Oversight (OLO) anticipates that enacting Bill 35-21 would have a net positive impact on economic conditions in the County. By expanding the scope of County financed contracts covered under the Prevailing Wage Law and instituting a local hiring requirement to contracts that exceed the prevailing wage threshold, the Bill likely would increase wages and employment for County residents. Importantly, although higher labor costs may result in a net increase in total construction and service costs for County contracts, the County, not private contractors, would bear the additional costs in the form of higher BID prices. In contrast, however, OLO anticipates that the Bill may create barriers to entry for small businesses in County financed construction and service projects.

BACKGROUND

County's Prevailing Wage Law

Patterned after the Federal Davis-Bacon and State of Maryland's prevailing wage laws, the County's Prevailing Wage Law went into effect on July 1, 2009.¹ Prevailing wage laws set minimum wage and benefit rates for construction laborers working on publicly funded projects. The intention of these laws is to prevent nonlocal, low-wage contractors from depressing local wages and to allow contractors to compete on a more level playing field.²

Currently, the County's Prevailing Wage Law (hereinafter "PWL") applies to all contracts for County financed construction projects that exceed \$500,000. Given the combined BID price and number of business involved in County financed construction projects per year, the County's current PWL covers a significant span of economic activity.

Table 1 presents data from FY19 through FY21 on executed County construction contracts (i.e., projects signed under contract between the County and a prime contractor). The total number of executed projects by prime contractors (i.e., the businesses awarded the project BID by the County) reached as high as eleven in FY20, and the total BID price of the projects when the contract was executed reached almost \$40 million in FY21. **Table 2** presents data on all the executed County financed construction contracts that were completed in FY20. The five projects involved a total of 86 sub-contractors (i.e., third-parties that have entered into contracts with a prime contractor on County financed projects), with

¹ Office of Procurement, Prevailing Wage Law, <https://www.montgomerycountymd.gov/PRO/dbrc/prevailing-wage-law.html>.

² Kevin Duncan and Jeffrey Waddoups, "Unintended Consequences of Nevada's Ninety-Percent Prevailing Wage Rule," *Labor Studies Journal* 45:2 (2020): 167.

Economic Impact Statement

Office of Legislative Oversight

an average of 17 sub-contractors per project, and the total BID price of the projects was more almost \$30 million, with an average BID price of almost \$6 million per project.

Table 1. Executed County Financed Construction Contracts

Fiscal Year	Total Number of Executed Projects/ Prime Contractors	Total Number of Bidders	Total BID Amount
FY21	3	21	\$39,995,742
FY20	11	53	\$36,896,786
FY19	5	14	\$6,220,100

Source: Office of Procurement, Montgomery County Government

Table 2. Completed Executed County Financed Construction Contracts in FY20

Total Number of Projects/Prime Contractors	5
Total Number of Bidders	18
Total Number of Sub-Contractors	86
Average Number of Sub-Contractors Per Project	17
Range of Sub-Contractors Across Projects	1 - 63
Total BID Amount	\$29,651,080
Total PO Amount ³	\$29,932,607
Average BID Per Project	\$5,930,216

Source: Office of Procurement, Montgomery County Government

Bill Description

If enacted, Bill 35-21 would **expand the scope of County financed contracts covered under the PWL** in three ways. First, the Bill would reduce the prevailing wage threshold minimum to contracts from \$500,000 to \$250,000. Second, the current law applies to County financed construction contracts that cover “the process of building, altering, repairing, improving,

³ Encumbered \$ amount by the department for the project after execution.

Economic Impact Statement

Office of Legislative Oversight

or demolishing any structure or building, or other improvements of any kind to any real property.”⁴ The Bill would expand the PWL to also include service-related contracts, or “routine operation, repair, and service contractors for maintenance of existing structures, buildings, or real property.” Third, the Bill would apply the prevailing wage requirements to certain public-private partnerships, excluding affordable housing development projects.⁵

In addition to expanding the scope of the County’s PWL, enacting Bill 35-21 would also **institute a local hiring requirement to County financed construction contracts that exceed the prevailing wage threshold**. In particular, the law would require County residents to fill “at least 51% of the new jobs to complete the [C]ounty financed construction contract that exceeds the prevailing wage threshold.” However, the County may waive or reduce the local hiring requirement if the County determines that “a good faith effort to comply has been made by the contractor.” Finally, contractors would be required to submit quarterly reports to the Department of Procurement.⁶

If enacted, Montgomery County would join DC in having both prevailing wage and local hiring requirements for certain government contracts. See **Table 3**.

Table 3. Government Construction Contracting Rules by Jurisdiction

Jurisdiction	Prevailing Wage Rate	Local Hiring Requirement
DC	Yes	Yes ⁷
Fairfax	Ordinance Proposed ⁸	No
Montgomery	Yes	Legislation Introduced

INFORMATION SOURCES, METHODOLOGIES, AND ASSUMPTIONS

As previously discussed, the County’s current PWL covers a significant span of economic activity. OLO anticipates that enacting Bill 35-21 would have non-negligible impacts on economic conditions in the County by expanding the scope of County financed contracts covered under the PWL and instituting a local hiring requirement to County financed construction contracts that exceed the prevailing wage threshold.

⁴ https://codelibrary.amlegal.com/codes/montgomerycounty/latest/montgomeryco_md/0-0-0-5067

⁵ Montgomery County Council, Bill 35-21.

⁶ Ibid.

⁷ https://does.dc.gov/sites/default/files/dc/sites/does/publication/attachments/FIRST%20SOURCE_Construction%20Factsheet.pdf

⁸ See <https://www.fairfaxcounty.gov/boardofsupervisors/board-supervisors-legislative-committee-meeting-march-16-2021>.

Economic Impact Statement

Office of Legislative Oversight

Given data and time limitations, however, OLO was unable to use a quantitative methodology to arrive at estimates of the anticipated impacts of the changes to the County's current PWL. Instead, OLO relied on qualitative sources to inform the claims made in subsequent sections of this analysis. In particular, OLO consulted the following sources:

- peer-reviewed research articles on the economic impacts of prevailing wage laws in the United States,
- Council staff analysis of Bill 21-08, which established the County's PWL,
- the fiscal and policy note for House Bill 37, Maryland General Assembly,
- a representative from a non-union construction company, and
- County personnel involved in the implementation in the County's PWL.

Before proceeding, OLO believes it is important to highlight a **scope limitation** with this analysis which arises from the potential for Bill 35-21 to increase total BID prices for County construction and/or service contracts and the negative opportunity costs this outcome would create.

Conventional economic theory implies that increased wage rates would increase costs for construction and service contracts.⁹ Consider the following hypothetical scenario in which the "wage differential method" is used to estimate the impact of PWLs on total costs: If the prevailing wage premium exceeds market rates by 10 percent and labor costs on County contracts are 50 percent of total costs, then the prevailing wage standards would increase total costs by 5 percent (10% x 50%). Statistical studies published in peer-reviewed journals, however, have questioned whether conventional economic theory applies in the context of publicly funded construction projects. In general, studies have not found statistically significant evidence of PWLs increasing BID prices for publicly funded construction projects (with the exception of housing projects).¹⁰ To explain why, economists have theorized that prevailing wage laws cause construction companies to replace unskilled workers with skilled workers and capital for labor, which in turn increases productivity and efficiency.¹¹

While OLO sees the statistical studies as more reliable than earlier studies that rely on the wage differential method, the current state of the literature nonetheless has limitations. In particular, there is a lack of experimental or quasi-experimental studies that can overcome common sources of bias, namely selection bias and confounding variables, and thus more reliably estimate the *causal effect* of PWLs on BID prices and other outcomes. As noted in the State's analysis of House Bill 34,

"[t]he primary challenge confronted by all prevailing wage researchers is identifying an appropriate 'control group' consisting of projects of similar type, timing, and location that do not pay the prevailing wage. In most jurisdictions that require a prevailing wage, all projects of a specified type and size are subject to it, so there is no natural control group."¹²

⁹ Lameck Onsarigo, Kevin Duncan and Alan Atalah, "The Effect of Prevailing Wages on Building Costs, BID Competition, and Bidder Behaviour: Evidence from Ohio School Construction," *Construction Management and Economics* 38:10 (2020): 917-933.

¹⁰ Ibid; Kevin Duncan and Russell Ormiston, "What Does the Research Tell Us about Prevailing Wage Laws?," *Labor Studies Journal* 44:2 (2019): 139-160; and Duncan and Waddoups, "Unintended Consequences of Nevada's Ninety-Percent Prevailing Wage Rule."

¹¹ Ibid.

¹² https://mgaleg.maryland.gov/2021RS/fnotes/bil_0007/hb0037.pdf

Economic Impact Statement

Office of Legislative Oversight

Given the state of research, OLO believes that enacting Bill 35-21 may increase total County construction and service contracts. For one, it is possible that productivity and efficiency gains achieved through labor and capital substitutions may not entirely offset increases in labor costs on County financed construction projects. Second, and more importantly, productivity and efficiency gains would arguably be more difficult to achieve on County *service* contracts. Thus, OLO expects enacting Bill 35-21 to result in a net increase in annual BID prices, which, by definition, would be paid for by the County, not private contractors.

Importantly, a net increase in BID prices for County financed construction projects and/or services may potentially result in forgone construction projects and/or services that otherwise would occur in the absence of enacting Bill 35-21. This outcome would create negative opportunity costs in the form of reduced opportunities for businesses to work as prime contractors or sub-contractors on County contracts. But due to data and time limitations, OLO does not account for this potential negative opportunity cost in its analysis in subsequent sections.

VARIABLES

The primary variables that would affect the economic impacts of enacting Bill 35-21 are the following:

- total number of County residents working on County contracts;
- average wages of County residents working on County contracts; and
- total number of small business prime and sub-contractors on County contracts.

IMPACTS

WORKFORCE ▪ TAXATION POLICY ▪ PROPERTY VALUES ▪ INCOMES ▪ OPERATING COSTS ▪ PRIVATE SECTOR CAPITAL INVESTMENT ▪ ECONOMIC DEVELOPMENT ▪ COMPETITIVENESS

Businesses, Non-Profits, Other Private Organizations

OLO anticipates that enacting Bill 35-21 would have an overall neutral impact on private organizations based in the County in terms of the Council's priority indicators.¹³ This conclusion is based largely on the likelihood that businesses bidding on County contracts would pass any net increase in total costs to the County in the form of higher BID prices. As a result, OLO expects that operating expenses and business incomes for contractors (prime or sub) should be insulated from the negative effects of higher labor costs.

However, OLO anticipates that enacting Bill 35-21 may have divergent impacts on certain businesses. On the one hand, the Bill has the potential to benefit certain businesses based in the County. If the Bill increases local employment on

¹³ Montgomery County Code, Sec. 2-81B, Economic Impact Statements,
https://codelibrary.amlegal.com/codes/montgomerycounty/latest/montgomeryco_md/0-0-0-80894.

Economic Impact Statement

Office of Legislative Oversight

County financed projects (see subsequent section), then certain business would benefit from any increase in household spending on goods and services that result from net increases in household income.

On the other hand, certain small businesses may experience negative impacts. While statistical studies generally have found little evidence of PWLs significantly reducing the number of bidders for publicly financed projects,¹⁴ OLO is unaware of studies that investigate the impact of PWLs on the *composition* of bidders in terms of business size, location, or other policy-relevant characteristics. Nevertheless, there is reason to believe that enacting Bill 35-21 may reduce the participation of small businesses in County financed construction and service projects.

Expanding the scope of the County's PWL and instituting a local hiring requirement would create reporting and compliance requirements for prime contractors as well as sub-contractors that would otherwise not be subject to the law in the absence of enacting Bill 35-21. OLO believes that small businesses would be more sensitive to the administrative burden created by these requirements because they lack the resources that large businesses have to pay for accounting, bookkeeping, and other administrative tasks. Thus, the Bill has the potential to create a barrier to entry for small business contractors unable/unwilling to take on the administrative burdens associated with the reporting and compliance regulations. These businesses may forgo business income they would otherwise attain from working on County contracts in the absence of enacting the Bill.

Beyond these impacts, OLO does not anticipate that enacting Bill 35-21 would significantly affect private organizations in terms of the Council's other priority indicators.

Residents

OLO anticipates that enacting Bill 35-21 would have a net positive impact on County residents in terms of the Council's priority indicators.

The prevailing wage rate is intended to reflect the rate paid for comparable work in the private sector within the County. The Maryland Department of Labor calculates the wage rates for each job classification in non-residential construction trades. To do so, the Department conducts an annual, non-representative survey which registered contractors, contractor's associations and labor organizations voluntarily participate in. Using the survey data, the Department of Labor sets the rates for particular job classifications with the following formula:

- Rate paid to 50% of workers.
- If fewer than 50% of workers are paid the same wage rate, rate paid to 40% of the workers.
- If fewer than 40% of workers are paid the same wage rate, the rate becomes a weighted average of all the rates paid to the workers.¹⁵

¹⁴ Duncan and Ormiston, "What Does the Research Tell Us."

¹⁵ Jim Tudor, "Maryland Prevailing Wage: Under Construction," Presentation, Maryland Department of Labor. See also <https://www.dlrl.state.md.us/labor/prev/prevoverview.shtml#survey>.

Economic Impact Statement

Office of Legislative Oversight

Because union wage rates within jurisdictions are usually the same, the majority wage typically reflects the union wage.¹⁶ Data from the U.S. Bureau of Labor Statistics indicate that union wages in the construction and service industries have been consistently higher than non-union wages.¹⁷ Thus, expanding the scope of the County's PWL likely would increase wages and benefits for workers on County financed contracts that would otherwise not be covered by the PWL in the absence of enacting Bill 35-21. Affected residents in turn would likely experience a net increase in household income.

Moreover, in theory, expanding the scope of the County's PWL and instituting a local hiring requirement should prevent businesses from drawing on nonlocal, low-wage workers to attain a competitive advantage in bidding for County contracts. Thus, enacting Bill 35-21 should increase the total number of County residents working on County contracts. Affected residents in turn would likely experience a net increase in household income. However, several factors that may mitigate local employment effect are worth noting. For instance, to meet the local hiring requirement, construction companies may rotate employees residing in the County between private and public, rather than increasing the total share of residents in their workforces. Also, the potential for productivity and efficiency gains may result in a net decrease in employees working on County contracts.

Beyond these impacts, OLO does not anticipate that enacting Bill 35-21 would significantly affect residents in terms of the Council's other priority indicators.

DISCUSSION ITEMS

Not applicable

WORKS CITED

Duncan, Kevin and Jeffrey Waddoups, "Unintended Consequences of Nevada's Ninety-Percent Prevailing Wage Rule," *Labor Studies Journal* 45:2 (2020): 166-185.

Duncan, Kevin and Russell Ormiston, "What Does the Research Tell Us about Prevailing Wage Laws?," *Labor Studies Journal* 44:2 (2019): 139-160

Montgomery County Code. Sec. 2-81B. Economic Impact Statements.

Montgomery County Council, Bill 35-21, Prevailing Wage Requirements - Construction Contracts - Amendments, Introduced on October 12, 2021

¹⁶ Duncan and Waddoups, "Unintended Consequences of Nevada's Ninety-Percent Prevailing Wage Rule"; and Onsarigo, et al, "The Effect of Prevailing Wages on Building Costs, BID Competition, and Bidder Behaviour."

¹⁷ <https://www.bls.gov/news.release/union2.t04.htm>; and <https://www.bls.gov/opub/mlr/2013/04/art2full.pdf>

Economic Impact Statement

Office of Legislative Oversight

Onsarigo, Lameck, Kevin Duncan and Alan Atalah, "The Effect of Prevailing Wages on Building Costs, BID Competition, and Bidder Behaviour: Evidence from Ohio School Construction," *Construction Management and Economics* 38:10 (2020): 917-933.

Rubenstein, Michael, Fiscal and Policy Note, House Bill 37, Fiscal and Policy Note, Maryland General Assembly, 2021 Session.

Tudor, Jim, "Maryland Prevailing Wage: Under Construction," Presentation, Maryland Department of Labor.

CAVEATS

Two caveats to the economic analysis performed here should be noted. First, predicting the economic impacts of legislation is a challenging analytical endeavor due to data limitations, the multitude of causes of economic outcomes, economic shocks, uncertainty, and other factors. Second, the analysis performed here is intended to *inform* the legislative process, not determine whether the Council should enact legislation. Thus, any conclusion made in this statement does not represent OLO's endorsement of, or objection to, the Bill under consideration

CONTRIBUTIONS

Stephen Roblin (OLO) prepared this report.

Racial Equity and Social Justice (RESJ) Impact Statement

Office of Legislative Oversight

BILL 35-21: PREVAILING WAGE REQUIREMENTS— CONSTRUCTION CONTRACTS—AMENDMENTS

SUMMARY

The Office of Legislative Oversight (OLO) anticipates that Bill 35-21 could have a favorable impact on racial equity and social justice in the County if it increases the share of local Black residents employed in the construction industry.

PURPOSE OF RESJ STATEMENTS

The purpose of RESJ impact statements is to evaluate the anticipated impact of legislation on racial equity and social justice in the County. Racial equity and social justice refer to a **process** that focuses on centering the needs, power, and leadership of communities of color and low-income communities with a **goal** of eliminating racial and social inequities.¹ Achieving racial equity and social justice usually requires seeing, thinking, and working differently to address the racial and social harms that have caused racial and social inequities.²

PURPOSE OF BILL 35-21

The purpose of prevailing wage laws are to regulate the minimum wage and benefit rates for construction workers hired for public works projects.³ As mandated by the Davis-Bacon Act of 1931, prevailing wage laws prohibits contractors and subcontractors whose projects exceed a certain price threshold from paying their workers less than the local market rate per construction position.⁴ Maintaining local wage rates by forbidding unreasonable bidding practices and wage competition serve as the overarching goal of prevailing wage laws.⁵

The purpose of Bill 35-21 is to expand the number of County-financed construction contracts that comply with the County's prevailing wage law.⁶ Toward this end, Bill 35-21 lowers the threshold for construction contracts to comply with the County's prevailing wage law from \$500,000 to \$250,000. Bill 35-21 also aligns the County's prevailing wage law to recent changes in State law that:

- Expand the definition of construction to include maintenance service contracts for upkeep services;
- Require at least 51 percent of the new jobs created by the County-financed construction contracts subject to the prevailing wage requirement to be filled by Montgomery County residents; and
- Require the contractor to report information regarding the employees hired under County-financed construction contracts on a regular basis (e.g., payroll frequency).

Bill 35-21 was introduced on October 12, 2021.

RESJ Impact Statement

Bill 35-21

THE CONSTRUCTION INDUSTRY AND RACIAL EQUITY

The construction industry offers high levels of compensation for occupations that do not require a college degree. In Montgomery County, prevailing wages for building construction range from \$25 to \$26 per hour for laborers and from \$27 to \$47 per hour for skilled trade positions (e.g., carpenters, electricians, and plumbers) excluding fringe benefits.⁷ Local data on construction earnings also demonstrates high compensation levels by race and ethnicity with White, Asian, Black, and Latinx residents earning on average between \$4,100 and \$4,300 monthly in 2017.⁸ Yet access to construction positions varies by race due to historical and on-going discrimination in the construction industry.

Drivers of Inequities: There is a long history of racial discrimination in the building trades that rely on kin networks to refer workers to construction companies and limits access to construction unions by race.⁹ Historically, most union construction workers did not pass through an apprenticeship program.¹⁰ Instead, survey data reveals that access to the construction industry was based primarily on family and friendship connections with father and son frequently members of the same building trades unions throughout the 20th century.¹¹ As such, the construction industry has been overwhelming White and has also become disproportionately Latinx.

The construction industry's informal hiring and training structure have perpetuated racially exclusionary hiring and training practices. Until the mid-20th century, some building trades had "Caucasian-only" clauses in their constitutions.¹² While there has been a variety of civil rights and regulatory responses to reduce discrimination in the construction industry, discrimination against Black construction workers persist. For example, more than 50 nooses have shown up on U.S. construction sites since 2015.¹³ And some construction unions continue to discriminate against Black workers through six exclusionary strategies:¹⁴

- **The Catch 22** where White workers hinder Black workers' ability to join unions by requiring them to have a job to be accepted into a union, but also require them to have union membership to apply for a construction job.
- **Stonewalling** where White workers ignore Black workers' attempts to communicate with them, thereby blocking Black workers' ability to work and join the union.
- **Biased Gatekeepers** where racially biased dispatchers refused to send Black construction workers to jobs, thus blocking their ability to work and to join the union.
- **Discriminatory Testing** where unions mandate testing that has no bearing on the ability to do a job but use it as way to fail Black applicants and to keep the union exclusively White.
- **Explicit Racism** where construction unions use overtly racist practices and approaches to limit Black membership, such as using racially offensive language or sending Black workers to dangerous jobs.
- **Voter suppression** where the exclusion of Black workers from construction unions limits their voting power and ability to make major decisions that benefit them and other Black workers.

Data on Inequities: Taken together, discrimination in the construction industry has fostered racial inequities in construction industry employment nationally, where in 2020: ¹⁵

- Black and Asian workers were under-represented in construction industry, accounting for 6 and 2 percent of the construction workforce compared to 12 and 6 percent of the total workers.
- White and Asian workers were over-represented in the construction industry, accounting for 89 and 30 percent of the construction workforce compared to 78 and 18 percent of the total workers.

RESJ Impact Statement

Bill 35-21

The pattern of Latinx over-representation in the construction industry is more pronounced locally, where in 2019:¹⁶

- 20 percent of Latinx workers were employed in the construction industry compared to
- 4.5 percent of White, Non-Hispanic workers, and 2.2 and 2.3 percent of Asian and Black workers.

Latinx workers are also over-represented among those employed in natural resources, construction, and maintenance occupations in Montgomery County, with:¹⁷

- 21.4 percent of Latinx workers employed in these occupations compared to
- 2.9 percent of White workers, 2.8 percent of Black workers, and 1.9 percent of Asian workers.

