



City of Sunnyvale

Agenda Item-No Attachments (PDF)

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REPORT TO COUNCIL

SUBJECT

Consider Adoption of Local Hiring Program

REPORT IN BRIEF

The City Council considered study issue NOVA 14-01 in November 2014 - "Examine Ways to Increase Local Hiring in Major Developments" - and directed staff to move forward with a local hiring program for both public and private major developments (see Study Issue Paper, Attachment 1). Local hiring programs are generally defined as programs that require developers and contractors using public funds to hire local residents, and are targeted at addressing unemployment. As with most public policy issues, however, attempting to translate that relatively simple concept into day to day operations raises any number of complex and controversial issues. The very premise of a local hiring program is challenging because it puts constraints on private employer/employee relationships and commerce, and seeks to give preference on the basis of residency-all areas limited by a number of laws and legal decisions. Additional challenges posed by the development and implementation of program details are examined in the context of this study.

Programs can range from official encouragement supporting local hiring, emphasizing its value to the community and focusing on education and outreach, to mandatory resource-intensive programs that set targeted goals for local hiring and the use of apprentices, require "good faith" efforts on the part of developers and contractors to secure local hires, and require detailed compliance reporting and monitoring.

Construction projects that are paid for in part or total with public funds appear to achieve many of the objectives of local hiring programs due to state and federal prevailing wage requirements (which eliminate the attraction of hiring low-wage, non-local labor, and require the use of apprenticeships). Coincidentally, two recent state laws relating to prevailing wage requirements associated with public works projects became effective January 2015. As a result of the workload arising from implementing these state laws, staff recommends hiring a full-time analyst to address the operational impacts of these new mandates and to begin collecting data to assess the status of local hiring in Sunnyvale. Staff further recommends adoption of a value-based policy statement to formally encourage local developers and contractors on public and private projects to make outreach efforts for local hiring, to use state-certified local apprenticeship or jobs training programs, and to pay prevailing wages.

Should Council wish to move forward with a local hiring program other than encouraging local outreach, the City will need to conduct a study to determine the extent that developers and contractors are using non-local labor, its impact on the local labor force, and the appropriate goals and measures to address the impact. The study would be modeled after other jurisdictions that have established a correlation between a defined problem and the adopted policy that addresses the problem. Local hiring provisions for purely *private* developments can only be achieved on a

contractual or voluntary, incentive-based manner.

BACKGROUND

At its February 7, 2014 Study/Budget Issues Workshop, City Council prioritized a study issue to examine opportunities to increase the hiring of local residents (defined at the time as those living in Santa Clara County) for private construction projects. The study was prompted by anecdotal information indicating that some developers might be making heavy use of low paid out-of-state workers, and/or housing out-of-state workers at unfinished business sites.

On November 11, 2014 staff presented Report to Council 14-0818, and recommended the implementation of several actions to encourage local hiring by developers and contractors for local development projects. Council concluded it wanted to explore a more aggressive local hiring program, and directed staff to review programs in other cities and return with a proposed plan for preparing an ordinance and/or program for local hiring requirements on large private and public construction projects. Council asked staff to consider requiring submission of a “local hiring plan” that includes job projections and outreach plans, requiring contractors and subcontractors on projects to be licensed per state law, and encouraging use of local apprenticeship programs. This report summarizes staff’s related study and findings, and presents options regarding “local hiring” programs for Council’s consideration.

EXISTING POLICY

Council Policy 1.1. Jobs/Housing Imbalance: Commits itself to encourage not only jobs and housing for as many of our citizens as possible, but also to maintain and improve our quality of life. The City Council considers these four components - jobs, housing, transportation, quality of life - as inseparable when seeking solutions.

Socio-Economic Legislative Advocacy Position 5.1.2: Support legislation and community-based efforts that improve the quality of life for children and families through increased access to educational support, health care, housing, emancipation transition services for foster youth, and vocational training programs.