Expanding Black workers access to good paying construction sector jobs could help to narrow large and persistent income inequities by race in Montgomery County.¹⁸ Disparities in contracts for County-financed construction projects also vary by race and ethnicity where:¹⁹

- White-owned businesses accounted for 80.6 percent of such contracts in 2020 (\$105.5 million of \$130.9 million) and 68.1 percent of contracts in 2019 (\$64.3 million of \$94.3 million)
- Latinx-owned businesses accounted for nearly 14 percent of such contracts in 2020 (\$17.7 million of \$130.9 million) and 25 percent of such contracts in 2019 (\$24.0 million of \$94.3 million)
- Black-owned businesses accounted for less than 6 percent of such contracts in 2020 (\$7.7 million of \$130.9 million) and 2019 (\$5.2 million of \$94.3 million)
- Asian-owned businesses accounted for less than one percent of such contracts in 2020 (\$0.1 million of \$130.9 million) and 2019 (\$0.8 million of \$94.3 million).

Since Black-owned firms are more likely to hire Black employees,²⁰ expanding Black business-owners access to County-financed construction contracts could further foster Black growth in the construction sector that could help to narrow income inequities by race in Montgomery County.

ANTICIPATED RESJ IMPACTS

If Bill 35-21 increases employment rates for Black residents or construction contracting opportunities for Black-owned businesses, either outcome could potentially narrow economic disparities by race in the County. However, if Bill 35-21 increases employment and business opportunities for other ethnic groups more than it benefits Black workers and businesses, then Bill 35-21 could exacerbate economic inequities by race.

OLO anticipates a favorable impact of Bill 35-21 on racial equity and social justice in the County if the number of Black residents employed under County-financed construction projects increases. OLO anticipates that lowering the contract threshold for the prevailing wage mandate from \$500,000 to \$250,000 could increase the number of Black-owned firms who secure County construction contracts. Since Black-owned firms are more likely to hire Black employees,²¹ an increase in construction contracts to Black-owned firms could increase local Black employment in construction.

RESJ Impact Statement

Bill 35-21

OLO also anticipates that Bill 35-21's requirement that County residents account for at least 51 percent of employees on County-funded construction contracts could also increase Black employment since Black residents tend to demonstrate the highest unemployment rates in the County. For example, in 2019, 8.1 percent of Black residents were unemployed compared to 5.1 percent of Latinx residents, 3.5 percent of Asian residents, and 2.8 percent of White, Non-Hispanic residents.²² If, however, local Black employees and businesses benefit from Bill 35-21 at the same rate as employees and entrepreneurs from other racial and ethnic groups, OLO anticipates that the bill would sustain racial and social inequities in the County relative to employment and entrepreneurship.

RECOMMENDED AMENDMENTS

The Racial Equity and Social Justice Act requires OLO to consider whether recommended amendments to bills aimed at narrowing racial and social inequities are warranted in developing RESJ impact statements.²³ OLO finds that Bill 35-21 could potentially narrow racial and ethnic inequities in construction employment and contracting across the County.

If the Council desires to narrow racial inequities in construction employment, it could consider an amendment to Bill 35-21 that align with the following best practice recommended by researchers at PolicyLink:

- **Establish targeted hiring for BIPOC and women with specific goals.** PolicyLink notes that the federal government establishes BIPOC and women hiring goals at the regional level for all federally funded construction contracts and that state and localities may set higher goals.²⁴ At the federal level, minority and women hiring targets cover contracts over \$10,000 and hiring goals can range from 0.5 to 87.3 percent.²⁵ Minnesota offers state examples where its Department of Human Rights has issued goals for minority and women employment in state-funded construction projects for each city and county.²⁶ The minority and women hiring goals in Minnesota apply to contracts in excess of \$100,000 for employers with more than 40 employees.²⁷ For Ramsey and Hennepin Counties, hiring goals on state-funded construction projects were set at 32 percent minority participation and 6 percent female participation.²⁸

More specifically, given the over-representation of Latinx residents in the construction industry, a recommended amendment for hiring with specific goals would focus on other workers of color (Black, Indigenous, and Asian workers) to advance racial equity in the construction industry.

CAVEATS

Two caveats to this racial equity and social justice impact statement should be noted. First, predicting the impact of legislation on racial equity and social justice is a challenging, analytical endeavor due to data limitations, uncertainty, and other factors. Second, this RESJ impact statement is intended to inform the legislative process rather than determine whether the Council should enact legislation. Thus, any conclusion made in this statement does not represent OLO's endorsement of, or objection to, the bill under consideration.

CONTRIBUTIONS

OLO staffers Dr. Elaine Bonner-Tompkins, Senior Legislative Analyst, and Dr. Theo Holt, Performance Management and Data Analyst, drafted this racial equity and social justice impact statement.

RESJ Impact Statement

Bill 35-21

¹ See the Government Alliance for Race and Equity's "Advancing Racial Equity and Transforming Government" for understanding government's role in creating inequities https://racialequityalliance.org/wp-content/uploads/2015/02/GARE-Resource_Guide.pdf

² Adopted from racial equity definition provided by Racial Equity Tools. <https://www.racialequitytools.org/glossary>

³ Kevin Duncan and Russel Ormiston, What Does the Research Tell Us about Prevailing Wage Laws? 2019, Labor Studies Journal.

⁴ Ibid

⁵ Ibid

⁶ Montgomery County Council, Bill 35-21, Prevailing Wage Requirements – Construction Contract Amendments, October 12, 2021 https://apps.montgomerycountymd.gov/ccllms/DownloadFilePage?FileName=2726_1_16738_Bill_35-2021_Introduction_20211012.pdf

⁷ State of Maryland, Division of Labor and Industry, Prevailing Wage Unit, Informational Wage Rates – Building Construction <https://www.dlir.state.md.us/PrevWage/web/content/TempLetters/BCFC7215-374D-4995-A392-D43ACFCA5AB1.pdf>

⁸ Juniper Independent Research Group, Racial Equity Profile Montgomery County, June 2019, Montgomery County, Maryland. [https://www.montgomerycountymd.gov/OLO/Resources/Files/2019 Reports/OLO2019-7-6_20_19.pdf](https://www.montgomerycountymd.gov/OLO/Resources/Files/2019%20Reports/OLO2019-7-6_20_19.pdf)

⁹ Lawrence Mishel, Diversity in the New York City union and nonunion construction sectors, Economic Policy Institute, March 2, 2017 <https://files.epi.org/pdf/119517.pdf>

¹⁰ Ibid

¹¹ Ibid

¹² Mishel

¹³ Taylor Telford, Dozens of nooses have shown up on U.S. construction sites. The culprits rarely face consequences, Washington Post, July 22, 2021 <https://www.washingtonpost.com/business/2021/07/22/noose-construction-industry-racism/>

¹⁴ Travis Watson, Union Construction's Racial Equity and Inclusion Charade, June 2021, Human Rights, Stanford Social Innovation Review, Stanford University. https://ssir.org/articles/entry/union_constructions_racial_equity_and_inclusion_charade

¹⁵ Current Population Survey, Household Data Annual Averages. Table 18. Employed persons by detailed industry, sex, race, and Hispanic or Latino ethnicity, 2020 <https://www.bls.gov/cps/cpsaat18.htm>

¹⁶ American Community Survey, 1-Year Estimates, 2019, Table S0201

¹⁷ Ibid

¹⁸ American Community Survey data cited in Montgomery County Racial Equity Profile (page 68) shows that household median income for Whites was \$119,000 and for Asians was \$109,000 in 2017 compared to \$72,000 for both Black and Latinx households.

¹⁹ Office of Procurement, Montgomery County Maryland, Minority, Female and Disabled-Owned Business Program, FY2020 Annual Report (https://www.montgomerycountymd.gov/PRO/Resources/Files/Reports/MFDRReport_FY20.pdf) and FY2019 Annual Report (<https://www.montgomerycountymd.gov/PRO/Resources/Files/Reports/FY19%20MFD%20Annual%20Report.pdf>)

²⁰ Michael Stoll, Steven Raphael, and Harry Holzer, Why Do Black Employers More Likely Than White Employers to Hire Blacks? Institute for Research on Poverty, Discussion Paper No. 1236-01, University of Wisconsin, Madison, 2001 <https://www.irp.wisc.edu/publications/dps/pdfs/dp123601.pdf>

²¹ Ibid

²² American Community Survey, 1-Year Estimates, 2019, Table S0201

²³ Montgomery County Council, Bill 27-19, Administration – Human Rights - Office of Racial Equity and Social Justice – Racial Equity and Social Justice Advisory Committee - Established

²⁴ Sarah Treuhaft and Victor Rubin, Economic Inclusion: Advancing an Equity Driven Growth Model, Job Creation: Sector or Industry Approaches, Big Ideas for Jobs, PolicyLink, 2012 https://www.policylink.org/sites/default/files/4A_TREUHAFT_RUBIN_POLICYLINK_REPORT_SECTORAL_INDUSTRY.PDF

²⁵ Ibid

²⁶ Ibid

²⁷ Ibid

²⁸ Ibid

Councilmember Will Jawando's Amendments

Amendment # 1 – Prevailing Wage Threshold Limit

(Adopted by the GO Committee on 1/13/22)

County funds means any:

- (1) funds directly appropriated by the County; or
- (2) grant funding for construction under Section [20-75](#) that cumulatively exceeds the ~~[\$500,000]~~ \$250,000 or the State prevailing wage threshold limit, whichever is lower.

Amendment # 2 – Construction Definition

(Adopted by the GO Committee on 1/13/22)

Amend lines 6 – 11, as follows:

Construction means the process of building, altering, repairing, improving, rehabbing, resurfacing, or pavement milling, or demolishing any structure or building, or other improvements of any kind to any real property, including routine operation, repair, and maintenance contracts of existing structures, buildings, or real property that will significantly restore, change, increase, or extend service life.

Amendment # 3 – Payments in Lieu of Taxes (PILOTS)

(Adopted by the Full Council on 2/15/22)

Payment in Lieu of Taxes or PILOTs means a payment determined by the Director of Finance that requires a property owner to pay the County an amount equivalent to local real property taxes owed in exchange for tax

payment relief. This applies to a qualifying development with more than 3 stories above ground.

County financed construction contract means a contract for construction work that is awarded by the County or where County funds are used to finance all or part of the cost of the contract[[]], including payment in lieu of taxes agreements.

Amendment #4 – Payments in Lieu of Taxes (PILOT)

Amendment #4

Strike and Amend lines 58-62, as follows:

Payment in Lieu of Taxes or PILOT means an authorized payment made by the owner of a qualifying development or qualifying housing development instead of paying the County real property tax, including real property tax levied under a special area taxing law, that would otherwise be due.

Amend lines 34-37, as follows:

County financed construction contract means a contract for construction work that is awarded by the County or where County funds are used to finance all or part of the cost of the contract. A county financed construction contract includes a construction contract that receives in whole or part payment in lieu of taxes under Sections 52-24(b) or 52-24A unless the qualified housing development:

- (1) does not exceed four (4) stories above ground level; or
- (2) is provided under Section 52-24(c).

Amendment #5 – Transition Clause

Insert line 146, as follows:

Sec 2. Transition. Section 1 of this Act must not apply to: (1) a county-financed construction contract if, prior to the effective date of this Act the contract was executed; or (2) a property for which a preliminary plan, a site plan, or a sketch plan was approved by the Planning Board prior to the effective date of this Act, if the

property is, or becomes, a qualifying housing development under Section 52-24 or a
qualifying development under Section 52-24A.



OFFICE OF PROCUREMENT

Marc Elrich
County Executive

Avinash G. Shetty
Director

MEMORANDUM
November 30, 2021

TO: Tom Hucker, President
County Council

FROM: Ash Shetty, Director
Office of Procurement

SUBJECT: Comments on Bill 35-21, Prevailing Wage Law (PWL) Amendments

Thank you for allowing the Office of Procurement the opportunity to express its support for and provide some feedback on proposed Bill 35-21. Below is a summary followed by a more detailed explanation.

1. Modification of Prevailing Wage Threshold – We fully support decreasing the prevailing wage threshold to \$250,000 in line with the State.
2. Expansion of Definition of “Construction” – We support expanding prevailing wage requirements to construction-related service contracts. However, the language currently in the Bill: (1) may be read to include all contracts for services, which are covered by the Wage Requirements Law (often known as “living wage”). and (2) conflicts with definitions elsewhere in the Code. The issues are further explained below. We request the language be amended to clarify Council’s intent and avoid confusion.
3. Application to Public-Private Partnership (“P3”) Contracts – As discussed below, the prevailing wage law is already applied to P3 contracts wherein the County’s contribution meets the monetary threshold of \$500,000. This legislation would increase the monetary threshold and adds multiple exceptions to the requirement.
4. Local Hiring Mandate – The Office of Procurement supports this provision with the caveats that: (1) we have been advised of some potential legal concerns; (2) we encourage Council to detail the hiring and verification processes that should be undertaken by contractors and the County in application of the requirement; and (3) we propose inclusion of a one-year Sunset Date in order to revisit and evaluate the practicality and effectiveness of the mandate with real-world data.

Written Statement on Bill 35-21, Prevailing Wage Law (PWL) Amendments

At the outset, I would like to provide you with some background information on the administration of the prevailing wage law (PWL). Broadly, the County enters into three types of procurement contracts – goods, services, and construction. Construction contracts are subject to the prevailing wage requirements of County Code §11B-33C. Contracts for services are subject to the Wage Requirements Law (WRL) codified at County Code §11B-33A.

Construction is currently defined as “the process of building, altering, repairing, improving, or demolishing any structure or building, or other improvements of any kind to any real property. Construction does not include the routine operation, repair, or maintenance of existing structures, buildings, or real property.” County Code §11B-1.

Services are currently defined as “the furnishing of labor, time, or effort by a contractor, not involving the delivery of a specific end product other than reports which are merely incidental to the required performance. This term does not include employment agreements or collective bargaining agreements.” County Code §11B-1.

For comparison purposes, the State of Maryland utilizes the following definitions:

(f) Construction. --

- (1) "Construction" means the process of building, altering, improving, or demolishing an improvement to real property.
- (2) "Construction" includes any major work necessary to repair, prevent damage to, or sustain existing components of an improvement to real property.
- (3) "Construction" does not include the maintenance or routine operation of an existing improvement to real property, or activities related to an energy performance contract.

(g) Construction related services. --

- (1) "Construction related services" means feasibility studies, surveys, construction management, construction inspection, and similar efforts associated with construction or the acquisition of public improvements as defined in § 4-401(d) of this article.
- (2) "Construction related services" does not include services provided in connection with an energy performance contract.

....

(u) Services. --

- (1) Except as provided in paragraph (3) of this subsection, "services" means:
 - (i) the labor, time, or effort of a contractor; and
 - (ii) any product or report necessarily associated with the rendering of a service.
- (2) "Services" includes services provided by attorneys, accountants, physicians, consultants, and other professionals who are independent contractors.
- (3) "Services" does not include:
 - (i) construction related services;
 - (ii) architectural services;
 - (iii) engineering services; or
 - (iv) energy performance contract services.

MD Code Ann., State Finance & Procurement, §11-101.

It appears that Bill 35-21 is intending to capture and bring into the County's prevailing wage sphere those contracts which, under Maryland law, would be considered "construction-related services." However, as explained below in Section 2, the specific language proposed in Bill 35-21 is likely to create more confusion rather than clarity. As discussed, this can be easily rectified.

1. Modification of the Prevailing Wage Threshold

Bill 35-21 would remove the current \$500,000 threshold for application of the prevailing wage law, and instead define the prevailing wage threshold as "the minimum dollar amount for a construction contract subject to the State prevailing wage law under §17-202 of the State Finance and Procurement Article of the Maryland Code, as amended." Currently, the State's threshold is \$250,000.

The impact of this change would be to put the County in lockstep with the State as to the monetary threshold at which prevailing wage requirements apply to a contract. As the County already ties its prevailing wage classification and pay rates to those established by the State, this is a logical step, and the Office of Procurement is in full support.

2. Amendment of Definitions in Section 11B-1 of the County Code

Overall, the County Executive supports the expansion of the prevailing wage law. However, we request that the Council: (1) sharpen the language so as to clarify the nature and scope of maintenance contracts to which the prevailing wage law should apply; and (2) replace the term "*service contracts*" with a different term so as to avoid confusion with existing Code provisions regarding services.

A. Maintenance Contracts

As noted above, the County's current definition of *construction* excludes "routine operation, repair, or maintenance of existing structures, buildings, or real property." Bill 35-21 would modify the definition of *construction* to read:

Construction means the process of building, altering, repairing, improving, rehabbing, or demolishing any structure or building, or other improvements of any kind to any real property, including routine operation, repair, and service contracts for maintenance of existing structures, buildings, or real property.

Bill 35-21 further proposes defining a *Service Contract* as "a contract for labor services by the County, subject to prevailing wage law, that provides ongoing maintenance of existing facilities to upkeep and preserve equipment, components, or systems."

Written Statement on Bill 35-21, Prevailing Wage Law (PWL) Amendments

The proposed language is very broad and constitutes a very significant expansion of work which would be considered *construction*. For example, lawn mowing, window washing, painting, moping a floor, posting of signs, changing lightbulbs, testing an alarm system, and even a visual property inspection can all be considered “routine operation” or “maintenance” of facilities, buildings, or real property. As such, these services would, arguably, now be deemed *construction* and subject to the prevailing wage law. This will lead to administrative burdens in enforcement and an increase in disputes and challenges from contractors objecting to such work being classified as *construction*, especially where such work is not considered construction by the State or neighboring jurisdictions.

Such a broad expansion of the application of the prevailing wage law will also have a notable financial impact on the County, as the number of County contracts subject to prevailing wage requirements will be significantly increased. Those contractors will, in turn, need to increase their pricing in order to comply with the prevailing wage law. The Department of Transportation (“DOT”) looked at the impact the Bill would have on a small sample of its CIP maintenance services contracts and determined that the County could expect a 25% - 65% price increase for each impacted contract. A contractor for the Department of Environmental Protection (“DEP”) has told DEP that he estimates a 30% price increase to bring his contract, currently classified as a service contract subject to the wage requirements law, into compliance with the prevailing wage law. Of course, there would also be an increased administrative cost to the County with respect to compliance monitoring and enforcement.

Another DEP contractor raised an interesting concern about the potential impact to the workforce, stating: “[w]e typically build crews based on whether they are needed on services or construction contracts. Our services contracts, with living wage requirements, allows us to offer employment to people newly joining the workforce, since it has lower wages for beginning workers, and allows these workers to gain the experience needed to work their way up. The prevailing wage for common laborer under the construction contracts is twice the rate for services contracts. Ultimately, if we have to convert all contracts to prevailing wage, we would be forced to lay off those currently making less than the prevailing wage and hire more experienced workers to take their place. This would all but eliminate the opportunity for new hires with no previous experience. And although we pay our common laborers on the services contracts much higher than the minimum wage, we can’t simply increase their pay to the newer prevailing wage. This would disrupt the entire pay scale on the crews.”

B. Use of Term “Service Contracts”

The challenges the County will face in administration will be amplified by certain contradictions created by Bill 35-21, which will result in confusion. First, Bill 35-21 crafts a new definition for the term *service contract*. However, the term *service contract* is already used elsewhere throughout Chapter 11B (e.g., §§ 11B-33B, 11B-72, 11B-73, 11B-74, 11B-85, 11B-87). Defining the term *service contract* as proposed in Bill 35-21 would have the unintended impact of altering the definition of *service contract* in these other provisions, none of which are related to the prevailing wage law.

Written Statement on Bill 35-21, Prevailing Wage Law (PWL) Amendments

Second, there is tension between the Bill's proposed definitions of *construction* and *service contract*. *Construction* applies to "structures" and "buildings," while a *service contract* is limited to "facilities." The Bill does not clarify the difference between these categories, which are commonly used interchangeably and not otherwise defined in the County Code.

Third, adding the new defined term "*service contract*" may cause confusion with the existing wage requirements law, which governs contracts "for procurement of *services*." § 11B-33A. As noted above, the term "*services*" is already defined in the Code. The difference between (1) "*service contracts*," which the Bill intends to limit to maintenance of existing structures, buildings, or real property subject to the prevailing wage law governing construction and (2) contracts for procurement of *services*, which under existing law is subject to the wage requirements law, will likely cause confusion. The two may at times overlap, leaving the Using Department and the Office of Procurement to guess as to which wage statute should be applied in each case.

Again, the County Executive supports the expansion of the prevailing wage law. If the intention of Bill 35-21 is to bring the County's application of the prevailing wage law in line with the State's, I would respectfully suggest adopting the definitions utilized by the State for "construction," "construction-related services," and "services." If the intention is to expand the County's prevailing wage law to contracts beyond the traditional scope of "construction," I request that the language of the Bill be revised to resolve and clarify the above concerns, including replacing the term *service contract* in Bill 35-21 with another term so as to avoid confusion.

3. Application of Prevailing Wage Requirements to Certain Public-Private Partnerships

The Introduction Memorandum for Bill 35-21 from Legislative Counsel indicates that the purpose of this amendment is to "apply prevailing wage requirements to certain public-private partnerships." However, the actual impact of the new language is to limit the statute's application to public-private partnerships.

The prevailing wage requirements currently apply to public-private partnerships, so long as the monetary threshold is met and no exclusion applies, as a public-private partnership is a contract "where County funds are used to finance all or part of the cost of the contract." County Code §11B-33C(a). Bill 35-21 would render the prevailing wage requirements inapplicable to a public-private partnership contract for construction work unless the County's contribution totaled at least \$5 million, regardless of the overall value of the contract. For example, under the current law, a public-private partnership contract for construction work with a total value of \$2 million, 50% of which is financed by the County, is subject to the prevailing wage requirements. But under Bill 35-21, that same contract would no longer be subject to prevailing wage requirements, as the County's contribution is less than \$5 million. The Office of Procurement fails to see how this achieves the stated purpose, and requests that the Bill be clarified.