ENVIRONMENTAL REVIEW

N/A

DISCUSSION

Context

The City’s interest in maximizing the employment of its residents is not new, as evidenced by the existing policies cited above. For decades now, Sunnyvale’s City Council has demonstrated its interest in helping local residents find employment by serving as the administrative entity for a seven-city consortium designated by the Governor of California as a Workforce Development Area. NOVA, the North Valley Job Training Consortium, is specifically designed to help residents of those seven cities prepare for and find employment. More recently, City Council adopted a local minimum wage that went into effect January 1, 2015, with additional direction to lead a regional effort to increase the minimum wage to \$15 per hour by 2018.

Both these policy actions acknowledge the important role that jobs play in maintaining and improving local residents’ quality of life. Proponents of local hiring programs suggest that they are necessary to

promote quality jobs for local residents, and that the lack of such a program facilitates an underground economy characterized by employers who not only hire from outside the area, but take advantage of workers by paying substandard wages. The more prevalent these practices are, the more difficult it is for employers who pay fairly to compete for local jobs. Opposing arguments suggest that a local hiring program in Sunnyvale, in addition to being legally vulnerable, is unnecessary in light of an economy characterized by low unemployment.

Legal Background

Local hiring programs are generally defined as programs that require developers and contractors using public funds to hire local residents. The use and implementation of local hiring programs implicates several federal constitutional provisions, including the Privileges and Immunities Clause, the Commerce Clause, and the Equal Protection Clause. Basically, these laws prohibit the City from discriminating against out-of-state workers, or burdening interstate commerce. In order to adopt an acceptable local hiring program under these restrictions, the City would need to conduct a thorough assessment and documentation of economic development in the community. The analysis would need to provide evidence justifying discrimination against nonresidents. In addition to evidentiary support, any program would have to be narrowly tailored to address the particular harm that was identified.

This is why most local hiring programs refer to “findings” of a higher rate of unemployment in that locality as compared to the region or state in which it is located. Those findings suggest a relationship between that relatively high unemployment and undesirable community conditions such as poverty and/or higher-than-average crime rates. A further correlation is made between these undesirable conditions and the beneficial impact a local hiring program could have on them.

In addition, the inclusion of federal or state funding in City projects preclude the application of local hiring requirements on those projects, based on federal and state regulations. In California, all projects that are constructed with public funds must comply with the state’s Prevailing Wage Law. The Prevailing Wage Law includes requirements not only for wage rates, but also for employment of apprentices from apprenticeship programs that are state-certified.

An additional challenge for Sunnyvale is that it has a charter provision (Section 1309) that requires public works to be awarded to the “lowest responsible and responsive bidder.” Mandatory local hiring requirements may conflict with this provision. Case law has held that the City may only consider the amount of the bid and the qualifications of the bidder to do the work; “socially responsible” is not a factor that can be included in considering whether a bidder is responsible. Some charter cities that have adopted local hiring programs have different language in their charters related to public works. For example, in Pasadena, which has adopted a program, the charter provides that public work contracts be let to the “lowest and best” bidder. This language provides more flexibility than Sunnyvale’s provision. The upshot of Section 1309 is that the City cannot impose mandatory local hiring quotas or mandatory outreach as a condition of bidding on its projects. The City could request local outreach efforts, so long as the efforts do not hinder full and open competition or preclude a contractor from bidding on a project.

Local hiring objectives can only be achieved on purely private projects by contract or through incentives. Some cities include local hiring policies when negotiating projects that include development agreements. Others have provisions similar to Sunnyvale’s green building incentives, allowing additional density or some other “bonus” in exchange for local hiring efforts. The framework

for these types of incentives can be included in an ordinance or specific plan, but they are negotiated on a case-by-case basis. To develop these tools, it is important to assess the jobs skills of local residents, and to document local needs, so that any program will be based on realistic goals and supported by evidence of its need. Financial incentives to private development may trigger the need for the developer to pay prevailing wage, so would likely not be utilized.