4. Local hiring mandate for at least 51% of the new jobs for the County financed construction contract to include local workers who reside in the County

It is my understanding that the Office of the County Attorney has opined that the proposed hiring mandate may violate the Privileges and Immunities Clause of the U.S. Constitution absent a “substantial reason” for the discrimination created by the requirement as well as a showing that the discriminatory legislation is directly related to the reason. The Office of the County Attorney further opines that the local hiring mandate may run afoul of the Equal Protection guarantees of Article 24 of the Maryland Declaration of Rights.

Of course, the above are serious, and possibly insurmountable, concerns. Beyond the legal obstacles, however, the proposed requirement would be exceedingly difficult, if not impossible, to monitor or enforce in any meaningful manner.

The County would have to investigate each contractor’s and subcontractor’s new employees’ residency on a regular basis, to ensure that the residency requirement is being met. This would involve site visits and interviews to determine worker’s residency for everyone this is on the job site. Additional County staff will be needed to sufficiently manage this aspect. The verification and investigation process prior to the contract award would delay the award process significantly.

Additionally, the Office of Procurement requests that Council amend the Bill so as to address following practical considerations:

- What steps contractors will be expected to take to verify the addresses being provided by prospective employees.
- What proof of employment will employees be required to produce.
- How frequently contractors are to monitor/verify employee residences.
- How frequently County compliance staff should follow-up/investigate employee residences.
- The consequences, if any, to the contractor if its employees move out of the County during the course of the contract term, taking the contractor below the 51% threshold.
- What information a contractor must provide to demonstrate a “good faith effort” to comply with the mandate.
- How County compliance staff are to account for hiring variables such as experience, education, skills, schedule demands, and personality “fits” in assessing a contractor’s “good faith efforts” to comply.
- Whether any individual right of action would be created.

Finally, the Office of Procurement proposes inclusion of a one-year Sunset Date for the local hiring mandate in order to allow the County time to gather data on the implementation and effectiveness of the provision and, if appropriate, reassess the structure of the mandate.

Written Statement on Bill 35-21, Prevailing Wage Law (PWL) Amendments

Feedback regarding this provision was solicited from various County contractors, who responded as follows:

- “We don’t discriminate against a worker based on where they live and have to place that worker on projects based on backlog and resource requirements.” - DEP contractor.
- “This will be very difficult to achieve and will present a multitude of peripheral issues if it must be enforced. Our best estimate is more than half of trade contractors would not be able to comply with this and this would undoubtedly increase the cost on a project.” - DGS contractor.
- “The 51% in-county hiring requirement would constrict an already diminished labor pool and make hiring even more difficult. The pandemic has created the largest exodus from the workforce since these statistics have been tracked, and even as we have increased wages significantly over the past two years it is still a struggle to find candidates interested in doing maintenance and construction work. The workforce gap is a market-wide phenomenon, and a targeted restriction will only put county maintenance program contractors at a disadvantage to other employers in hiring flexibility. This restriction would make hiring for this work even more difficult and make it more difficult for any contractor to run an efficient maintenance operation.” – DEP contractor.
- “The 51% resident recruitment requirement will be difficult to comply with, monitor, audit and achieve. It constrains [our] ability to source because it limits the number of subs who qualify. Because the demand will exceed supply, assuming the goal is achievable, it will certainly drive-up costs.” – DGS contractor

5. Reporting and Enforcement

As noted by the Office of the County Attorney, provisions regarding reporting and enforcement of prevailing wage compliance are already present in Section 11B-33C of the County Code. Bill 35-21 appears to create additional “reporting requirements” and “violations” sections, without modifying the existing sections. This is likely to cause significant confusion in the implementation of the law.

6. Retroactivity

Finally, the Office of Procurement requests that Bill 35-21 be applied only to contracts solicited or entered into after July 1st, 2022 as the effective date. Retroactive application of the Bill to existing contracts would be a significant hardship to contractors whose pricing was based on the law as of the time their contract was entered into.



**Written Testimony of Larry Stafford, Executive Director of Progressive Maryland
On Montgomery County Council Bill 35-21:
Prevailing Wage – Construction Contracts – Amendments**

POSITION: SUPPORT WITH AMENDMENTS

Thank you for the opportunity to submit written testimony in support of Bill 35-21: Prevailing Wage Requirements – Construction Contracts – Amendments. My name is Larry Stafford, and I am the Executive Director of Progressive Maryland.

Progressive Maryland has thousands of members across the state, including a large chapter in Montgomery County. Progressive Maryland is a multi-racial, working-class political organization that is building a movement to save our planet and put working people in control of our government and economy while ending all forms of structural oppression within our state.

We at Progressive Maryland support Bill 35-21 because clarifies and expands the County's prevailing wage ordinance. Specifically, if passed, Bill 35-21 would apply to "routine operation, repair, and service contracts for maintenance of existing structures, buildings, or real property that will significantly restore, change, increase, or extend service life." Such a change would bring Montgomery County's prevailing wage ordinance into line with Baltimore County's, which was passed in 2020 with bi-partisan support. It will also clarify that road milling and resurfacing, and sidewalk replacement, should be covered by prevailing wage; for more than a decade, the Executive has been inappropriately classifying such projects as service contracts.

Bill 35-21 will improve workers' wages and level the playing field for more types of construction contractors. Without prevailing wage, low-road contractors cut wages to the bone to try and win work—at the detriment to workers. As we seek to recover from the Covid-19 pandemic, policies like prevailing wage are more important than ever. So, this is the right time to be expanding the roster of public works projects covered by prevailing wage.

It is also critical that Montgomery County spell out its policies with regard to prevailing wage and economic development subsidies. In 2020, County Council Bill 29, which provided a PILOT to private development on WMATA properties located in the County, was silent on whether prevailing wage should apply, and an amendment to require it failed to pass on a 4-5 vote. Bill 35-21 helps address this shortfall in the County's Code of Ordinances by applying prevailing wage to certain PILOT projects. **Progressive Maryland suggests amending Bill 35-21 so that it defines and covers tax increment financing (TIFs) and public-private partnerships (P3s) in case the county ever adopts these tools.** Baltimore County's prevailing wage law includes TIFs, PILOTs, and P3s valued at \$5,000,000 or more, so the precedent exists.

Moreover, by expanding its prevailing wage law, Montgomery County will be shifting more employment on County public works projects to County residents, which will have a positive economic impact on its local economy. According academic research, prevailing wage laws help promote local companies, who also tend to employ local residents.

Progressive Maryland supports reducing the prevailing wage threshold from \$500,000. **Progressive Maryland suggests amending the bill to lower the threshold to \$250,000, or the state's threshold, whichever is lower.** \$250,000 is the state's new threshold, and it is the threshold of both Baltimore and Anne Arundel Counties. No other locality tethers their prevailing wage threshold to the state's threshold. So why should Montgomery County?

Progressive Maryland also supports the local hiring component of Bill 35-21, which requires county contractors to use best efforts to fill at least 51% of new jobs required to complete county-financed construction projects with county residents. It is important that taxpayer dollars create taxpayer jobs. **Progressive Maryland suggests amending Bill 35-21 to clearly articulate a "best efforts" reporting requirement, and a process for withholding county payments for contractors who violate those requirements.**

We at Progressive Maryland urge the County Council to pass Bill 35-21, and send it to the desk of County Executive Elrich as soon as possible.

Thank you for the opportunity to share the viewpoint of Progressive Maryland on this very important bill.



Plumbers Local Union No. 5

United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO

5891 Allentown Road, Camp Springs, MD 20746 • Telephone: (301) 899-7861 • Fax: (301) 899-7868

October 30, 2021

Dear Council Members:

As **Business Manager/Financial Secretary Treasurer** of UA Plumbers & Gasfitters Local 5, please accept this letter in strong support of Bill 35-21, Prevailing Wage Requirements – Construction Contracts – Amendments.

The UA Plumbers & Gasfitters Local 5 have been installing, maintaining, and servicing the waste, water & gas systems in the Washington D.C. area since 1890. We represent some 1,800 of the most highly skilled construction workers to be found anywhere, including over 300 apprentices, which provide the workforce excellence across some 65 signatory construction contractors throughout the Washington, DC Metropolitan area.

We provide and fund some of the most comprehensive and rigorous skills training programs in the nation, due in large part to the Davis-Bacon and Prevailing Wage programs at the federal, state and county levels. It's because of prevailing wage reforms like those found in Bill 35-21, as well as those recently enacted in Arlington County, Baltimore County, and Anne Arundel County, that we can prepare thousands of young apprentices for outstanding middle-class jobs, with health care, pensions, and scholarships.

Make no mistake - this bill is an extremely powerful anti-poverty and stimulative measure, that is greatly needed.

Specifically, Bill 35-21 conforms and aligns our local prevailing wage law with the state prevailing wage law, making our regional wage rates more uniform, and more competitive with neighboring jurisdictions. The bill also broadens the local prevailing wage program by including projects like P3s, other construction crafts, and includes targeted local hiring provisions. But most important to my members, the bill expands county prevailing wages to service contracts, which encompasses much of the work and skills training that we do.

It is important to note that, due to a drafting omission, we are supporting a critically important amendment, offered by Council President Hucker, to conform the new county service contract to the federal McNamara-O'Hara Service Contract Act of 1965. That amendment also significantly narrows the scope of the service contract applicability to mechanical systems contracts, specifically. Without this amendment, which should have been in the original bill, the bill falls short of achieving the full economic impact that was envisioned, and that is necessary.

Members of the Council, this bill will have an enormous impact in terms of lifting workers into the middle-class and helping to focus our scarce county safety-net resources on those families who most need them.

On behalf of my members and the thousands of other workers whose lives will be positively impacted by this legislation, thank you for your leadership, for your service, and for your support.

Sincerely,

Terriea "T" Smalls
UA Plumbers & Gasfitters Local No. 5
Business Manager / Financial Secretary Treasurer

Yunmy Carroll (Testifying by Video)

Representative of “Women of Local 602 Steamfitters Union” Group

Bill 35-21: Support with Amendment



Women of Local 602 Steamfitters Union

Mission Statement:

For the acceptance, preservation and livelihood of the women of the Local 602. Our mission as member of this group is to be dedicated to recruit, retain, mentor and support our membership while working side by side within our Brethren. We will inspire and empower each other to seek out opportunities to promote our local union. We also want to take the initiative to work with the community and the Brotherhood to encourage and cultivate a diverse membership.



Dear Members of the Council:

On behalf of the Mechanical Contractors Association of Metropolitan Washington (MCAMW), and in solidarity with the Mechanical Contractors Association of Maryland, I write today to express our strong support for the Bill 35-21, Prevailing Wage Requirements – Construction Contracts – Amendments.

We appreciate strong leadership of Council President Hucker, Councilmember Jawando, and all 7 members who have cosponsored this important legislation to incentivize good jobs, strong apprenticeship training, and building a thriving regional economy.

The MCAMW represents 180 construction contractors, some 10,000 workers, and 1,000 working apprentices. Our economic footprint throughout the region is substantial, generating some \$2 BILLION in annual revenue, and some \$500 MILLION in state, federal and local taxes each and every year.

We support Bill 35-21, because we know that prevailing wages (and Davis Bacon wages on the federal level), yield better outcomes, more timely deadlines, and far fewer workplace injuries. That's why Arlington County, Baltimore County, and Anne Arundel County have all recently enacted prevailing wage reforms.

Bill 35-21 is critical for our members and contractors, in conforming, expanding and aligning the county law to both the state and the federal laws. Specifically, the bill conforms the county law to the state prevailing wage threshold, expands prevailing wages to public-private partnerships (P3s), and implements local hiring requirements for county public works construction projects.

In addition, we are supporting the Council President's amendment to fix an omission in the original bill draft. The amendment will align the new county law on Bill 35-21 to the federal McNamara-O'Hara Service Contract Act of 1965, but precisely limits that scope only to mechanical systems contracts.

Thank you so much for your support of this important legislation, and I hope for its passage.

Sincerely,

A handwritten signature in black ink, appearing to read "T. Bello", is placed above the printed name.

Thomas L. Bello
Executive Vice President

Journeyman Pipe Fitters and Apprentices



Local Union No. 602

8700 ASHWOOD DRIVE • 2ND FLOOR • CAPITOL HEIGHTS, MD 20743

TELEPHONE: (301) 333-2356 • FAX: (301) 333-1730
AFFILIATED WITH AFL-CIO

Dear esteemed Members of the Council:

As Business Manager/Financial Secretary Treasurer of UA Steamfitters Local 602, please accept this letter in strong support of Bill 35-21, Prevailing Wage Requirements – Construction Contracts – Amendments.

The UA Steamfitters Local 602 represents some 4,200 Journeymen, 920 Apprentices, and 200 plus signatory Mechanical Construction and Service Contractors in the Heating, Air Conditioning, Refrigeration and Process Piping Industry throughout the Washington, DC Metropolitan area. Our economic and workforce footprint is enormous, including having performed some 7,231,500 work hours in 2020 alone. We understand how to make Maryland work, because it's what we do, each and every day.

Our work is a business-labor partnership, and our contractor affiliates, represented by the Mechanical Contractors Association of Metro Washington (MCAMW), is a powerful driver of local economies throughout the region, generating some \$2 BILLION in annual revenue, and some \$500 MILLION in state, federal and local taxes each and every year.

As much as anyone, we understand the importance of the federal Davis-Bacon and state/local Prevailing Wage programs, which are critical in our training and preparing the next generation of skilled Apprentices and Journeymen who will drive the standards of construction excellence in building world-class infrastructure and economic growth. But we can and must do much better, just as Arlington County, Virginia, Baltimore County, and Anne Arundel County have recently done with their prevailing wage reforms.

That's why this legislating is critical.

Bill 35-21 makes several common-sense, conforming, and necessary alignments to the county law. For example, the bill conforms the county prevailing wage law to the state prevailing wage law, with regard prevailing wage thresholds. In addition, the bill expands the scope of prevailing wage to public-private partnerships (P3s) and several other construction works. And finally, the bill adopts the recently-passed Baltimore City local hiring requirement for county public works construction projects, to ensure greater stimulative return on investment for county taxpayers, by ensuring that more residents of Montgomery County receive the benefit of county-funded projects.

In addition, we are supporting Council President Hucker's amendment to address a drafting omission. The amendment conforms the county law to the federal McNamara-O'Hara Service Contract Act of 1965, and narrowly-tailors the county law specifically to mechanical systems contracts.

In a time when our economy and jobs are stagnating, and recession is rising, one solution is clear: Prevailing Wages can help to train and employ local workers, and fire up the economic base, if we unleash the full power of the program. We can do it, and we must.

For these reasons, we ask for your support of this important legislation, with amendment.

Thank you for your consideration, and for your support for the working men and women of UA Steamfitters Local 602.

Very truly yours,

Chris Madello

Business Manager / Financial Secretary Treasurer



**Testimony of Victoria Leonard, Political and Legislative Director,
Baltimore-Washington Laborers' District on
Montgomery County Council Bill 35-21:
Prevailing Wage – Construction Contracts – Amendments**

POSITION: SUPPORT WITH AMENDMENTS

Thank you for the opportunity to testify today on Bill 35-21. My name is Victoria Leonard. I am the Political and Legislative Director for the Baltimore Washington Laborers' District Council. We are an affiliate of the Laborers' International Union of North America, or LiUNA for short. The District Council represents more than 7,500 construction workers across the region, many of whom reside in Montgomery County.

On behalf of LiUNA, thank you so much for introducing this bill, and with such wide support. A special thanks to Council President Hucker and Councilmember Jawando for working together as lead sponsors. And a shout-out as well to co-sponsors Councilmembers Rice, Albornoz, Katz and Riemer. We at LiUNA feel that this is a great moment in Montgomery County.

LiUNA supports this bill because it brings the county's prevailing wage threshold into line with the state's threshold, which is now \$250,000. LiUNA also supports the broader definition of construction included in the bill. All workers on county construction contracts deserve to earn a fair day's pay for a fair day's work. And contractors who pay fair wages and benefits deserve a fair shot to compete and win work. Finally, LiUNA supports this bill because it champions local hiring.

However, LiUNA would like to suggest strengthening Bill 35-21 in two important ways:

1. Projects receiving economic development subsidies need to be more holistically addressed in the bill. Baltimore County, which passed its prevailing wage law in 2020, and Anne Arundel County, which passed its prevailing law last month, both cover subsidized projects receiving more than \$5 million in county funds. LiUNA hopes that Montgomery County will be able to do the same, or even better.
2. The process for implementing the local hiring provision needs to be spelled out in Bill 35-21, rather than leaving it to up to county government to adopt regulations. Both the Baltimore County and Anne Arundel County prevailing wage laws provide good examples for things like reporting requirements and what to do when a violation occurs.

In closing, we at LiUNA appreciate the Council for taking on the effort to update the County's prevailing wage law, and we look forward to working with you on finalizing this bill.

Testimony of Lorie Craig, Owner, Craig Electric
on
Montgomery County Council Bill 35-21:
Prevailing Wage Requirements – Construction Contracts - Amendments

Position: Support

Thank you for the opportunity to testify on Bill 35-21. My name is Lorie Craig. I am the owner of Craig Electric – proudly located in Rockville, Maryland in District 4. My husband Kevin and I employ five people, and we have been in electrical contracting business for more than 20 years. Our specialty is electric controls, and we have worked on many construction projects across the region.

Craig Electric supports Bill 35-21. We support lowering the county's prevailing wage threshold to the state's current level of \$250,000. We support expanding prevailing wage to include routine operation, repair, and maintenance. And we support expanding prevailing wage to cover development projects receiving subsidies from the county.

From the perspective of a construction contractor, these adjustments to the county's prevailing wage law will be very helpful for several reasons.

Number one, by broadening the coverage of the county's prevailing wage law, you are further leveling the playing field for high-road contractors like my company. It is well-established that prevailing wage prevents low-road contractors from undercutting quality contractors like Craig Electric who are committed to paying family supporting wages and benefits. When there is a level playing field, I know my company can compete and win work.

Number two, prevailing wage helps companies like mine retain a trained and skilled workforce. This in turn reduces turnover and injury rates, and boosts worker productivity. All of these factors combined help offset the impact of prevailing wage on construction costs.

Thank you for the opportunity to testify. Please vote in favor of this bill.



**Testimony of Kurt Snyder, Marketing and Communications Manager,
Sheet Metal and Air Conditioning Contractors Association, Mid-Atlantic Chapter
on
Montgomery County Council Bill 35-21:
Prevailing Wage – Construction Contracts – Amendments**

POSITION: SUPPORT WITH AMENDMENTS

Thank you for the opportunity to submit testimony on Bill 35-21. My name is Kurt Snyder. I am the Marketing and Communications Manager for the Mid-Atlantic Chapter of the Sheet Metal and Air Conditioning Contractors Association, or SMACNA for short.

SMACNA is a worldwide organization that represents more than 3,500 union HVAC and sheet metal contractors. We have 45 member firms headquartered in Maryland, including many with offices in Montgomery County.

SMACNA supports Bill 35-21 because it lowers the County's prevailing wage threshold to \$250,000 and expands its coverage to include "routine operation, repair, and service contracts for maintenance of existing structures, buildings, or real property that will significantly restore, change, increase, or extend service life."

These modifications to Montgomery County's prevailing wage law are game-changers for SMACNA members because they will help them compete on a broader range of projects. From a contractors' perspective, prevailing wage is very helpful because it levels the playing field for reputable, high road contractors like the members of SMACNA. Prevailing wage prevents low-road contractors from undercutting high-road contractors committed to paying decent wages and benefits. Prevailing wage signals to high-road companies that they can compete for and win government contracts. Experience shows that by raising standards for workers, governments like Montgomery County can encourage more companies to bid for contracts.

SMACNA also supports the local hiring portion of Bill 35-21. It is good public policy to have local taxpayer dollars create for local jobs for Montgomery County residents. And with prevailing wage in place, local residents will not need to commute out-of-county to earn decent, family-supporting wages. And for local contractors, that also makes it easier to retain a quality workforce.

SMACNA does offer some suggested amendments for Bill 35-21, which we believe will bring it into line with best practices occurring in other Maryland counties. Specifically:

1. **Amend the bill so that prevailing wage applies to county-subsidized capital projects, such as those receiving tax increment financing (TIFs) or payment in lieu of taxes (PILOTs), as well as public-private partnerships (P3s).** As drafted, Bill 35-21 covers P3s in which the county has invested \$5,000,000 or more, with a carve-out for certain affordable housing projects, but is silent on PILOTs and TIFs. Baltimore County's prevailing wage law, passed in 2020, covers county-subsidized projects receiving \$5,000,000 or more, whether the subsidy comes in the form of a P3, TIF, or PILOT. Requiring prevailing wage on economic development projects receiving large taxpayer subsidies will help reputable contractors like the members of SMACNA compete and win this work.
2. **Amend the bill to set the County's prevailing wage threshold at \$250,000, or the state's threshold, whichever is lower.** As drafted, the legislation bases the County's threshold on the state's threshold, which is currently \$250,000 (lowered from \$500,000 in 2021.) Baltimore County's threshold is \$300,000 and Anne Arundel County's threshold is \$250,000, but neither is linked to state's threshold.

On behalf of all the sheet metal contractors who belong to SMACNA, we urge the County Council to pass Bill 35-21 as soon as possible. Thank you for the opportunity to share our thoughts and on this very important bill.



Testimony of Gustavo Torres, Executive Director, CASA
on
Montgomery County Council Bill 35-21:
Prevailing Wage Requirements – Construction Contracts - Amendments

Position: Support With Amendments

Thank you for the opportunity to submit written testimony in support of Bill 35-21: Prevailing Wage Requirements – Construction Contracts - Amendments. My name is Gustavo Torres and I am the Executive Director of CASA.

CASA is the largest grassroots immigrant advocacy organization in the Mid-Atlantic Region. We have more than 115,000 lifetime members, and are committed to blending human services, community organizing and strategic campaigns to serve the full spectrum of needs, dreams and aspirations of our members.

CASA supports Bill 35-21, with some amendments.

CASA supports lowering the county's prevailing wage threshold. We believe the threshold should be \$250,000 or the state's threshold, whichever is lower. A \$250,000 threshold brings Montgomery County in line with the state's new, lower threshold, as well as with the thresholds in Baltimore County (\$300,000) and Anne Arundel County (\$250,000), both of which recently passed prevailing wage ordinances.

CASA supports expanding the types of county-financed construction projects to be covered by the county's current prevailing wage law, including economic development projects (other than affordable housing projects) receiving county subsidies, including projects receiving PILOTs or TIFs in addition to P3s. The Covid-19 pandemic vividly illustrates the adverse impact that systemic racism, including wage discrimination, can have on people of color. Prevailing wage laws establish wage floors for different types of construction work on public projects based on what workers actually earn in a community. As we recover from the pandemic, broadening the county's prevailing wage law to include routine operation, repair, and service contracts for the maintenance of existing structures, buildings, and real property, as well as private projects receiving public subsidies, will lift more construction workers out of poverty, create more pathways to the middle class, and



enable more of the workforce that maintains our public infrastructure to be able to afford to live here.

Economic research shows that these laws also reduce racial income inequality in construction. Prevailing wage laws also help prevent misclassification and wage theft in the construction industry. Misclassification, or the illegal classification of workers as independent contractors, is rampant in the construction industry and disproportionately affects workers of color, including many of CASA's members.

In addition, prevailing wage requirements prevent low-road businesses from undercutting high-road employers committed to paying decent wages and benefits in bid competitions. Providing employers with a clear guideline for what is an acceptable rate of compensation signals to high-road employers that they can compete for and win government contracts. Experience shows that by raising standards for workers, governments can encourage more companies to bid for contracts.

CASA also supports the local hiring component of Bill 35-21, which requires county contractors to use best efforts to fill at least 51% of new jobs required to complete the capital improvement contract or capital project with county residents. We support including "reporting requirements," "violations," and "untimely reporting" sections in Bill 35-21, rather than leaving it to the discretion of the county government to adopt regulations or promulgate policies and guidelines. It is important that taxpayer dollars create taxpayer jobs, and targeted hire provisions can help increase recruitment of women and Black and Latinx workers in the construction industry.

On behalf of all of us at CASA, please vote in favor of Bill 35-21.



Dear Montgomery County Councilmembers:

On behalf of the Mid-Atlantic Pipe Trades Association and our members across Montgomery County, I ask you to support Council Bill 35-21 with amendments. Whenever taxpayer dollars are getting used on construction, be it through Capital Improvement or given as a Tax Incentive, the wages earned by the workers on the project should be the county's prevailing wage to ensure local workers work on local projects.

The original Davis Bacon Act (Prevailing Wage) was created to protect local works and wages. It ensured that low-wage workers from out of state did not come and take jobs from higher-wage employees, lowering the market wage in an area and then sending their money back home to their families. In addition, it was designed to protect the market wage rate and ensure that local workers worked on local construction projects. Eventually, a companion law called the McNamara O'Hara Service Act of 1965 was created to protect the same group of workers as they serviced mechanical systems in the completed construction project.

In the last two years, the State of Maryland and the Commonwealth of Virginia have both updated or created their Prevailing Wage laws with the same threshold and wage standards as Council Bill 35-21 to protect their local works. In addition, Arlington County, Virginia, Baltimore County, Maryland, and Anne Arundel County, Maryland have also worked on their local laws in these states. This bill will bring Montgomery County in line with the State of Maryland and other surrounding counties regarding construction wages, expand Prevailing Wage to include Public-Private Partnerships, and emphasize the hire of local workers.

An amendment to Council Bill 35-21, introduced by Councilman Hucker, will also let Montgomery County, the most progressive county in Maryland, lead the way on construction service. Amending this legislation to match service contracts to the McNamara Ohara Act will ensure that the people servicing the mechanical systems such as plumbing, HVAC, Sprinklers, elevators, Electrical earn the same wages for these completed construction projects as they will building them.

Council Bill 35-21 will protect local works and help keep taxpayer dollars in the county. It will ensure that a construction worker from Montgomery County isn't losing a job to a construction worker from Mississippi or Alabama just because those workers are willing to earn half the wages of the local worker.

On behalf of our members and all Plumbers and Steamfitters across Montgomery County, I ask you to support Council Bill 35-21 with the amendment to align mechanical service contracts with the federal McNamara-O'Hara Act.

Sincerely,

Jason Ascher
Political Director
Mid-Atlantic Pipe Trades Association



THINK JEWISHLY. ACT LOCALLY.

**Written Testimony of Laura Wallace, Senior Organizer for Montgomery County,
Jews United for Justice, on Montgomery County Council Bill 35-21:
Prevailing Wage – Construction Contracts – Amendments**

Position: Support with Amendments

Thank you for the opportunity to submit written testimony in support of Bill 35-21: Prevailing Wage Requirements – Construction Contracts – Amendments. My name is Laura Wallace, and I am the Montgomery County Senior Organizer for Jews United for Justice (JUFJ).

Jews United for Justice's mission is to advance economic, racial, and social justice in Maryland and DC by educating and mobilizing our local Jewish community and allies to action. We have helped win a higher minimum wage, paid family and medical leave, police accountability, affordable housing, and many other progressive policies. We are committed to moving resources and power into the hands of people of color who have been systematically blocked from the political process.

Jewish tradition teaches us the value of laborers' work, stating in the book of Deuteronomy that employers "must pay [workers] their wages on the same day, before the sun sets, for they are needy and urgently depend on it; else they will cry to God against you and you will incur guilt" [Deuteronomy 24:15]. Workers deserve full compensation for their work. And in Montgomery County, we have the opportunity to ensure more workers receive their fair share.

JUFJ supports Bill 35-21 because it broadens and clarifies the County's prevailing wage ordinance, and lowers its threshold. Bill 35-21 brings Montgomery County's prevailing wage threshold into line with recent prevailing wage legislation enacted by Baltimore County in 2020 and by Anne Arundel County in October 2021. Montgomery County's threshold is currently \$500,000; Baltimore County's is \$300,000 and Anne Arundel County's is \$250,000. In addition, earlier this year the state dropped its threshold to \$250,000. **Because the state could raise its threshold in the future, we support an amendment that sets the threshold at \$250,000 or the state's threshold, whichever is lower, rather than linking the County's threshold completely to the state threshold.**

As we continue to recover from the COVID-19 pandemic, now is the right time to align with Baltimore County's practices and broaden the types of public works projects covered by prevailing wage. We therefore support applying the Montgomery County prevailing wage law to "routine operation, repair, and service contracts for maintenance of existing structures, buildings, or real property that will significantly restore, change, increase, or extend service life." This expansion will improve workers' wages and level the playing field for more types of construction contractors. In the absence of prevailing wage, low-road contractors cut wages to try and win work – to the detriment of workers.

Montgomery County must articulate policies with regard to economic development subsidies and prevailing wage. Last year, the Council introduced Bill 29-20 to provide a *payment in lieu of taxes* (PILOT) to support private development on WMATA properties located in the County. We were disappointed that the bill did not address whether prevailing wage should apply, and an amendment to require it failed to pass on a 4-5 vote. The current Bill 35-21 identifies that prevailing wage applies to PILOTs, with certain exceptions related to the construction of affordable housing. **Because in the future, Montgomery County might use tax increment financing (TIFs) or public private partnerships (P3s,) JUFJ believes Bill 35-21 must be amended to apply prevailing wage to TIFs and P3s, and include a definition of each, or include references to the state's definitions.**

Bill 35-21 includes a local hiring component, similar to both Baltimore County and Anne Arundel County, which requires County contractors to use best efforts to fill at least 51% of new jobs that are required for construction projects financed by the County with County residents. It is important that taxpayer dollars create taxpayer jobs. **JUFJ supports an amendment so that Bill 35-21 specifies a “best efforts” reporting requirement, and a process for withholding County payments for contractors who violate those requirements.**

Thank you for the opportunity to testify to this very important bill. We urge you to move quickly to pass Bill 35-21 with the detailed amendments.



November 2, 2021

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abcmetrowashington.org

The Honorable Tom Hucker
Council President
Montgomery County Council
100 Maryland Avenue
Rockville, Maryland 20850

Subject: Opposition to Bill 35-21 by the Metropolitan Washington Chapter, Associated Builders and Contractors

Dear Council President Hucker,

The Metropolitan Washington Chapter, Associated Builders and Contractors ("ABC") respectfully submits this opposition to Bill 35-21 (Prevailing Wage Requirements – Construction Contracts – Amendments).

ABC submits this opposition to challenge the Bill's new requirement that "51% of the new jobs to complete" applicable county-financed construction projects must be filled by Montgomery County residents (the "Local Source Requirement"). Bill, 11B-33C(d)(3). ABC urges the Council to strike the Bill's proposed new Local Source Requirement for several reasons.

First, the Local Source Requirements will be counter-productive and harmful to the County for policy reasons. The construction industry, like many industries in the post-COVID-19 era, is experiencing a labor shortage. See Exhibit A. ABC Chief Economist Anirban Basu recently noted that "[t]he ongoing labor shortage puts continued upward pressure on the price of delivering construction services." Id. Based on ABC's Construction Backlog Indicator, a growing chorus of project owners are choosing to delay projects and, in some instances, cancel them altogether. Id. Contractors simply cannot find enough workers to build the projects in demand. This labor shortage is driving prices higher and leading to the delay or cancellation of projects. Passing the Local Source requirement would only exacerbate this labor shortage and impose delays and cost increases on County construction projects.

On the other hand, ABC and its members believe the best way to promote local construction hiring is to devote resources to increasing the construction labor pool through training, internships and recruitment. For example, ABC member companies are heavily involved in Montgomery County Public School's Construction Trades Foundation. This program promotes construction vocational training of Montgomery County's high school students. Additionally, the ABC Work Force Development committee also promotes expanding and hiring among the construction workforce through programs such as ABC CraftMasters. The County and its residents would be better served by investing in programs such as these which actively promote construction hiring in the County, rather than further handcuffing contractors by decreasing their available labor resources and increasing the cost of County-financed projects.

Second, the Local Source Requirement may be unconstitutional and is likely vulnerable to legal challenge under the Privileges and Immunities Clause of the U.S. Constitution. Quotas on local hiring have previously been struck down by both federal and state courts. *Metro Washington Chapter v. D.C.*, 57 F. Supp. 3d 1, 24 (D.D.C. 2014)

(denying motion to dismiss challenge to D.C. "First Source" local hiring requirements); *W.C.M. Window Co., Inc. v. Bernardi*, 730 F.2d 486 (7th Cir. 1984) (held that an Illinois residence based classification violated the Privileges and Immunities Clause); *Util. Contractors Ass'n of New England, Inc. v. City of Worcester*, 236 F.Supp.2d 113 (D.Mass.2002) (Massachusetts law that required all contractors on public projects to allocate 50 percent of all employee work hours to city residents were granted a preliminary injunction against enforcement of the law); see also, *United Bldg. & Const. Trades Council of Camden Cty. & Vicinity v. Mayor & Council of City of Camden*, 465 U.S. 208, 221-22, 104 S.Ct. 1020 1027 (1984) ("[t]he opportunity to seek employment with such private employers is sufficiently basic to the livelihood of the Nation as to fall within the purview of the Privileges and Immunities Clause even though the contractors and subcontractors themselves are engaged in projects funded in whole or in part by the city."). The County would not be well-served by endangering the entire Bill because it includes a constitutionally infirm local-hiring requirement.

Accordingly, ABC opposes the Bill because: (1) it would exacerbate the effects of the current labor shortage and lead to delays and cost increases on County projects; and (2) is legally infirm.

Sincerely,



Marcus D. Jackson, Director
Government Affairs

Nonresidential Construction Employment Rises Slightly in September, Says ABC

Posted @ Friday, October 8, 2021 9:36 AM by Erika Walter | Files in **Construction Economic Update, Employment, News Release 2021**

WASHINGTON, Oct. 8—The construction industry added 22,000 jobs on net in September, according to an Associated Builders and Contractors analysis of data released today by the U.S. Bureau of Labor Statistics. Overall, the industry has recovered 912,000 (81.9%) of the jobs lost during earlier stages of the pandemic.

Nonresidential construction employment increased by 18,600 positions on net, with all three subcategories showing gains for the month. Nonresidential specialty trade contractors added 11,400 jobs, while nonresidential building and heavy and civil engineering employment rose by 4,100 and 3,100 positions, respectively.

The construction unemployment rate dropped slightly to 4.5% in September. Unemployment across all industries fell from 5.2% in August to 4.8% last month.

"The economy added fewer than 200,000 jobs in September, well below the consensus forecast of 500,000 new jobs, making it clear that August's disappointing employment performance was not an aberration," said ABC Chief Economist Anirban Basu. "Earlier during the summer, the U.S. economy had been adding jobs at a rapid pace. The last few weeks suggest the final stages of labor market recovery will prove extremely challenging.

"Theories abound regarding why employers are struggling to fill available jobs, including fear of infection and vaccination, previously received federal assistance and changed values during the pandemic," said Basu. "Recent data suggest that many job seekers are actively looking for opportunities to continue to work from home much of the time. Construction generally does not supply many opportunities for telework.

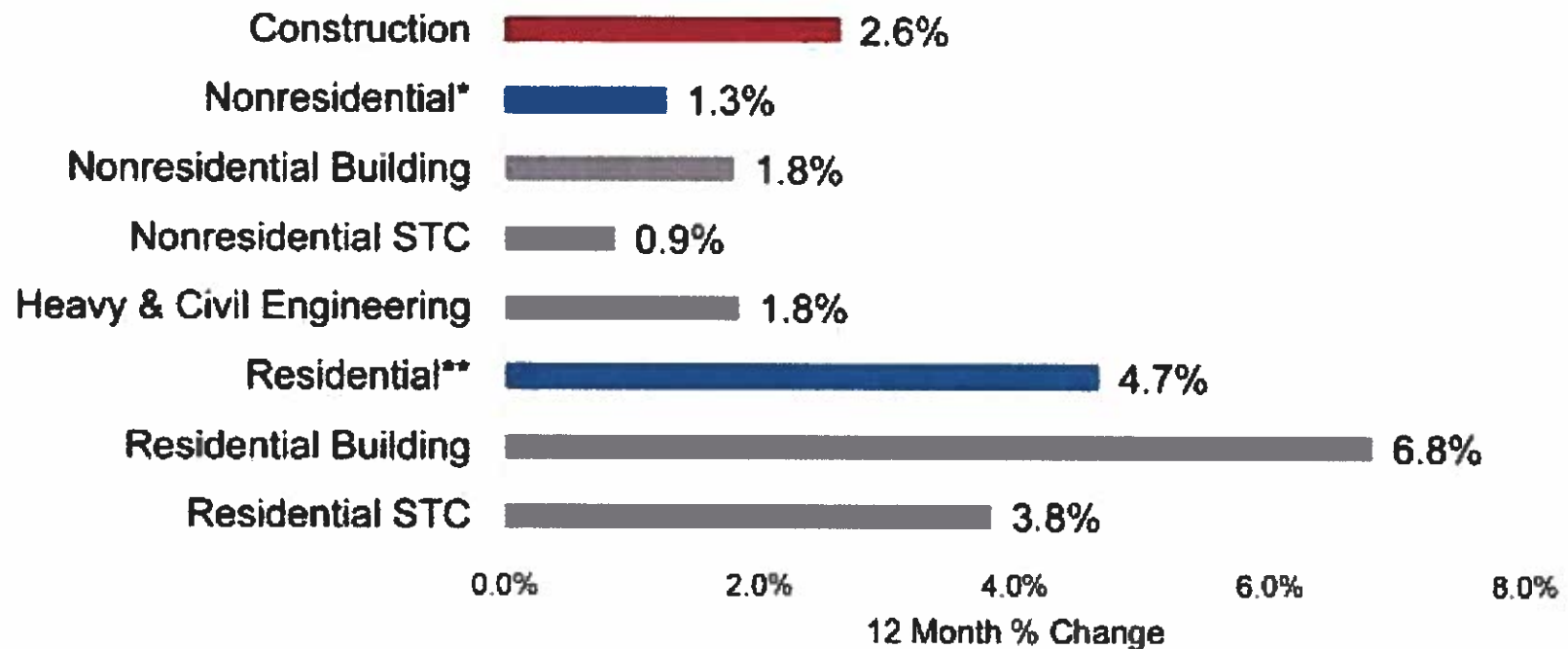
"The ongoing labor shortage puts continued upward pressure on the price of delivering construction services," said Basu. "Along with input shortages and rising materials prices, this is placing the recovery of nonresidential construction spending at risk. Based on ABC's **Construction Backlog Indicator**, a growing chorus of project owners are choosing to delay projects and, in some instances, cancel them altogether. The primary issue is that bids are coming in too high to justify the deployment of capital under many circumstances.

"Despite adding jobs on net in September, construction industry employment remains below March 2021 levels, and recent economic data suggest that some fraction of the **confidence** contractors have been expressing in recent months is unjustified," said Basu. "Inflationary pressures are slowing the pace of recovery in nonresidential construction, and with global supply chains in disarray and employers suffering ongoing difficulty filling openings, industry challenges will persist into 2022. At some point, however, the labor market should begin to normalize as people experience growing difficulty paying their bills and global supply chain dynamics eventually improve."

Construction Employment Statistics: September 2021

	September 2021	August 2021	September 2020	1-Month Net Change	12-Month Net Change	12-Month % Change
Employment						
Construction	7,447,000	7,425,000	7,256,000	22,000	191,000	2.6%
Nonresidential	4,385,900	4,367,300	4,331,000	18,600	54,900	1.3%
Nonresidential Building	814,600	810,500	800,200	4,100	14,400	1.8%
Nonresidential Specialty Trade Contractors	2,534,800	2,523,400	2,513,000	11,400	21,800	0.9%
Heavy & Civil Engineering	1,036,500	1,033,400	1,017,800	3,100	18,700	1.8%
Residential	3,060,800	3,057,400	2,924,500	3,400	136,300	4.7%
Residential Building	882,300	880,100	826,100	2,200	56,200	6.8%
Residential Specialty Trade Contractors	2,178,500	2,177,300	2,098,400	1,200	80,100	3.8%
Average Hourly Earnings						
All Private Industries	\$30.85	\$30.66	\$29.50	\$0.19	\$1.35	4.6%
Construction	\$33.25	\$33.08	\$31.82	\$0.17	\$1.43	4.5%
Average Weekly Hours						
All Private Industries	34.8	34.6	34.8	0.2	0.0	0.0%
Construction	40.0	38.8	39.0	1.2	1.0	2.6%

Source: Bureau of Labor Statistics

Construction Employment Growth: September 2020 v. September 2021

Source: Bureau of Labor Statistics

*Includes Nonresidential Building, Nonresidential STC, and Heavy and Civil Engineering

**Includes Residential Building and Residential STC



To,
The Montgomery County Council
100 Maryland Avenue
Rockville, Maryland

October 26, 2021

Bill 35-21, Prevailing Wage Requirements – Construction Contracts – Amendments
Position: Support

Dear Council members,

The Sierra Club Montgomery County supports bill 35-21.

This legislation expands the coverage of Montgomery County's prevailing wage law, ensuring that workers on a broader range of public works projects are paid family-supporting wages. The bill also includes a section to promote local hiring of county residents.

The Sierra Club, nationally and in Maryland, is committed to the principles of equity, justice, and inclusion, and supports placing these principles at the center of environmental initiatives. These principles embrace respecting and supporting the rights of workers, which includes their ability to have good jobs, earn a decent living, and enjoy on-the-job health and safety protections.

Sierra Club supports Bill 35-21 because it promotes quality construction work and produces good value for taxpayers. There is significant research that demonstrates prevailing wage laws boost worker productivity, reduce injury rates, and increase apprenticeship training, all of which helps to address the shortage of skilled labor in construction. For these reasons, Sierra Club specifically has supported prevailing wage on utility and stormwater management projects.

The Sierra Club has supported prevailing wage legislation at both the local and state levels, including most recently Maryland Senate Bill 35 in 2021 and Anne Arundel County Bill 72-21.

The Sierra Club urges the Council to pass Bill 35-21 as quickly as possible.

Sincerely,

Shruti Bhatnagar,
Chair, Sierra Club Montgomery County, MD
Shruti.bhatnagar@mdsierra.org | 240.498.3459

Prevailing Wage Law White Paper

Review of Public Policy Research

Gerard M. Waites, Esq.
O'Donoghue & O'Donoghue, LLP
4748 Wisconsin Ave, N.W.
Washington, D.C. 20016

January 2017

Table of Contents

I.	Introduction.....	1
II.	Executive Summary	1
III.	An Accurate Assessment of the Impact of Prevailing Wage on Project Cost Requires a Careful Analysis of Key Variables	1
A.	A Substantial Body of Credible Research Proves Prevailing Wage Policy Has No Real Impact on Total Project Cost	1
B.	Failure to Properly Consider Relevant Control Factors Yields Flawed Analysis & Inaccurate Results.	4
C.	The Few Studies Showing Prevailing Wages Impact Project Cost Have Been Discredited Due to Flawed Analysis and/or Improper Methodologies	5
IV.	Project Cost is Not Impacted Because PW Policy Promotes Training, Skill Levels, Productivity & Other Advantages.....	7
A.	Prevailing Wage Cost is Offset by Increased Efficiency & Productivity.....	8
B.	Non-Application of PW Policy Does Not Produce Cost Savings Due to Contractor Pricing Practices.....	9
V.	Prevailing Wage Policy Produces Substantial Economic & Public Policy Benefits for the State.....	10
A.	Prevailing Wages Increase State Tax Revenue & Resident Income.	10
B.	Prevailing Wages Promote Skill Training & Safety	12
C.	Prevailing Wages Promote Law Compliance	12
VI.	Conclusion	13
	Appendix A. Research Studies Supporting Prevailing Wage Laws.....	14

I. INTRODUCTION

This paper provides a comprehensive review of exhaustive research on the impact of prevailing wage laws (PWLs), which shows—uniformly and consistently—that such laws have no statistically significant impact on construction cost. It also reviews multiple public policy benefits generated for states or local jurisdictions that have adopted these policies.

II. EXECUTIVE SUMMARY

Prevailing wage policies require certain levels of wages and benefits to be paid on public construction. Currently, prevailing wage laws are in place for the federal government, thirty states, and the District of Columbia. Under prevailing wage, mandated rates are generally calculated from the mean or mode of wage figures collected in surveys of employers, in an attempt to make the prevailing wage reflect the wages that workers typically receive in that area. Studies show that prevailing wage policies are effective in promoting the use of local contractors and residents, which, in turn, earn and spend in the local economies.

To date, at least thirty-nine reports – including more than sixteen empirical analyses of actual construction data – by major colleges, academics, and other reputable institutes and researchers have shown that while prevailing wage requirements may increase *hourly labor* costs, they **do not have a real impact on total project cost** (see Appendix A for complete list of studies). In fact, the few studies that purport to show prevailing wages increase project cost have been discredited because they failed to control for critical variables, such as location, project type and inflation. Prevailing wage laws do not increase project costs for several reasons, including the fact that they promote better training, greater skill levels and higher labor productivity.

Moreover, when the *actual net impact* of prevailing wage laws is considered, research shows an *overall positive impact on state finances* since these laws help return substantial tax revenues to the state. Studies also demonstrate PWLs provide a host of other important economic and public policy benefits, including increased apprenticeship and training opportunities in construction for residents and safer workplaces with fewer injuries and workers' compensation claims.

III. AN ACCURATE ASSESSMENT OF THE IMPACT OF PREVAILING WAGE ON PROJECT COST REQUIRES A CAREFUL ANALYSIS OF KEY VARIABLES

A. A Substantial Body of Credible Research Proves Prevailing Wage Policy Has No Real Impact on Total Project Cost

More than sixteen empirical analyses conducted by major universities, academics and other reputable organizations over the last two decades confirm that prevailing wage laws do not increase the overall construction cost of public construction projects.¹ These studies, based on extensive

¹ See Kevin Duncan & Frank Manzo IV, *The Economic, Fiscal, and Social Effects of Kentucky's Prevailing Wage Law*, 9, Prepared for the Ky. State Building and Construction Trades Council (2016), <http://www.faircontracting.org/wp-content/uploads/2016/12/kentucky-report-duncan-and-manzo-2016-final.pdf> (summarizing findings of 17 peer-reviewed studies over the last sixteen years that have examined the issue and

research and analysis comparing prevailing wage projects to non-prevailing wage projects, show that there is no statistically significant difference in project cost.

A key finding from these studies and other research is that it is essential that such studies take into account numerous control variables in order to obtain accurate, reliable results. Developing controls for factors such as project location or inflation, for example, is vital to avoid skewed findings and ensure the analysis yields credible results. The question of whether the application of prevailing wage has any true impact on total and final project cost is considerably more sophisticated than it might appear at first glance.

In order to conduct a proper, accurate analysis of the impact of prevailing wages on total project cost, the main control factors that generally should be considered include the following:

observing 76% have found “that prevailing wages are not associated with increased construction costs.”); Michael P. Kelsay, *The Adverse Economic Impact from Repeal of the Prevailing Wage Law in West Virginia*, Prepared for the Affiliated Construction Trades Foundation (2015), <http://www.faircontracting.org/wp-content/uploads/2015/01/The-Adverse-Economic-Impact-from-Repeal-of-the-PW-Law-in-WV-Dr.-Michael-Kelsay-Full-Report.pdf>; Kevin C. Duncan, *An Analysis of Davis Bacon Prevailing Wage Requirements: Evidence from Highway Resurfacing Projects in Colorado*, Colo. State Univ.-Pueblo (2011), https://www.bctd.org/BCTD/media/Files/Duncan,-Kevin-DB-Study-Highways_1.pdf; Michael P. Kelsay, et al., *The Adverse Economic Impact from Repeal of the Prevailing Wage Law in Missouri*, Univ. of Mo. – Kansas City (2011), <http://cas.umkc.edu/economics/resources/prevailingwagestudy.pdf>; Construction Labor Research Council, *Wages, Productivity and Highway Construction Costs*, Prepared for the Construction Industry Labor-Management Trust (2004); Michael Kelsay, et al., *The Adverse Economic Impact from Repeal of the Prevailing Wage Law in Missouri*, Univ. of Mo. – Kansas City (2004), http://www.faircontracting.org/PDFs/prevailing_wages/The%20Adverse%20Economic%20Impact%20from%20Repeal%20of%20the%20Prevailing%20Wage%20Law%20in%20Missouri.pdf; Hamid Azari-Rad et al., *State Prevailing Wage Laws and School Construction Costs*, 42 Indus. Rel. 445 (2003), <http://content.csbs.utah.edu/~philips/soccer2/Publications/Prevailing%20Wages/Cost%20of%20Construction/IR%20Summer%202003.pdf>; Hamid Azari-Rad, et al., *Making Hay When it Rains*, 27 J. of Educ. Fin. 997 (2002), http://www.jstor.org/stable/23565174?seq=1#page_scan_tab_contents (free registration required); Peter Philips, *A Comparison of Public School Construction Costs in Three Midwestern States that have Changed their Prevailing Wage Laws in the 1990s: Kentucky, Ohio, and Michigan*, Univ. of Utah (2001), http://www.faircontracting.org/PDFs/prevailing_wages/Public_School%20Peter%20Phillips.pdf; Cihan Bilgonsy & Peter Philips, *Prevailing Wage Regulations and School Construction Costs: Evidence from British Columbia*, 24 J. of Educ. Fin. 415 (2000), http://ohiostatebtc.org/wp-content/uploads/2014/04/PWL_BC_11.pdf; Peter Philips, *Kentucky's Prevailing Wage Law: Its History, Purpose and Effect*, Univ. of Utah (1999), http://media.wix.com/ugd/6f7032_f6b6724fdc504131aedc456b4fe9757f.pdf; Mark J. Prus, *Prevailing Wage Laws and School Construction Costs: An Analysis of Public School Construction in Maryland and the Mid Atlantic States*, Prepared for the Prince George's County Council, Md. (1999), http://www.buildri.org/sites/default/files/articles/full_text_prus_maryland.pdf; Howard Wial, *Do Lower Prevailing Wages Reduce Public Construction Costs?*, Keystone Research Center (1999), http://keystoneresearch.org/sites/default/files/krc_prevailwage_costs.pdf; Peter Philips, *Kansas and Prevailing Wage Legislation*, Prepared for the Kansas Senate Labor Relations Committee (1998), http://www.faircontracting.org/PDFs/prevailing_wages/kansas_prevailing_wage.pdf; Peter Philips, *Square Foot Construction Costs for Newly Constructed State and Local Schools, Offices, and Warehouses in Nine Southwestern and Intermountain States: 1992-1994*, Prepared for the Legislative Education Study Committee of the New Mexico State Legislature (1996), http://www.faircontracting.org/PDFs/prevailing_wages/sq_ft_report.pdf; Mark Prus, *The Effect of State Prevailing Wage Laws on Total Construction Costs*, State Univ. of N.Y. at Cortland (1996), http://www.faircontracting.org/PDFs/prevailing_wages/effects_davisbacon.pdf; Peter Philips, et al., *Losing Ground: Lessons from the Repeal of Nine Little Davis-Bacon Acts* (Econ. Dep't, Univ. of Utah, Working Paper, 1995), http://www.faircontracting.org/PDFs/prevailing_wages/losingground.pdf.

1. Funding source (i.e., public v. private construction)²
2. State of construction (i.e., Pennsylvania, Missouri)³
3. Nature of the construction (i.e., new construction v. renovations)⁴
4. Structure type (i.e., healthcare facility, hotel)⁵
5. Project size (i.e., larger school v. smaller school)⁶
6. Area location (i.e., urban or rural)⁷
7. Seasonal start time (i.e., fall v. spring)⁸
8. Current economic and market conditions⁹
9. Inflation-adjustment¹⁰

A review of available research to date shows these factors significantly affect the comparisons between projects with and without prevailing wage requirements. It is also clear that the most reputable and reliable studies review many years of project data and compare cost information for literally hundreds if not thousands of construction projects.

In brief, the only way to conduct an accurate comparative analysis of prevailing wage impact and avoid spurious, unreliable results, is to: (1) use a serious, professional-level analysis that reviews extensive project data and may require extensive research; and (2) develop a research methodology that controls for the many important factors or variables that can significantly impact project cost findings.¹¹

² Kelsay (2015), *supra* note 1, at 35; Nooshin Mahalia, *Prevailing Wages and Government Contracting Costs*, 2, Econ. Policy Inst. (2008), <http://www.epi.org/page/-/old/briefingpapers/215/bp215.pdf>; Kelsay, et al. (2004), *supra* note 1, at 34; Prus (1996), *supra* note 1, at 5.

³ Prus (1996), *supra* note 1, at 6; Mahalia (2008), *supra* note 2, at 6.

⁴ Philips (2001), *supra* note 1, at 13; Herbert F. Weisberg, *Analysis of Regression and Surveys in Ohio LSC Report on S.B. 102 on Claimed Cost Savings from Exempting School Construction from Prevailing Wage Requirements*, 5, Ohio State Univ. (2002), http://www.ctnewsjunkie.com/upload/2015/OSU_Study.pdf; Prus (1996), *supra* note 1, at 11.

⁵ Kelsay (2015), *supra* note 1, at 36-37; Kelsay, et al. (2004), *supra* note 1, at 34; Prus (1996), *supra* note 1, at 4, 6.

⁶ Weisberg (2002), *supra* note 4, at 5; Peter Philips, *Quality Construction – Strong Communities: The Effect of Prevailing Wage Regulation on the Construction Industry in Iowa*, 22, Univ. of Utah (2006), http://www.faircontracting.org/PDFs/prevailing_wages/PreConstIowa.pdf; Philips (2001), *supra* note 1, at 13; Mahalia (2008), *supra* note 2, at 8; Prus (1996), *supra* note 1, at 6; Prus (1999), *supra* note 1, at 23.

⁷ Kelsay, et al. (2004), *supra* note 1, at 59; Philips (2001), *supra* note 1, at 13; Weisberg (2002), *supra* note 1, at 6; Mahalia (2008), *supra* note 2, at 6; Prus (1999), *supra* note 1, at 23.

⁸ Philips (2006), *supra* note 6, at 24.

⁹ Philips (2006), *supra* note 6, at 24; Weisberg (2002), *supra* note 4, at 9; Philips (2001), *supra* note 1, at 16; Bilgonsy & Philips (2000), *supra* note 1, at *8.

¹⁰ Philips (2001), *supra* note 1, at 16; Philips (2006), *supra* note 6, at 24.

¹¹ See, e.g., Kelsay, et al. (2004), at 34.

B. Failure to Properly Consider Relevant Control Factors Yields Flawed Analysis & Inaccurate Results

The comparison of prevailing wage and non-prevailing wage projects that do not control for these factors will produce a flawed analysis. For example, a comparison of publicly-funded/prevaling wage projects with privately-funded/non-prevailing wage projects is inherently flawed because numerous factors other than prevailing wage requirements can make public projects cost more than private projects (i.e., minority or small business contracting rules).¹² Similarly, comparing states that have significantly disparate costs of living rates—such as New York and Alabama—leads to highly inaccurate and misleading results. These two general control variables aptly demonstrate that reliable results are only achieved by comparing commensurate data.

While other control variables require more nuanced analysis, they are equally, if not more important to obtaining reliable data. Area location, for example, can be extremely important because urban construction costs undoubtedly run higher than rural construction costs.¹³ It is also essential to differentiate between structure types due to the average increased costs of certain facilities.¹⁴ Even within general structure categories – such as schools – more nuanced analysis is necessary. Larger schools have higher construction costs per square foot than smaller schools.¹⁵ High schools and elementary schools, for example, may vary in this regard.

Likewise, research shows that new construction projects and general alterations should be analyzed separately since such projects differ substantially in cost.¹⁶ Studies also found seasonal start time relevant because certain projects beginning in the fall were more expensive than projects that begin in the spring.¹⁷ In addition, as with any economic comparison, it is vital to consider market conditions and inflation-adjustment factors.¹⁸ Without inflation adjustments, projects completed during inflationary periods will appear grossly more expensive when compared with other projects.¹⁹ Similarly, projects beginning during different economic cycles will vary

¹² Mahalia (2008), *supra* note 2, at 2.

¹³ Kelsay, et al. (2004), *supra* note 1, at 59; Philips (2001), *supra* note 1, at 13; Weisberg (2002), *supra* note 4, at 6; Prus (1999), *supra* note 1, at 23.

¹⁴ Kelsay, et al. (2004), *supra* note 1, at 34.

¹⁵ Weisberg (2002), *supra* note 4, at 5; Philips (2001), *supra* note 1, at 13; Bilgonsy & Philips (2000), *supra* note 1, at * 8; Prus (1999), *supra* note 1, at 23.

¹⁶ Philips (2001), *supra* note 1, at 13. This same study even found that school construction projects that included pools varied considerably than those that did not.

¹⁷ Philips (2006), *supra* note 6, at 24.

¹⁸ Philips (2006), *supra* note 6, at 24; Weisberg (2002), *supra* note 4, at 9; Philips (2001), *supra* note 1, at 16; Bilgonsy & Philips (2000), *supra* note 1, at *9.

¹⁹ Philips (2001), *supra* note 1, at 16.

considerably in cost.²⁰ For example, building during “cost storms” – when the construction market is booming – will inevitably increase project costs.²¹

C. The Few Studies Showing Prevailing Wages Impact Project Cost Have Been Discredited Due to Flawed Analysis and/or Improper Methodologies

As explained here, virtually every study that has shown a purported overall increase in project costs from prevailing wage laws has been subsequently disproved by scrutinizing the research methodology and research analysis techniques employed.²²

For instance, the first major study to purport to show that prevailing wage regulations caused an increase in construction costs was a study by Martha Fraundorf, et al, in the early 1980s, which concluded that prevailing wage projects in rural areas across the country were 26% more expensive than non-prevailing projects.²³ However, the Fraundorf study's analysis and conclusion has been discredited by subsequent research, which concludes that the difference in costs observed by Fraundorf was actually attributable to the cost differential between public and private projects in general, rather than prevailing wage requirements.²⁴

A 1996 study that replicated the Fraundorf model showed that public construction was 32% more expensive than private construction in states *without* prevailing wage laws.²⁵ In fact, government specifications and building design contributed to the higher cost of public construction – not prevailing wage regulation.²⁶ Thus, rather than provide reliable data showing the alleged cost differential on prevailing and non-prevailing wage projects, the Fraundorf study merely

²⁰ Philips (2006), *supra* note 6, at 24; Weisberg (2002), *supra* note 4, at 9; Bilgony & Philips (2000), *supra* note 1, at *8.

²¹ Philips (2006), *supra* note 6, at 24.

²² There is one recent study that controlled for many of the complicating factors described here but still found an overall project increase for prevailing wages. The study looked at low-income housing developments and found that prevailing wages incurred as much as a 37% cost premium. Sarah Dunn, et al., *The Effects of Prevailing Wage Requirements on the Cost of Low-Income Housing*, 59 Industrial & Labor Rel. Review No. 1, at 141-57 (2005). However, subsequent researchers have criticized the study's findings as flawed because: (1) it estimated labor's share of total construction costs to be as high as 46% with prevailing wages and projected that share to fall to about 17% if the prevailing wage law is repealed - an unrealistically low figure; (2) the cost of the projects analyzed by the study “may have been influenced by ... other factors such as more exacting Housing and Urban Development (HUD) construction standards”; and (3) the study included projects for which the authors were unable to determine whether the prevailing wage law actually applied. Kevin Duncan & Alex Lantsberg, *How Weakening Wisconsin's Prevailing Wage Policy Would Affect Public Construction Costs and Economic Activity*, 19-20, Colo. State Univ.-Pueblo and Smart Cities Prevail (2015), <http://www.faircontracting.org/wp-content/uploads/2015/05/How-Weakening-Wisconsin's-Prevailing-Wage-Policy-Would-Affect-Public-Construction-Costs-and-Economic-Activity2.pdf>.

²³ Martha Fraundorf & Mason Farell, *The Effect of Davis-Bacon Act on Construction in Rural Areas*, 66 Rev. of Econ. and Statistics 142 (1984).

²⁴ Prus (1996), *supra* note 1.

²⁵ *Id.* at 8.

²⁶ *Id.*

proves that any research analyzing the effect of prevailing wage requirements must control for the inherent cost differential between public and private projects.

In addition, a 1999 study finding an increase in overall construction costs due to prevailing wage regulations failed to consider the appropriate control variables.²⁷ Performed by the Mackinac Center for Public Policy, the study estimated a 10% increase in total construction costs from increased labor costs on prevailing wage jobs.²⁸ A 2001 study identified numerous problems with the Mackinac Center's research design, including its use of a 30-month-long time period, a seasonal adjustment that did not reflect construction industry patterns, and employment adjustments based on unseasonably warm weather on the end points of the data.²⁹ Unsurprisingly, the 2001 study could not replicate the Mackinac Center's results in other states.³⁰

Similarly, a 2013 Anderson Economic Group, LLC analysis of Michigan's prevailing wage law, which claimed that repealing the state's prevailing wage law would save \$225 million in annual educational capital outlays, was subsequently refuted by a University of Utah white paper due to its use of inaccurate assumptions and failure to account for numerous variables.³¹ For example, the study overestimated labor's share of construction costs (assuming labor costs are 30% of total capital outlays), misconstrued "total capital outlays" for "payments to contractors," and did not account for reduced worker productivity and construction quality due to an increase in use of unskilled labor.³²

In contrast to the flawed research that showed prevailing wages increase overall project costs, those studies that more accurately account for complicating factors have confirmed that factors other than the wage rate are typically to blame for any observed cost differences. For example, one study that examined the impact of prevailing wage laws in Kentucky, Michigan, and Ohio, found that urban schools cost 10.5% more than rural schools and that breaking ground on a

²⁷ Richard Vedder, *Michigan's Prevailing Wage Law and its Effects on Government Spending and Construction Employment*, Mackinac Center for Public Policy (1999).

²⁸ *Id.* at 14.

²⁹ Peter Philips, *Four Biases and a Funeral: Dr. Vedder's Faulty Experiment Linking Michigan's Prevailing Wage Law to Construction Employment*, Univ. of Utah (2001), http://www.faircontracting.org/PDFs/prevailing_wages/fourbias.pdf.

³⁰ *Id.* at 3.

³¹ See Peter Philips, *Mr. Rosaen's Magical Thinking: A Short Evaluation of Alex Rosaen's 2013 Prevailing Wage Methodology* (Dep't of Econ., Univ. of Utah, Working Paper No. 2013-12, 2013), http://economics.utah.edu/research/publications/2013_12.pdf (critiquing Alex L. Rosaen, *The Impact of Michigan's Prevailing Wage Law on Education Construction Expenditures*, Anderson Economic Group, LLC (2013)).

³² *Id.* at 2-3. In 2015, the Anderson Economic Group issued a revised study with updates to its methodology, in light of the University of Utah critique, and found that prevailing wages result in \$127 million in added educational construction costs. See Alex L. Rosaen & Traci Taylor, *The Impact of Michigan's Prevailing Wage Law on Education Construction Expenditures*, 13, A10, Anderson Economic Group, LLC (2015), <http://www.andersoneconomicgroup.com/Portals/0/upload/AEG%20Prevailing%20Wage%20Update%209-17-2015.pdf>. However, the updated study acknowledges it does not consider variables such as the characteristics of individual education projects or "changes in worker productivity, material costs, or labor share that may occur in the absence of a prevailing wage." See *id.* at A1.

project in the fall added 10% to total costs compared to breaking ground in the spring.³³ Sound research results require that factors like these are accounted for in analyses of prevailing wage's impacts on construction projects.³⁴

A study of school construction in British Columbia underscores the need to control for a variety of factors.³⁵ The study examined a six-year period before and after the adoption of a prevailing wage law. The research found that, without introducing any controls, prevailing wage caused a 16% increase in construction costs.³⁶ However, once controls for the business cycle, building type, number and size of contractors, regional differences, and time trends were introduced, there was *no statistically significant increase* in construction costs.³⁷ As the Fraundorf and Mackinac Center research illustrates, studies finding that prevailing wage requirements increase public construction costs routinely ignore these and other key controls.

A key methodological flaw observed in research purporting to show overall project cost increases from prevailing wage requirements, which is illustrated by the Mackinac Center and Anderson Economic Group studies discussed above, is the assumption that any increase in labor costs will directly lead to a commensurate increase in overall project costs. However, as discussed in Section IV below, although prevailing wage laws do increase wage costs, these costs are mitigated by the beneficial consequences produced by increasing workers' wages.

IV. PROJECT COST IS NOT IMPACTED BECAUSE PW POLICY PROMOTES TRAINING, SKILL LEVELS, PRODUCTIVITY & OTHER ADVANTAGES

Several factors mitigate any cost-increasing effect that prevailing wage requirements might have. These factors include: (1) increased worker productivity resulting from prevailing wage that leads to more efficient project completion and fewer worker hours, and (2) effective contractor practices that eliminate any savings associated with non-prevailing wage projects.

At the outset, it is important to realize that, because labor costs generally make up a relatively small portion of overall construction costs, an increase in labor costs does not produce the same percent increase in the overall contract price. Average labor costs represent a low and declining percentage of construction costs – making up on average less than 25% of construction costs.³⁸ This means that if, for example, the prevailing wage rate is 10% higher than the non-

³³ Philips (2001), *supra* note 1, at 13.

³⁴ See, e.g., J.W. Creswell, *Research Design: Qualitative, Quantitative, and Mixed Methods Approaches*, 53, Sage Publications (2013) (explaining that proper research design requires appropriate control variables to determine a causal relationship).

³⁵ Bilgosity & Philips (2000), *supra* note 1.

³⁶ *Id.* at *14.

³⁷ *Id.* at *14-15.

³⁸ See Frank Manzo IV, et al., *The Impact of Prevailing Wage Laws on Military Veterans: An Economic and Labor Market Analysis*, 9, Prepared for VoteVets.org (2016), http://b3cdn.net/votevets/62350ae9afd6c4c714_0jm6bsc5b.pdf; see also Philips (1999), *supra* note 1, at 51; Mahalia (2008), *supra* note 2, at 2.

prevailing wage rate, the absolute maximum effect that an increase in wages could have on overall contract price would be 2.5%, if all other factors remained equal.³⁹

As research shows, however, this small potential increase in contract price does not generally come to fruition because all other factors do not remain equal with a prevailing wage construction system – instead, prevailing wages correlate with cost-saving factors that offset increased wage costs. These cost-saving factors include increased productivity that prevailing wage systems encourage through higher wages and better training as well as contractor practices that prevent a state without prevailing wages to receive any actual wage savings.

A. Prevailing Wage Cost is Offset by Increased Efficiency & Productivity

A major reason that studies show no difference between contract prices in prevailing wage and non-prevailing wage systems is that increased labor costs in prevailing wage regimes are offset by the increased productivity of the better-paid and better-trained workforce.

It is a basic principle that workers with more skill and training will complete jobs in less time than untrained, ill-equipped workers. Higher wages in prevailing wage states attract these higher skilled workers. As far back as 1979, the Bureau of Labor Statistics published a study of aggregated school construction costs, finding that total labor costs were the same in the South and the Northeast, despite the fact that hourly wages were 50% higher in the Northeast.⁴⁰ Prevailing wage states also have much higher enrollment in construction training programs and a higher degree of trainees who complete their programs.⁴¹ These more highly trained workers are more productive and better able to complete projects quickly and efficiently.

For example, one study found that the average value added per worker in states with prevailing wage laws was 13-15% higher than in those without prevailing wage laws.⁴² This difference in percentage of value added (13-15%) directly corresponded to the difference between wages paid to the workers in prevailing wage states and those paid to workers in the non-prevailing wage states.⁴³

One recent study that compared construction costs in six states found that there was no statistical difference in average square foot costs across all types of construction (school and other non-residential structures) between prevailing wage and non-prevailing wage states over the eight-

³⁹ Mahalia (2008), *supra* note 2, at 2.

⁴⁰ Philips (1996), *supra* note 1, at 4.

⁴¹ See Philips (1998), *supra* note 1, at 40; see also Frank Manzo IV, et al., *Common Sense Construction: The Economic Impacts of Indiana's Common Construction Wage*, 23, Midwest Econ. Policy Institute, Univ. of Ill. at Urbana-Champaign and Smart Cities Prevail (2014) <http://illinoisepi.org/countrysidenonprofit/wp-content/uploads/2014/07/Common-Sense-Construction-CCW-Report-FINAL1.pdf> (observing that states with PWLs have nearly double the amount of construction apprentices than non-prevailing wage law states).

⁴² Philips (2006), *supra* note 6, at 3.

⁴³ *Id.* at 7.

year study period.⁴⁴ It also found that in West Virginia, the state that was the primary subject of the study, university school construction costs were actually \$58.52 lower on a per square foot basis than in the non-PWL states – a statistically significant difference.⁴⁵ Another study that analyzed a cross-section of government construction projects in nine states – five of which had prevailing wage laws and four of which did not – found that the average square foot construction cost for schools was often *lower* in the states with prevailing wage laws. Specifically, elementary schools cost \$6 less per square foot and middle schools and high schools both cost \$11 less per square foot in the states with prevailing wage laws.⁴⁶

In Utah, after the state’s prevailing wage requirement was repealed in 1981, cost overruns tripled – perhaps due to a switch to a lower-paid, less well-trained workforce.⁴⁷ Data on cost overruns is difficult to obtain – most studies on contract price use the accepted bid price. It is possible that other studies would show that non-prevailing wage projects are even more costly if they were to factor in cost overruns.

B. Non-Application of PW Policy Does Not Produce Cost Savings Due to Contractor Pricing Practices

Other reasons that prevailing wage does not have any cost impact on state construction costs have to do with contractors’ practices. Contractors might absorb higher labor costs in prevailing wage areas or replace other items with lower-cost substitutions to lower their bids.⁴⁸ On the flip side, under a non-prevailing wage system, contractors might keep profits from lower labor costs for themselves and not pass the savings on to the government. Studies show when contractors have lower construction worker wage and benefit costs, their profits are higher.⁴⁹ In addition, reductions in labor costs are offset by a major rise in materials use and costs.⁵⁰

Non-prevailing wage contractors may also already pay wages that are the same as or more than the prevailing wage. In fact, studies show that a switch from prevailing to non-prevailing wage has no impact on contractors’ bids for public construction.⁵¹

⁴⁴ Kelsay (2015), *supra* note 1, at 32-33. Prevailing wage states considered in the study included Maryland, Ohio (excluding elementary and secondary school construction), Pennsylvania and West Virginia. Non-prevailing wages states considered included North Carolina, Ohio (elementary and secondary school construction) and Virginia.

⁴⁵ *Id.* at 50.

⁴⁶ Philips (1996), *supra* note 1, at 1.

⁴⁷ Dale Belman & Paula B. Voos, *Prevailing Wage Laws in Construction: The Costs of Repeal to Wisconsin*, 12, The Institute for Wisconsin’s Future (1995), http://www.faircontracting.org/PDFs/prevailing_wages/PrevailingWage%20Laws%20in%20Construction_%20Cost%20of%20Repeal%20to%20Wisconsin.pdf; Philips, et al. (1995), *supra* note 1, at 13.

⁴⁸ Mahalia (2008), *supra* note 2, at 2-3.

⁴⁹ See Duncan & Lantsberg (2015), *supra* note 22, at 23.

⁵⁰ *Id.*

⁵¹ See Armand Thieblot, *The Davis-Bacon Act, State “Little Davis-Bacon” Acts, the Walsh-Healey Act, and the Service Contract Act*, Wharton School, Univ. of Penn. (1986) (examining re-bid prices during a 34-day suspension of

V. PREVAILING WAGE POLICY PRODUCES SUBSTANTIAL ECONOMIC & PUBLIC POLICY BENEFITS FOR THE STATE

While studies have shown that prevailing wages rarely if ever lead to any statistically significant increase in construction costs, many studies do show that prevailing wage laws produce a host of desirable economic and social benefits for the state. These include: increased income to state residents, increased tax revenue for the state, a trained and efficient workforce, and a more honest and upstanding base of contractors.

A. Prevailing Wages Increase State Tax Revenue & Resident Income

The most prominent benefit that prevailing wages produce for a state is increasing state tax revenues due to residents' higher income and subsequent consumption. One reason why prevailing wage policies boost state tax revenue and local economies is that they prevent leakages of contracts to out-of-state contractors. As noted in one recent study, in states with weak or no PWLs, out-of-state contractors are responsible for completing about two percent more of the total value of construction than in states with strong or average policies.⁵²

The benefit of prevailing wages is most effectively illustrated by the research that quantifies the economic effects of the loss of a prevailing wage law. For example, one study of nine states found that following repeal of prevailing wage laws, worker earnings declined an average of \$1,477 a year.⁵³ Many other studies have examined the probable effect that a repeal of prevailing wage laws and a corresponding decline in workers' earnings would have on state tax revenue.⁵⁴

federal Davis-Bacon Act in 1971 and finding that re-bids saved less than 1% a year); *see also* Philips, et al. (1995), *supra* note 1; Duncan & Lantsberg (2015), *supra* note 22, at 17 (observing that when contractors switch from state to federally funded projects that have prevailing wage requirements, bid prices are not higher).

⁵² Frank Manzo, IV, et al., *The Economic, Fiscal, and Social Impacts of State Prevailing Wage Laws: Choosing Between the High Road and the Low Road in the Construction Industry*, vii, Ill. Econ. Policy Inst., Smart Cities Prevail (2016), <http://www.smartcitiesprevail.org/wp-content/uploads/2016/02/PW-national-impact-study-FINAL2.9.16.pdf>.

⁵³ *See* Philips, et al. (1995), *supra* note 1, at 6.

⁵⁴ *See e.g.*, Duncan & Lantsberg (2015), *supra* note 22, at 31 (finding that weakening Wisconsin's prevailing wage law would reduce state and local tax revenue by nearly \$40 million on an annual basis); Kelsay (2015), *supra* note 1, at 61 (finding repeal of West Virginia's PWL would cost residents and their families between \$51.3 and \$77.3 million in lost income annually and cost the State of West Virginia between \$1.43 and \$2.15 million in sales tax revenues and another \$3.08 to \$4.64 million in income tax revenues); Peter Philips, *Kentucky's Prevailing Wage Law: An Economic Impact Analysis*, 38-40, Prepared for the Ky. State Building and Construction Trades (2014), <http://www.faircontracting.org/wp-content/uploads/2014/02/Kentucky-Report-2014-Philips.pdf> (finding repeal of Kentucky's prevailing wage law could reduce state earnings by \$125 to \$252 million and result in a decrease in state tax income and sales tax revenues of between \$10 and \$20 million annually); Manzo, et al. (2014), *supra* note 41, at 13-14 (finding that if Indiana repealed its Common Construction Wage law, Indiana workers' incomes would drop by about \$246 million and state and local governments can expect to lose \$21 million in annual revenues).

A University of Missouri study found that, if prevailing wage laws were repealed, state residents and their families would lose between \$294.4 million and \$356 million annually in income. Consequently, the state of Missouri would lose between \$17.7 and \$21.4 million annually in income tax revenue and between \$5.7 and 6.9 million in sales tax revenue annually.⁵⁵

Another study in Wisconsin estimated that construction workers and their families would lose \$123 million in annual income if prevailing wage laws were repealed.⁵⁶ Even if Wisconsin saved what the authors estimated would be a maximum of \$4.8 million from the repeal of prevailing wage laws, it would experience an annual net loss of \$6.8 million as a result of \$11.6 million in lost sales and income tax revenue caused by the reduced incomes of construction workers.⁵⁷ Following the repeal of Kansas's prevailing wage law, while construction costs remained the same, controlling for other factors, Kansas and its neighboring non-prevailing wage states did experience a decline of 11% in workers' earnings, compared to a 2% decline in earnings in prevailing wage states.⁵⁸

Beyond a decrease in tax revenue, the repeal of prevailing wage laws would also burden the state with increased claims for public assistance. For example, one study that evaluated the social impacts of prevailing wage laws observed that if states with weak or no prevailing wages enacted or strengthened their PWL's, the amount of construction workers living in poverty would decrease by 30 percent.⁵⁹ In addition, it is more likely that construction workers in states with an effective PWL would be covered by health insurance.⁶⁰ Further, the amount of construction workers in strong or average PWL states receiving food stamp assistance is 55 percent lower than states with weak or no PWLs.⁶¹

Another study conducted in San Jose found that a non-union construction worker on a non-prevailing wage project without health benefits would be eligible for between \$916 and \$8,032 per year in public assistance, while a worker earning prevailing wage with health benefits would earn enough to support a family without public assistance.⁶² The authors also found that if the city's major municipal buildings had not been built under prevailing wage, the state would have

⁵⁵ Kelsay, et al. (2004), *supra* note 1, at 3.

⁵⁶ Belman & Voos (1995), *supra* note 47, at 10.

⁵⁷ *Id.* at 3.

⁵⁸ Philips (1998), *supra* note 1, at 40.

⁵⁹ Frank Manzo, IV, et al., *supra* note 52, at 21-22.

⁶⁰ *Id.* at 25 ("An effective state prevailing wage law increases the probability that a construction worker is covered by health insurance in the past month by between 8.0 and 9.8 percentage points").

⁶¹ *Id.* at 27.

⁶² Working Partnerships USA. *Economic, Fiscal and Social Impacts of Prevailing Wage in San Jose, California*, 9 (2011), http://wpusa.org/5-13-11%20prevailing_wage_brief.pdf.

experienced net losses of: 1,510 jobs, \$164 million in total economic activity, and \$1.9 million in local property and sales tax revenues in addition to the increased demands for public assistance.⁶³

B. Prevailing Wages Promote Skill Training & Safety

Prevailing wage laws promote apprentice programs, which are important training grounds for state residents and encourage safety to the benefit of society in general. Several studies have found that state apprenticeship rates declined dramatically following the repeal of prevailing wage laws.⁶⁴ The increased training of construction workers in prevailing wage states impacts site safety as well as project cost. When contractors are forced to reduce labor costs, workers are pressured to work faster and take more chances on the job.⁶⁵

In fact, between 1976 and 1999, states with prevailing wage laws saw lower injury rates than states without prevailing wage laws, likely as a result of prevailing wage's effect on training and retention of experienced workers.⁶⁶ In Kansas, after the repeal of prevailing wage laws, occupational injuries rose by 19 percent.⁶⁷ As another example, plumbers and pipefitters surveyed nationally saw an average of 15% more serious injuries in the year following repeal of prevailing wage laws.⁶⁸ Construction workers in states without prevailing wages report 12 percent more disabilities than workers in states with prevailing wage laws.⁶⁹ The demonstrated rise in jobsite injuries correlated with the repeal of prevailing wage laws would likely increase workers' compensation expenses in those states without prevailing wages and could drive that percentage higher.

C. Prevailing Wages Promote Law Compliance

Prevailing wage laws create an atmosphere of regulation that draws attention to the classification and compensation of workers. Absent this regulation, subcontractors may more easily misclassify workers as independent subcontractors, even though they work directly for the contractor and had no involvement in the bid. States without prevailing wages show greater instances of misclassified subcontractors. As a result of this misclassification, the state loses

⁶³ *Id.* at 1.

⁶⁴ Mahalia (2008), *supra* note 2, at 8 (noting a 40% drop in Utah apprenticeships following its 1981 repeal of prevailing wage and 38% decrease in apprenticeships in Kansas following its 1987 repeal of prevailing wage).

⁶⁵ Belman & Voos (1995), *supra* note 47, at 3.

⁶⁶ Hamid Azari-Rad et al., *The Economics of Prevailing Wage Laws*, Ashgate Publishers (2005).

⁶⁷ Philips (1998), *supra* note 1, at 41.

⁶⁸ Belman & Voos (1995), *supra* note 47, at 3.

⁶⁹ Philips (2014), *supra* note 54, at 29.

employer contributions for payroll taxes, including workers compensation premiums, social security, and unemployment insurance.⁷⁰

In states with prevailing wage regulations, contractors also pay about 56% more into health insurance and pension contributions than contractors in non-prevailing wage states.⁷¹ This means that workers in non-prevailing wage states enter retirement in poorer health and with less accumulated savings than workers in prevailing wage states. These circumstances burden the state as the workers age and turn to state programs for assistance.

VI. CONCLUSION

As the research shows, not only does prevailing wage have no impact on construction costs for states, but it may, in fact, produce an overall benefit to the state in revenue and other benefits that accompany a trained and efficient workforce. The studies are almost unanimous in support of these conclusions and those that are in disagreement have been disproven through proper use of analytical factors and controls.

⁷⁰ Peter Philips, *Report on the Prevailing Wage Law of Nevada: Its History, Cost and Effects*, 6, Univ. of Utah (2001), <http://www.faircontracting.org/wp-content/uploads/2014/10/Report-on-the-Prevailing-Wage-Law-of-Nevada-Its-History-Cost-and-Effects.pdf> (executive summary only).

⁷¹ Philips (2014), *supra* note 54, at 25.

Appendix A. Research Studies Supporting Prevailing Wage Laws

Links to Studies Included Where Available

1. Kevin Duncan & Frank Manzo IV, *The Economic, Fiscal, and Social Effects of Kentucky's Prevailing Wage Law*, Prepared for the Ky. State Building and Construction Trades Council (2016), <http://www.faircontracting.org/wp-content/uploads/2016/12/kentucky-report-duncan-and-manzo-2016-final.pdf>.
2. Kevin Duncan, et al., *Towards the High Road in the New Hampshire Construction Industry: The Impact of a State Prevailing Wage Law*, The Keystone Research Center (2016), http://www.faircontracting.org/wp-content/uploads/2012/08/KRC_NH_Prevailing_Wage.pdf.
3. Frank Manzo IV, et al., *The Impact of Prevailing Wage Laws on Military Veterans: An Economic and Labor Market Analysis*, Prepared for VoteVets.org (2016), http://b3cdn.net/votevets/62350ae9afd6c4c714_0jm6bsc5b.pdf.
4. Frank Manzo, IV, et al., *The Economic, Fiscal, and Social Impacts of State Prevailing Wage Laws: Choosing Between the High Road and the Low Road in the Construction Industry*, Ill. Econ. Policy Inst. and Smart Cities Prevail (2016), <http://www.smartcitiesprevail.org/wp-content/uploads/2016/02/PW-national-impact-study-FINAL2.9.16.pdf>.
5. Kevin Duncan, et al., *The Cost of Repealing Michigan's Prevailing Wage Policy: Impacts on Total Construction Costs and Economic Activity*, Smart Cities Prevail and Midwest Econ. Policy Institute (2015), <http://illinoisepi.org/countrysidenonprofit/wp-content/uploads/2014/06/The-Cost-of-Repealing-Michigans-PWL-FINAL.pdf>.
6. Kevin Duncan & Alex Lantsberg, *How Weakening Wisconsin's Prevailing Wage Policy Would Affect Public Construction Costs and Economic Activity*, Colo. State Univ. – Pueblo and Smart Cities Prevail (2015), <http://www.faircontracting.org/wp-content/uploads/2015/05/How-Weakening-Wisconsin's-Prevailing-Wage-Policy-Would-Affect-Public-Construction-Costs-and-Economic-Activity2.pdf>.
7. Kevin Duncan & Alex Lantsberg, *Building the Golden State: The Economic Impacts of California's Prevailing Wage Policy*, Smart Cities Prevail (2015), <http://www.smartcitiesprevail.org/wp-content/uploads/2015/04/SCP-Building-the-Golden-State.pdf>.
8. Michael P. Kelsay, *The Adverse Economic Impact from Repeal of the Prevailing Wage Law in West Virginia*, Prepared for the Affiliated Construction Trades Foundation (2015), <http://www.faircontracting.org/wp-content/uploads/2015/01/The-Adverse-Economic-Impact-from-Repeal-of-the-PW-Law-in-WV-Dr.-Michael-Kelsay-Full-Report.pdf>.
9. Peter Philips, *Wisconsin's Prevailing-Wage Law: An Economic Impact Analysis*, Univ. of Utah (2015), http://www.wisconsincontractorcoalition.com/application/files/9914/2889/7832/Wisconsin_Report_April_2015.pdf.

10. Frank Manzo, IV, et al., *Common Sense Construction: The Economic Impacts of Indiana's Common Construction Wage*, Midwest Econ. Policy Institute, Univ. of Ill. at Urbana-Champaign and Smart Cities Prevail (2014), <http://illinoisepi.org/countrysidenonprofit/wp-content/uploads/2014/07/Common-Sense-Construction-CCW-Report-FINAL1.pdf>.
11. Frank Manzo IV, *Building a Strong McHenry: How Prevailing Wage Works*, Ill. Econ. Policy Institute (2014), <http://illinoisepi.org/countrysidenonprofit/wp-content/themes/12/docs/McHenry%20County%20Prevailing%20Wage%20Economic%20Commentary.pdf>.
12. Peter Philips, *Kentucky's Prevailing Wage Law: An Economic Impact Analysis*, Prepared for the Ky. State Building and Construction Trades (2014), <http://www.faircontracting.org/wp-content/uploads/2014/02/Kentucky-Report-2014-Philips.pdf>.
13. Alison Dickson Quesada, et al., *A Weakened State: The Economic and Social Impacts of the Prevailing Wage Law in Illinois*, Univ. of Ill. at Urbana-Champaign (2013), http://illinoisepi.org/countrysidenonprofit/wp-content/uploads/2013/10/PWL_full-report_ltr-format.pdf.
14. Peter Philips, *Mr. Rosaen's Magical Thinking: A Short Evaluation of Alex Rosaen's 2013 Prevailing Wage Methodology* (Dep't of Econ., Univ. of Utah, Working Paper No. 2013-12, 2013), http://economics.utah.edu/research/publications/2013_12.pdf.
15. Kevin C. Duncan, *An Analysis of Davis Bacon Prevailing Wage Requirements: Evidence from Highway Resurfacing Projects in Colorado*, Colo. State Univ. – Pueblo (2011), https://www.bctd.org/BCTD/media/Files/Duncan,-Kevin-DB-Study-Highways_1.pdf.
16. Michael P. Kelsay, et al., *The Adverse Economic Impact from Repeal of the Prevailing Wage Law in Missouri*, Univ. of Mo. – Kansas City (2011), <http://cas.umkc.edu/economics/resources/prevailingwagestudy.pdf>.
17. Working Partnerships USA, *Economic, Fiscal and Social Impacts of Prevailing Wage in San Jose, California*, (2011), http://wpusa.org/5-13-11%20prevailing_wage_brief.pdf.
18. Nooshin Mahalia, *Prevailing Wages and Government Contracting Costs*, Econ. Policy Inst. (2008), <http://www.epi.org/page/-/old/briefingpapers/215/bp215.pdf>.
19. Construction Labor Research Council, *Analysis of Kentucky Governor's Study "The Impact of Prevailing Wage Laws on Labor Costs for Capital Construction Projects"*, Prepared for the National Alliance for Fair Contracting (2006), http://lecet.org/Legislative/prevailing_wage/KY%20Study%20Analysis.pdf.
20. Peter Philips, *Quality Construction – Strong Communities: The Effect of Prevailing Wage Regulation on the Construction Industry in Iowa*, Univ. of Utah (2006), http://www.faircontracting.org/PDFs/prevailing_wages/PreConstIowa.pdf.

21. Construction Labor Research Council, *Wages, Productivity and Highway Construction Costs*, Prepared for the Construction Industry Labor-Management Trust (2004).
22. Michael Kelsay, et al., *The Adverse Economic Impact from Repeal of the Prevailing Wage Law in Missouri*, Univ. of Mo. – Kansas City (2004), http://www.faircontracting.org/PDFs/prevailing_wages/The%20Adverse%20Economic%20Impact%20from%20Repeal%20of%20the%20Prevailing%20Wage%20Law%20in%20Missouri.pdf.
23. Hamid Azari-Rad et al., *State Prevailing Wage Laws and School Construction Costs*, 42 Indus. Rel. 445 (2003), <http://content.csbs.utah.edu/~philips/soccer2/Publications/Prevailing%20Wages/Cost%20of%20Construction/IR%20Summer%202003.pdf>.
24. National Alliance for Fair Contracting, *In Defense of Prevailing Wage Laws: Studies and Reports by the Experts* (2003), http://www2.lecet.org/mura/clearinghouse/assets/PDF/in_defense_of_prevailing_wage_laws.pdf.
25. Hamid Azari-Rad, et al., *Making Hay When it Rains*, 27 J. of Educ. Fin. 997 (2002), http://www.jstor.org/stable/23565174?seq=1#page_scan_tab_contents (free registration required).
26. Herbert F. Weisberg, *Analysis of Regression and Surveys in Ohio LSC Report on S.B. 102 on Claimed Cost Savings from Exempting School Construction from Prevailing Wage Requirements*, Ohio State Univ. (2002), http://www.ctnewsjunkie.com/upload/2015/OSU_Study.pdf.
27. Peter Philips, *Report on the Prevailing Wage Law of Nevada: Its History, Cost and Effects*, Univ. of Utah (2001), <http://www.faircontracting.org/wp-content/uploads/2014/10/Report-on-the-Prevailing-Wage-Law-of-Nevada-Its-History-Cost-and-Effects.pdf>.
28. Peter Philips, *A Comparison of Public School Construction Costs in Three Midwestern States that have Changed their Prevailing Wage Laws in the 1990s: Kentucky, Ohio, and Michigan*, Univ. of Utah (2001), http://www.faircontracting.org/PDFs/prevailing_wages/Public_School%20Peter%20Phillips.pdf.
29. Peter Philips, *Four Biases and a Funeral: Dr. Vedder's Faulty Experiment Linking Michigan's Prevailing Wage Law to Construction Employment*, Univ. of Utah (2001), http://www.faircontracting.org/PDFs/prevailing_wages/fourbias.pdf.
30. Cihan Bilgonsy & Peter Philips, *Prevailing Wage Regulations and School Construction Costs: Evidence from British Columbia*, 24 J. of Educ. Fin. 415 (2000), http://ohiostatebtc.org/wp-content/uploads/2014/04/PWL_BC_11.pdf.
31. Peter Philips, *Kentucky's Prevailing Wage Law: Its History, Purpose and Effect*, Univ. of Utah (1999), http://media.wix.com/ugd/6f7032_f6b6724fdc504131aadc456b4fe9757f.pdf.

32. Mark J. Prus, *Prevailing Wage Laws and School Construction Costs: An Analysis of Public School Construction in Maryland and the Mid Atlantic States*, Prepared for the Prince George's County Council, Md. (1999), http://www.buildri.org/sites/default/files/articles/full_text_prus_maryland.pdf.
33. Howard Wial, *Do Lower Prevailing Wages Reduce Public Construction Costs?*, Keystone Research Center (1999), http://keystoneresearch.org/sites/default/files/krc_prevailwage_costs.pdf.
34. Peter Philips, *Kansas and Prevailing Wage Legislation*, Prepared for the Kansas Senate Labor Relations Committee (1998), http://www.faircontracting.org/PDFs/prevailing_wages/kansas_prevailing_wage.pdf.
35. Mark Prus, *The Effect of State Prevailing Wage Laws on Total Construction Costs*, State Univ. of N.Y. at Cortland (1996), http://www.faircontracting.org/PDFs/prevailing_wages/effects_davisbacon.pdf.
36. Peter Philips, *Square Foot Construction Costs for Newly Constructed State and Local Schools, Offices, and Warehouses in Nine Southwestern and Intermountain States: 1992-1994*, Prepared for the Legislative Education Study Committee of the New Mexico State Legislature (1996), http://www.faircontracting.org/PDFs/prevailing_wages/sq_ft_report.pdf.
37. Dale Belman & Paula B. Voos, *Prevailing Wage Laws in Construction: The Costs of Repeal to Wisconsin*, The Institute for Wisconsin's Future (1995), http://www.faircontracting.org/PDFs/prevailing_wages/PrevailingWage%20Laws%20in%20Construction_%20Cost%20of%20Repeal%20to%20Wisconsin.pdf.
38. Peter Philips, et al., *Losing Ground: Lessons from the Repeal of Nine Little Davis-Bacon Acts* (Econ. Dep't, Univ. of Utah, Working Paper, 1995), http://www.faircontracting.org/PDFs/prevailing_wages/losingground.pdf.
39. Steven Allen, et al., *Rebuttal to Congressional Budget Office Cost Estimates of Davis-Bacon Repeal* (1993), <http://www.faircontracting.org/wp-content/uploads/2012/11/CBO-ESTIMATE-ON-DAVIS-BACON-REPEAL.pdf>.

Testimony of Roger P. Manno, Esq.

Bill 35-21: Support with Amendment

Honorable Members of the Government Operations Committee and the County Council:

Please accept this testimony in strong support of Bill 35-21, Prevailing Wage Requirements – Construction Contracts – Amendments, along with Council President Hucker's technical amendment to clarify the definition of Mechanical Service Contracts, and to align the bill to the federal McNamara-O'Hara Service Contract Act of 1965.

This legislation is a timely and powerful wage, local hiring, and economic driver, at a time when our county needs it most.

I was privileged to serve in the Maryland House of Delegates from 2007-2011, and the Maryland Senate from 2011-2019. During that time, I authored a number of bills, laws and an Executive Order to advance prevailing wages and exceptional workforce training through certified apprenticeship training programs. Testimony and studies introduced in those legislative hearings illuminated the powerful impact of prevailing wage programs in advancing local job creation through rigorous skills-training programs, funded directly by those wages. In fact, the Senate Taskforce on Prevailing Wage in Maryland reviewed data compiled by the State Department of Labor, Licensing and Regulation between 2012 and 2013, which revealed that a staggering 76.34% of all jobs created by prevailing wage contracts went directly to Maryland workers.

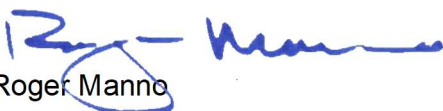
In addition, as detailed in the policy brief in your packet by national construction policy expert, attorney Gerard M. Waites of O'Donoghue & O'Donoghue LLP, some 39 studies on prevailing wages overwhelmingly indicate that prevailing wage programs increase local skills training programs, stabilize wage rates, increase productivity and jobsite safety, provide necessary stimulus in the form of local tax revenues, and do not increase overall construction project costs.

Councilmembers, by aligning the Montgomery County prevailing wage threshold to the state threshold (which is also the threshold in the recently passed Anne Arundel County prevailing wage legislation), Bill 35-21 harmonizes our regional prevailing wage rates, while incentivizing good jobs and outstanding workforce training for local residents.

Lastly, by expanding the scope of the program to mechanical service contracts, Bill 35-21 simplifies our county procurement program for all construction and construction systems-related service work, and aligns our mechanical service contract work with the federal McNamara-O'Hara Service Contract Act of 1965.

For the forgoing reasons, I respectfully ask for your support of Bill 35-21, along with Council President Hucker's technical amendment.

Sincerely at your service,



Roger Manno

February 14, 2022

The Honorable Gabriel Albornoz
President, Montgomery County Council
100 Maryland Avenue Rockville, MD 20850

Dear Council President Albornoz:

MHP respectfully requests that the Council delay action on Amendment #3 to Bill 35-21, which is expected to be offered during tomorrow's deliberations, until the Council has received additional input from the affordable housing development community and DHCA.

As introduced, Bill 35-21 explicitly exempted affordable housing development from prevailing wage requirements; however, we understand that the Council will be considering an amendment tomorrow from Councilmember Jawando to require prevailing wage for projects which receive a payment in lieu of taxes (PILOT) from the County. If this amendment is adopted, it would in turn necessitate removing the exemption for affordable housing projects. If the bill applies to affordable housing projects that receive loans from the HIF, it has the potential to significantly impact affordable housing development in the County for projects large and small.

MHP only recently became aware of the bill and the amendments, as have most of our peers, and we are still assessing the impacts of the bill. At this time, we do not believe the Council will have sufficient information to make an informed decision regarding the amendment. The Council packet itself states: **"However, if the PILOT amendment is adopted and the removal of the HIF exclusion (lines 42-53) then DHCA believes it would increase construction costs to an unknown extent. Further, depending on the impact, this could increase the amount of public subsidy required to achieve the same number of units each year or decrease the total number of affordable units DHCA lending could support."**

Construction costs have increased dramatically over the last 24 months due to supply chain and other issues. Our preliminary analysis shows that a prevailing wage requirement would increase projects costs another 10 to 15 percent for low-rise housing, and potentially much more for high-rise rehab or new construction projects. For new construction projects with budgets approaching \$100 million, a 10 to 15% increase is a nontrivial issue. We fully support the goal of paying prevailing wages, but the County will need to offset the increase in labor costs with additional subordinate funding, i.e. additional funding from the HIF. Otherwise, projects will simply not have the financing to move to construction.

We also have questions about how the legislation will impact projects in our pipeline that have a commitment of HIF funds from DHCA, but which have not broken ground yet. Requiring projects that are on the cusp of construction to pay prevailing wages threatens to jeopardize projects that have been carefully budgeted for years in advance. Non-profit developers need assurances from DHCA that they are prepared to cover any increase in costs if the amendment is adopted.

Putting aside concerns about wages, we also have concerns with bill's local hiring requirement. It will be extremely difficult for affordable housing projects to meet the requirement of 51% of labor being derived from Montgomery County residents. Typically, contractors have their sub-contractors that they are accustomed to using, and using subs solely because of their location could create issues for quality of work and working relationships. Our contractors report that achieving a 30% local residency requirement is already difficult. If the Council mandates jobs be filled by County residents, it will likely result in contractors seeking to game the system by hiring ghost contractors like some have done in the District of Columbia. **Our recommendation is to amend the bill to have a goal or best-efforts approach rather than a mandate and waiver process.**

Again, MHP supports the goal of raising wages for projects where public funds are involved, but we believe the Council needs more information regarding the impacts on affordable housing development before acting on the PILOT amendment.

Thank you for your consideration of our views. Please feel free to reach out to MHP President, Rob Goldman, with any follow-up at rgoldman@mhparkers.org or 301-812-4114.

Sincerely,

A handwritten signature in black ink that reads "Robert Goldman". The signature is fluid and cursive, with the first name "Robert" and last name "Goldman" clearly distinguishable.

Robert A. Goldman, ESQ.
President



MONTGOMERY HOUSING ALLIANCE

www.montgomeryhousingalliance.org

A coalition of organizations focused on increasing the rate of preservation and development of affordable housing in Montgomery County

Action in Montgomery
Affordable Housing Conference of
Montgomery County
AHC, Inc.
APAH
Coalition Homes, Inc.
Coalition for Smarter Growth
Enterprise Community Partners
Habitat for Humanity
Metro Maryland
Housing Association of Nonprofit
Developers
Housing Initiative Partnership
Housing Opportunities Commission of
Montgomery County
Housing Unlimited
Interfaith Works
Jewish Community Relations
Council of Greater Washington
Keystar Real Estate
Latino Economic Development
Center
MHP
Montgomery County Coalition
for the Homeless
Rebuilding Together
Montgomery County
Victory Housing

February 14, 2021

Hon. Gabe Albornoz, President
Montgomery County Council

Re: Bill 35-21 Prevailing Wage Requirements – Construction Contracts

Dear Council President Albornoz and Members of the Council,

As you consider action on Bill 35-21 regarding prevailing wage requirements for construction contracts, Montgomery Housing Alliance (MHA) strongly urges you to defer a decision on the proposed Amendment #3 until you have had the opportunity to hear from affordable housing providers and explore unintended negative impacts the amendment could have on efforts to address affordable housing need in the County.

Amendment #3 would extend the prevailing wage requirement to projects receiving payment in lieu of taxes (PILOT). MHA commends the Council for unanimously passing Bill 26-21 last year, ensuring that many future affordable housing projects will receive automatic PILOT. Bill 35-21 includes an exemption for affordable housing developed by the Housing Opportunities Commission (HOC) as well as developments that receives funding from the County's Housing Initiative Fund (HIF) or Affordable Housing Opportunity Fund (AHOF). As noted in the Council report, Amendment #3 presents a conflict because, as a result of Bill 26-21, most affordable housing developments that receive funds through the HIF or the AHOF will also receive automatic PILOT. Given this conflict, we urge you to address how prevailing wage requirements may be extended to projects receiving PILOT in a later piece of legislation, after further research and consultation with the affordable housing community.

If Amendment #3 is passed at this time, it could jeopardize the future of affordable housing development in the County, including projects currently in the pipeline. Construction costs have dramatically increased in recent months, and continue to rise. These increases are already threatening to derail shovel-ready projects. Effectively imposing the requirements included in Bill 35-21 on affordable housing developments without allocating funding to defray increased construction costs would amount to an unfunded mandate, which would significantly jeopardize developers' ability to undertake projects. As DHCA has noted in its analysis of Amendment #3, extending the bill to affordable housing

1



*The Montgomery Housing Alliance is a committee of
the Community Development Network of Maryland*
www.communitydevelopmentmd.org

(84)



MONTGOMERY HOUSING ALLIANCE

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A coalition of organizations focused on increasing the rate of preservation and development of affordable housing in Montgomery County

could increase the amount of public subsidy required to achieve the same number of units each year or decrease the total number of affordable units DHCA lending could support. The County is already falling short in the number of units produced each year toward meeting the Council's adopted housing targets. Imposing additional costs on affordable housing will further slow development and deepen need.

MHA supports efforts to ensure higher wages and better access to jobs for County residents, but we urge you to preserve the original exemption for affordable housing in Bill 35-21 and defer a decision about how the requirements may be extended to projects receiving PILOT until after further analysis and discussion with stakeholders, including affordable housing providers. MHA thanks the Council for your consistent support for affordable housing; please continue that support by holding a decision on the issue raised in Amendment #3.

Sincerely,

Montgomery Housing Alliance

CC: Aseem Nigam, Director, Department of Housing and Community Affairs

INFORMATIONAL WAGE RATES

The wage rates listed below are published by the State of Maryland, Division of Labor and Industry, Prevailing Wage Unit.

The wage rates posted on this site are provided for **informational** purposes ONLY.

The wage and fringe rates may change between the time of issuance of the wage determinations and the award of the public works contract. Therefore, prior to the award of the public works contract, verification must be made with the public body, to insure that the rates contained in this determination are still prevailing.

These **Informational Prevailing Wage Rates** may not be substituted for the requirements of pre-advertisement for bids or onsite job posting for a public work contract that exceeds \$250,000 in value and either of the following criteria are met: (1) the contracting body is a unit of State government or an instrumentality of the State and there is any State funding for the project; or (2) the contracting body is a political subdivision, agency, person or entity (such as a county) and the State funds 25% or more of the project.

MONTGOMERY COUNTY		BUILDING CONSTRUCTION			Print Date Jan 07, 2022
CLASSIFICATION	MODIFICATION REASON	BASIC HOURLY RATE	BORROWED FROM	FRINGE BENEFIT PAYMENT	
BALANCING TECHNICIAN	AD	\$42.67		\$22.75	
BRICKLAYER	AD	\$34.00		\$12.84	
CARPENTER	AD	\$30.34		\$14.02	
CARPENTER - SHORING SCAFFOLD BUILDER	AD	\$30.34		\$14.02	
CARPET LAYER	AD	\$30.71		\$13.87	
CEMENT MASON	AD	\$28.95	033	\$0.00	
COMMUNICATION INSTALLER TECHNICIAN	AD	\$29.45		\$11.40	
DRYWALL - SPACKLING, TAPING, & FINISHING	AD	\$26.10		\$11.32	
ELECTRICIAN	AD	\$48.00		\$21.20	
ELEVATOR MECHANIC	AD	\$48.60		\$40.24	
FIREPROOFER - SPRAYER	AD	\$26.00		\$5.20	
FIRESTOPPER	AD	\$29.41		\$8.98	
GLAZIER	AD	\$33.26		\$12.90	
INSULATION WORKER	AD	\$38.01		\$17.62	
IRONWORKER - FENCE ERECTOR	AD	\$32.73		\$13.52	
IRONWORKER - ORNAMENTAL	AD	\$33.90		\$24.52	
IRONWORKER - REINFORCING	AD	\$30.79	033	\$23.01	
IRONWORKER - STRUCTURAL	AD	\$33.90		\$24.52	
LABORER - AIR TOOL OPERATOR	AD	\$25.88		\$9.01	
LABORER - ASPHALT PAVER	AD	\$25.88		\$9.01	
LABORER - ASPHALT RAKER	AD	\$25.88		\$9.01	
LABORER - BLASTER - DYNAMITE	AD	\$25.88		\$9.01	
LABORER - BURNER	AD	\$25.88		\$9.01	
LABORER - COMMON	AD	\$25.88		\$9.01	
LABORER - CONCRETE PUDDLER	AD	\$25.88		\$9.01	
LABORER - CONCRETE SURFACER	AD	\$25.88		\$9.01	
LABORER - CONCRETE TENDER	AD	\$25.88		\$9.01	
LABORER - CONCRETE VIBRATOR	AD	\$25.88		\$9.01	
LABORER - DENSITY GAUGE	AD	\$25.88		\$9.01	
LABORER - FIREPROOFER - MIXER	AD	\$25.88		\$9.01	
LABORER - FLAGGER	AD	\$25.88		\$9.01	

LABORER - GRADE CHECKER	AD	\$25.88		\$9.01
LABORER - HAND ROLLER	AD	\$25.88		\$9.01
LABORER - HAZARDOUS MATERIAL HANDLER	AD	\$25.88		\$9.01
LABORER - JACKHAMMER	AD	\$25.88		\$9.01
LABORER - LANDSCAPING	AD	\$25.88		\$9.01
LABORER - LAYOUT	AD	\$25.88		\$9.01
LABORER - LUTEMAN	AD	\$25.88		\$9.01
LABORER - MASON TENDER	AD	\$25.88		\$9.01
LABORER - MORTAR MIXER	AD	\$25.88		\$9.01
LABORER - PIPELAYER	AD	\$25.88		\$9.01
LABORER - PLASTERER - HANDLER	AD	\$25.88		\$9.01
LABORER - SCAFFOLD BUILDER	AD	\$25.88		\$9.01
LABORER - TAMPER	AD	\$25.88		\$9.01
MILLWRIGHT	AD	\$35.84		\$14.10
PAINTER	AD	\$25.10		\$11.32
PILEDRIIVER	AD	\$33.62		\$12.82
PLASTERER	AD	\$29.05		\$5.95
PLUMBER	AD	\$44.92		\$20.16
POWER EQUIPMENT OPERATOR - ASPHALT DISTRIBUTOR	AD	\$20.50	033	\$12.08
POWER EQUIPMENT OPERATOR - BACKHOE	AD	\$29.23	021	\$13.18
POWER EQUIPMENT OPERATOR - BOOM TRUCK	AD	\$37.09		\$23.49
POWER EQUIPMENT OPERATOR - BULLDOZER	AD	\$29.05	021	\$12.10
POWER EQUIPMENT OPERATOR - CONCRETE PUMP	AD	\$34.00	021	\$6.70
POWER EQUIPMENT OPERATOR - CRANE	AD	\$41.73		\$10.55
POWER EQUIPMENT OPERATOR - DRILL - RIG	AD	\$39.67		\$10.55
POWER EQUIPMENT OPERATOR - EXCAVATOR	AD	\$28.00	033	\$16.24
POWER EQUIPMENT OPERATOR - FORKLIFT	AD	\$26.33		\$10.55
POWER EQUIPMENT OPERATOR - GRADALL	AD	\$29.00	021	\$6.42
POWER EQUIPMENT OPERATOR - LOADER	AD	\$21.00	033	\$9.22
POWER EQUIPMENT OPERATOR - MECHANIC	AD	\$32.89	021	\$8.86
POWER EQUIPMENT OPERATOR - MILLING MACHINE	AD	\$28.00	021	\$0.00
POWER EQUIPMENT OPERATOR - PAVER	AD	\$25.70	033	\$4.72
POWER EQUIPMENT OPERATOR - ROLLER - ASPHALT	AD	\$21.76	033	\$7.86
POWER EQUIPMENT OPERATOR - ROLLER - EARTH	AD	\$31.73	021	\$13.27
POWER EQUIPMENT OPERATOR - SKID STEER (BOBCAT)	AD	\$26.33		\$10.55
POWER EQUIPMENT OPERATOR-VACUUM TRUCK	AD	\$26.00	021	\$8.23
RESILIENT FLOOR	AD	\$30.71		\$13.87
ROOFER/WATERPROOFER	AD	\$31.75		\$12.03
SHEETMETAL WORKER (INCLUDING METAL ROOFING)	AD	\$42.67		\$22.75
SPRINKLERFITTER	AD	\$36.95		\$24.37
STEAMFITTER/PIPEFITTER	AD	\$45.39		\$23.69
STONE MASON	AD	\$40.81		\$19.59
TILE & TERRAZZO FINISHER	AD	\$25.81		\$11.66
TILE & TERRAZZO MECHANIC	AD	\$31.18		\$12.74
TRUCK DRIVER - DUMP	AD	\$21.47	021	\$7.00
TRUCK DRIVER - DUMP - ARTICULATING	AD	\$19.07	021	\$7.00
TRUCK DRIVER - FLATBED	AD	\$23.50		\$2.19
TRUCK DRIVER - TACK/TAR TRUCK	AD	\$29.32	021	\$1.99
TRUCK DRIVER - TRACTOR TRAILER	AD	\$23.08	021	\$7.00
TRUCK DRIVER - WATER	AD	\$19.07	021	\$7.00

Incidental Craft Data: Caulker, Man Lift Operator, Rigger, Scaffold Builder, and Welder receive the wage and fringe rates prescribed for the craft performing the operation to which welding, scaffold building, rigging, operating a Man Lift, or caulking is incidental.

These **Informational Prevailing Wage Rates** may not be substituted for the requirements of pre-advertisement for bids or onsite job posting for a public work contract that exceeds \$250,000 in value and either of the following criteria are met: (1) the contracting body is a unit of State government or an instrumentality of the State and there is any State funding for the project; or (2) the contracting body is a political subdivision, agency, person or entity (such as a county) and the State funds 25% or more of the project.

Modification Codes:

- (AD) 17-209 Annual Determination from Survey Wage Data Received
- (CH) 17-211 Commissioners' Hearing
- (CR) 17-208 Commissioners' Review
- (SR) 17-208 Survey Review by Staff

Each "Borrowed From" county is identified with the FIPS 3-digit county code unique for the specific jurisdiction in Maryland.

For additional information on the FIPS (Federal Information Processing Standard) code, see <http://www.census.gov/datamap/fipslist/AllSt.txt>

The Prevailing Wage rates appearing on this form were originally derived from Maryland's annual Wage Survey. The Commissioner of Labor & Industry encourages all contractors and interested groups to participate in the voluntary Wage Survey, detailing wage rates paid to workers on various types of construction throughout Maryland.

A mail list of both street and email addresses is maintained by the Prevailing Wage Unit to enable up-to-date prevailing wage information, including Wage Survey notices to be sent to contractors and other interested parties. If you would like to be included in the mailing list, please forward (1) your Name, (2) the name of your company (if applicable), (3) your complete postal mailing address, (4) your email address and (5) your telephone number to PWMAILINGLIST@dlr.state.md.us. Requests for inclusion can also be mailed to: Prevailing Wage, 1100 N. Eutaw Street - Room 607, Baltimore MD 21201-2201.

END OF REPORT

Bill No. 26-21
Concerning: Taxation – Payments in Lieu
of Taxes – Affordable Housing -
Amendments
Revised: 12-14- 2021 Draft No. 5
Introduced: June 29, 2021
Enacted: December 14, 2021
Executive: December 27, 2021
Effective: March 28, 2022
Sunset Date: _____
Ch. 37, Laws of Mont. Co. 2021

COUNTY COUNCIL FOR MONTGOMERY COUNTY, MARYLAND

Lead Sponsors: Councilmembers Riemer and Friedson

AN ACT to:

- (1) establish a minimum payment in lieu of taxes for certain qualifying housing developments;
- (2) eliminate the annual maximum aggregate amount of all payments in lieu of taxes approved under this Section; and
- (3) generally amend the law governing a payment in lieu of real property taxes for certain housing developments.

By amending

Montgomery County Code
Chapter 52, Taxation
Section 52-24

Boldface	<i>Heading or defined term.</i>
<u>Underlining</u>	<i>Added to existing law by original bill.</i>
[Single boldface brackets]	<i>Deleted from existing law by original bill.</i>
<u>Double underlining</u>	<i>Added by amendment.</i>
[[Double boldface brackets]]	<i>Deleted from existing law or the bill by amendment.</i>
* * *	<i>Existing law unaffected by bill.</i>

The County Council for Montgomery County, Maryland approves the following Act:

1 **Sec. 1. Section 52-24 is amended as follows:**

2 **52-24. Payments in lieu of taxes for certain housing developments.**

3 (a) Definitions. In this Section, the following words have the following
4 meanings.

5 Area median income means the median household income for the
6 Washington, DC metropolitan area as estimated by the U.S. Department
7 of Housing and Urban Development, adjusted by household size based
8 on the occupancy standard for the unit.

9 Director means the Director of Finance or the Director's designee.

10 Payment in lieu of taxes means an authorized payment made by the owner
11 of a qualifying housing development instead of paying the County real
12 property tax, including a County real property tax levied under a special
13 area taxing law, that would otherwise be due.

14 Section 8 Project-Based Rental Assistance means a program operated by
15 the U.S. Department of Housing and Urban Development that provides
16 housing assistance payments under a contract with the owner of a multi-
17 family rental housing property to make up the difference between rent
18 affordable to a low income household earning between 50 and 80 percent
19 of the area median income and the approved rent for an adequate housing
20 unit pursuant to 42 U.S.C. §1437f, as amended.

21 (b) When authorized by state law, the Director [of Finance] may agree to
22 accept a negotiated payment in lieu of the real property tax that would
23 otherwise be levied on a qualifying housing development. A qualifying
24 housing development is any housing development of which the owner is
25 expressly eligible under state law to make payments in lieu of taxes.

26 (c) [[The]] When authorized by state law, the Director must offer a payment
27 in lieu of taxes for a qualifying housing development:

- (1) owned or ~~[[operated]]~~ controlled by the Housing Opportunities Commission that exempts 100% of the real property tax that would otherwise be levied; ~~[[and]]~~ ~~[[or]]~~
- (2) owned or controlled by a non-profit housing developer if at least 50% of the dwelling units located on the property receiving the payment in lieu of taxes are built under a government regulation or binding agreement with the County limiting the rent charged for the unit for at least 15 years to make the unit affordable to households earning 60% or less ~~[[than 65%]]~~ of the area median income. The offer must exempt 100% of the real property tax that would otherwise be levied for a period of at least 15 years, but no more than the number of years that rents charged for 50% of the dwelling units must remain restricted to households earning 60% or less of the area median income; or
- (3) owned or controlled by a non-profit housing developer if all of the dwelling units are subject to a Section 8 Project-Based Rental Assistance Payment contract. The offer must exempt 100% of the real property tax that would otherwise be levied as long as the Section 8 Project-Based Rental Assistance Payment contract is in effect.
- (d) The Director must not offer a ~~[[partial]]~~ payment in lieu of taxes for a qualifying housing development under this Section for any property that has already received a payment in lieu of taxes under any Section ~~[[with at least 25% but less than 50% of the dwelling units built under a government regulation or binding agreement limiting the rent charged for the unit for at least 15 years but no more than the number of years that the rents charged for affordable units must remain restricted:~~

(1) for each dwelling unit affordable for residents at 51% to 65% of area median income, the project must receive a payment in lieu of taxes for one unit;

(2) for each dwelling unit affordable for residents at 31% to 50% of area median income, the project must receive a payment in lieu of taxes for 2 units; and

(3) for each dwelling unit affordable for residents at 30% or less of area median income, the project must receive a payment in lieu of taxes for 3 units]].

~~[(b)]~~ (e) Any payment accepted by the Director [of Finance] must conform to guidelines included in a regulation adopted by the [County] Executive under method (1). Before the Director [of Finance] accepts a payment in lieu of taxes, the Director must consult the Director of the Department of Housing and Community Affairs on whether:

(1) the subject of the payment is a qualifying housing development; and

(2) the amount of the payment complies with applicable guidelines.

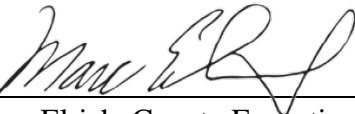
~~[(c)]~~ (f) [The aggregate amount of all payments in lieu of taxes under this Section (other than payments for a housing development owned or operated by the Housing Opportunities Commission) must not exceed an amount set annually by Council resolution for the following 10-year period. The Council by separate resolution may approve a payment which exceeds the aggregate amount previously set.] The Executive, in each annual operating budget submitted to the Council, must calculate the amount of pending payments in lieu of taxes already approved under this Section, including payments for housing developments owned or operated by the Housing Opportunities Commission.

82 **Sec. 2. Transition.** Except for Subsection (c)(3), ~~[[The]]~~ the amendments in
83 Section 1 establishing a mandatory payment in lieu of taxes must only apply to a
84 property that is eligible for a payment in lieu of taxes due to affordable dwelling units
85 that come under a government regulation or binding agreement limiting the rent
86 charged on or after this Act takes effect.

Approved:

	12/15/2021
Gabriel Albornoz, President, County Council	Date

Approved:

	12/27/2021
Marc Elrich, County Executive	Date

This is a correct copy of Council action.

	12/28/2021
Selena Mendy Singleton, Esq., Clerk of the Council	Date

Response to Council Questions for Bill 35-21, Prevailing Wages – Requirements – Amendments

3/17/2022

- 1. Is there a mechanism for the County to respond to developers who receive an automatic or 100% PILOT, but may still experience a gap in funding because the amendment will now require prevailing wages? What is the projected cost?**

The answer to question 1 differs for PILOTs for affordable housing and PILOTs given to WMATA leaseholds.

DHCA can respond to project cost increases where the County is supporting construction with HIF loans; however, the amount of loan available will be based on funding availability and project underwriting which counts on project value and cashflow to support the repayment of the loan.

For example, DHCA currently has 8 construction-related projects which we expect to close in the next six months, with estimated construction costs of \$200 million without a prevailing wage requirement. Those projects include Low Income Housing Tax Credits (LIHTC) where increased costs might increase the LIHTC equity to cover 25% of the increased costs. DHCA has committed \$63 million on these projects.

As the County generally only participates financially in housing projects that produce affordability beyond the MPDU required amount, the County would not participate financially in market rate high-rise housing projects on WMATA leaseholds beyond the 100% automatic PILOT; there is limited additional ability to support the development monetarily.

Within each market-rate individual deal it is hypothetically possible that the County could identify required public infrastructure and could construct that improvement with public CIP funds, reducing the overall cost of the project and addressing the potential gap in funding due to the requirement to pay prevailing wages. It is also possible that within any individual deal there are desired public benefits that the County would normally require but could instead forego, again reducing the overall project cost. As noted, these types of supports are highly deal specific and would require significant consultation with WMATA and the developer. The Department of Finance is not aware of any other programs by which the County could selectively subsidize private development.

- 2. Which existing PILOT projects would be impacted by this amendment? Specifically, a few projects named at the Council meeting were WMATA at Grosvenor, Wall Park, and Farm Women's Market? Are there any affordable housing projects impacted? Or other potential projects? Council staff will contact the Planning Department, DHCA.**

The Fivesquares project at the Grosvenor-Strathmore station referenced in question #2 is the only project in the planning/development process that is anticipated to benefit from a PILOT (as authorized under section 52.24A of the County code), that would be covered by this amendment that the Department of Finance is aware of. The Gables project adjacent to Wall Park and the EYA/Bernstein Management project adjacent to the Bethesda Farm Women's Cooperative Market are not eligible to receive a PILOT under Section 52.24A. While there are additional WMATA sites

along the Red Line that could be the site of future high-rise rental residential properties benefiting from a PILOT, none are currently proposed or under negotiation.

Affordable housing construction or renovation projects in the pipeline would be impacted by prevailing wage requirements based on the lending trigger of \$250,000. There are currently 16 projects that have not yet received PILOTS but the department has issued a commitment letter, conditional commitment or statement of interest to the developer. Two projects that would receive a PILOT only and no loan are in conversation with DHCA, but should not have impact as they do not involve construction.

- 3. *Reviewing projects from the last five years, what is the approximate time frame for a new construction affordable housing project (Including early stages of planning, obtaining financing, and regulatory approval)? Similarly, what is the average time for an affordable housing acquisition and preservation project that requires substantial renovations?***

For new construction and substantial renovations, developers spend time and money in getting site control, performing analysis and applying for financing, which generally take over a year.

Construction and occupancy can be completed in two to three years. The full life cycle of a project can be four to five years.

- 4. *What percentage of affordable housing projects are funded with county funding (via HIF, PILOT, etc.)?***

Over the past 10 years, almost all affordable housing developments in the County have involved DHCA, there were very few projects completed without any involvement of County support and relying on the State LIHTC or other financing alone.

- 5. *How might the amendment impact the ability of a developer to propose a project with levels of affordability that would make it competitive for an award of a 9% tax credit?***

The competitive scoring for 9% tax credits (LIHTC) evaluates total square foot construction costs of the project, with penalty points deducted for exceeding guidelines. The competition for these tax credits requires a significant amount of units for households earning 30% or 40% of the area median income (AMI); one current project has 35 out of 42 units funded with 9% LIHTC and under 40% AMI. The higher-than-average costs in Montgomery County have created competitive challenges. The competition for 9% LIHTC involves is very tight, such that any penalty for exceeding the square foot cost targets would eliminate a project from consideration.

- 6. *Would the County Executive's commitment to the amendment remain the same if costs increase significantly for developers of affordable housing projects? Staff will request a response from DHCA and Finance.***

County Executive believes that the employees involved in developing affordable housing should earn enough to be able to live in the County, and that the cost increases for developers of affordable housing projects can be addressed during the underwriting process. Most projects involve multiple financing sources, and the County will work with all its partners on the projects to support a solution to meet the needs of the project.

- 7. *What are the different types of County contributions or assistance that are available for a developer with a PILOT? For example, HIF/Opportunity Fund, Forgone Taxes, or other-related contributions.***

Support for affordable housing development is fundamentally HIF/Opportunity fund lending, which reduces the project debt along with conventional, federal and state financing. PILOT agreements reduce operating expenses which complement the HIF/ Opportunity Fund lending. In addition to a loan and PILOT, The County in some cases enter into rental agreements to address shorter-term rent reductions to keep rents affordable at lower AMI for a period of time.

- 8. *What are the current wage rates for construction-related jobs under a PILOT project? Is the wage rate similar to the State's prevailing wage rate? Council staff will ask DHCA to inquire with housing partners whether they will provide an anonymous response for review.***

In a relatively quick and informal process, the two affordable housing developers who have investigated prevailing wage estimate the variance between prevailing wages and current wages could increase total construction costs by 6-10% on average, and up to 15% for high-rise.

- 9. *How many affordable housing PILOT projects in the last ten years have been approved with more than 50% of affordable units and with less than 50% of affordable units?***

Of the 513 PILOT agreements currently in place, only 10 have fewer than 50% of the units restricted affordable and included in the PILOT.

- 10. *If the Council considers a transition clause to preserve existing projects and exclude them from this amendment, what process or approval should the clause be linked to and by what timeframe. DHCA, Finance, or OCA may be able to provide a response.***

For the anticipated PILOTs on WMATA leaseholds: Negotiations between WMATA and their development partner and then the project review process with the Montgomery County Planning Department are extensive and can take years from initiation to completion. Once development partners start negotiations on a project, they have likely already expended considerable resources evaluating the site. A change in the anticipated rules that affects project costs within the middle of those negotiations or once negotiations are substantially complete and the project is under planning department review could be quite disruptive. The transition clause ultimately selected should reflect the balance Council desires between supporting existing WMATA leasehold PILOT projects under negotiation and maximizing Bill 35-21's benefit in the form of mandatory higher wages to a subset of the regional workforce.

For affordable housing projects, a transition date of twelve months from effective date of the law would provide a window of time to allow affordable housing projects to evaluate cost impacts, seek additional financing, or potentially exercise options to terminate the project. A transition based on site plan approval from Planning Board could provide a similar timeframe for adjustments. , and needs an appropriate definition of what level of Planning Board approval would provide for the twelve-month time for developers to adjust.

Compliance & Monitoring

- 1. *How will the County monitor a developer's compliance with the County's prevailing wage law?***

The County will require a third-party compliance contractor, such as an existing relationship the County has with CCMI, to monitor and report to the County.

- 2. *What is the estimated fiscal impact for the County to monitor this provision?***

DHCA will bill the developer for the compliance contractor's costs, as well as its operating costs, to be part of the transaction fees

3. *Are there existing mechanisms or resources to audit a private developers' contractor's payroll to ensure prevailing wages are paid?*

Third-party compliance contractors are currently used to monitor a developer's payroll records to ensure the prevailing wages are provided.

For the anticipated PILOTs on WMATA leaseholds: The Department of Finance has staff that reviews and monitors PILOTs and tax incentives projects similar to those that would occur at WMATA leaseholds. The Department of Finance anticipates there will be few WMATA leasehold PILOTs to review each year and would add this to the existing workload for those staff members. Regarding the mechanism or resources to audit payroll, the PILOT agreement signed by the County and by the developer would specify that the developer must provide certified payroll or other documents demonstrating that they satisfy the requirement to pay prevailing wages.

Enforcement

1. *How will the County enforce the prevailing wage law if a contractor fails to comply?*

County prevailing wage law remedies would apply, as defined in Chapter 11B.

2. *Does the County have existing resources to enforce, or will it outsource?*

DHCA's loan compliance monitoring resources for federally funded projects that use Davis Bacon wage monitoring would need to be expanded. The amended Bill would include all current affordable housing lending projects, which would more than triple the compliance monitoring and would need to expand contractor or staff positions.

3. *Can the County assess liquidated damages for non-compliance for PILOT projects?*

County prevailing wage law remedies would apply, including liquidated damages, as defined in Chapter 11B.

4. *If a developer is alleged to have violated the prevailing wage requirements proposed in the amendment, what penalties would they incur? Would there be an impact on future requests/applications for county funding/PILOTs? What, if any, recourse would a developer be provided to challenge the allegation/finding?*

The County's prevailing wage law remedies would apply, including liquidated damages. County lending relationships are guided by the developer's eligibility and project underwriting which includes the history of any previous lending performance. The compliance with prevailing wage requirements will be monitored and documented by a third-party specializing in prevailing wage enforcement, and any questions or challenges to a finding of failure would involve the documentation provided by the contractors employed by the developer.

For the anticipated PILOTs on WMATA leaseholds: The penalties for failure to comply with the requirements of a PILOT agreement and the recourse for the developer to challenge any allegation are defined in that PILOT agreement, a legal contract, signed by the County and by the developer. These agreements include clauses allowing the County to 'claw back' benefits granted and/or to end future benefits if the developer fails to abide by the terms. If the Department of Finance finds that a developer is violating the agreement the Department first tries to work with that developer to rectify the situation. If that effort fails, the Department of Finance typically engages the Office of the County Attorney which may take appropriate legal action against the developer.

Payment in Lieu of Taxes (PILOTS)

There are nine categories of Payment in Lieu of Taxes Agreements.

1. **WMATA:** Bill 29-20 requires the Director of Finance to offer a PILOT for residential (8 stories or more above ground and primarily rental residential units) or commercial high-rise buildings constructed by a private developer on property leased from WMATA at a Metro station. **A qualifying development is a project where at least 50% of the project consists of one or more high-rise residential apartment buildings and at least 25% of the required Moderately Priced Dwelling Units must be affordable to households at 50% of area median income.** The PILOT must be for a period of 15 years and may begin in the year a Use and Occupancy Permit is issued or in the second-year property tax is levied.

Bill 29-20 requires that none of the contractors or subcontractors have had 3 or more final violations in the last three years of applicable wage and hours law and at least 25% of workers constructing the project were residents while performing the work.

2. **Housing Opportunities Commission (HOC):** Bill 26-21, which becomes effective March 28, 2022, requires the Director of Finance to offer a 100% PILOT for qualifying housing developments that are owned or controlled by HOC. While this had generally been the practice, it was not absolute. The current value of PILOT agreements with HOC is about \$10.1 million.
3. **Affordable Housing (“automatic”):** Bill 26-21 also requires the Director of Finance to offer a 100% PILOT for a qualifying housing development that is owned or controlled **by a non-profit housing developer if at least 50% of the units** are built under government regulation or the binding agreement that limits the rent charged to a household earning 60% or less of area median income for at least 15 years. The PILOT must be for at least 15 years, but no longer than the units remain affordable. This automatic 100% PILOT is for properties that come under a new binding agreement starting March 28, 2022. It does not change existing PILOT agreements for a property.
4. **Project-Based Section 8:** The property must have a HUD agreement that has expired or is about to expire and is voluntarily renewing the contract. The current executive regulation says that the PILOT is equal to financial loss from participating in the Section 8 program. However, effective March 28, Bill 26-21 will require the Department to exempt 100% of the property tax as long as the Section 8 Project-Based Rental Assistance Payment contract is in effect. The current value of these PILOT agreements is about \$586,000.
5. **Affordable Housing (general or negotiated with DHCA):** The amount allowed for each affordable unit is equal to the average Montgomery County homeowner tax credit; an 80% reduction in property tax is allowed in years 1 through 5; decreased by 10% per year

until it is 30% in year ten after which it expires. Property owners can be non-profit or for-profit entities. The PILOT can be up to 100% if the owner, developer, or sponsor of the property is a HUD designated Community Housing Development Organization (CHDO). Senior/Elderly Housing may be included in this category. The value of existing PILOT agreements is about \$9.1 million.

6. **Enterprise Zones** – These agreements are approved under the regulatory authority in “other rental housing.” The amount allowed for each affordable unit is equal to the average Montgomery County homeowner tax credit, and an 80% reduction in property tax is allowed in years 1 through 5; decreased by 10% per year until it is 30% in year ten after which it expires. The current value of the PILOT agreements is about \$952,000 for three properties.
7. **MPDUs** (new agreements no longer being executed): The regulations in place allow the Department to execute a PILOT agreement for MPDUs required under Chapter 25A to make the project financially feasible. The County is no longer entering into PILOT agreements for meeting MPDU requirements as zoning and density offsets have changed. The current value of PILOT agreements is \$514,000 for four properties.
8. **Group Homes**: The property owner must have non-profit status and the group home must provide housing to a special population (such as developmental disability, persistent mental illness.) The amount allowed is the average Montgomery County homeowner tax credit.
9. **Affordable Elderly Housing**: The PILOT may be up to 100% of the property tax. This housing must be built by a non-profit entity and meet certain other criteria in State law.

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