Local Hiring Program Elements

If the City were to pursue local hiring policies to be negotiated in future projects, many factors would need to be analyzed prior to developing those policies. While the general concept behind local hiring programs appears simple and straightforward, the elements of a specific local hiring program can range from relatively simple to surprisingly complex. Much depends on answers to the questions posed below. A representative sample of labor's perspective on these questions is found in the proposal from Working Partnerships (Attachment 2), a San Francisco-based community-labor organization dedicated to addressing the root causes of inequality for workers and communities of color. A perspective from the development community is provided in Attachment 3. Staff's exploration of each of these questions is discussed in more detail below.

How Do You Define Local?

In the context of a local hiring program, the term "local" refers not to the location that the work is performed (it is assumed that all work falling under the local hiring program occurs within, and is restricted to, the limits of the City adopting the program), but rather to the area in which workers employed by the project reside. That is, how many of the project's employees reside within the area defined as "local" by that particular city's program?

Most cities surveyed by staff with existing local hiring programs (see Attachment 4) define "local" as a resident of their City, and some (e.g., Stockton) go so far as to stipulate that for the purposes of local hiring you must have lived in the city for at least a year preceding the award of contract for the project in question. One surveyed city, Lodi, defines "local" as a resident of the county to which it belongs.

The majority of proponents for a local hiring program in Sunnyvale have suggested adoption of a tiered program that would cause employers to first seek workers from Santa Clara County; should that effort not fulfill their needs, they would then be allowed to seek employees from the larger nine-county Bay Area (see Attachment 2).

To Which Development Projects Would the Local Hiring Program Apply?

Council's direction on November 11, 2014 was to explore a local hiring program that would apply to both large private developments and large public works projects. To finalize such a program, Council would need to define the term "large".

Most cities with local hiring programs impose related requirements only on projects above a certain size, and most have chosen to establish a dollar amount representative of the value of the project to define that size and to serve as a threshold. In these cases, *public* projects valued at or above the threshold are subject to the local hiring program, while those with a value lower than the threshold are not. *Private* projects are typically held to the same threshold, with the dollar amount representing the level of *public subsidy* rather than the total value of the project. This criterion related to a public subsidy is a reflection of the additional legal challenges a city might face were it to attempt to impose local hiring requirements on private projects funded solely by private dollars. *Staff could not find any municipality that requires private developers to adhere to local hiring criteria or pay prevailing wages*

if they are not also enjoying the benefit of public funding for their projects. The application of local hiring policies to private projects is made on a voluntary, incentive-based manner or on a contractual basis. The City of Pasadena, for example, offers developers a rebate of up to 50% of the construction tax paid for a particular project, but indicates the program has been an ineffective motivator and that zero rebates have been requested or provided.

Proponents of local hiring also request that the City adopt a policy relating to inclusion of local hiring elements on projects involving the sale or lease of public land. Additionally, they would like local hiring requirements embedded in future specific plans, and in future projects in the City that involve a development agreement. The City of Berkeley has adopted a provision in its “Downtown Mixed-Use District” ordinance that creates incentive for developers to provide job training or employment opportunities similar to the way Sunnyvale creates incentive for the utilization of green building standards by giving density bonuses. The City of Berkeley negotiates local hiring provisions in some of its development agreements.

What Would be Required of Projects to Which the Program Applies?

Would a certain percentage of a project’s jobs be targeted for local applicants? If so, what would that percentage be?

Labor representatives suggest that a minimum percentage should exist, but that coming up with a specific number that would apply to every project is challenging. Ideally, the appropriate percentage would vary depending on the project and the type of construction trades involved. Most developers and builders favor no minimum target. All of the cities surveyed by staff include in their local hiring program a requirement that the developer provide the city a list of projected jobs and target “local hires” in advance of commencing work, but they vary greatly in the required target. The City of Pasadena targets 15% of the workforce, East Palo Alto targets 30%, and the City of Stockton aims for 50%. Others, such as Berkeley and Lodi, do not include a target percentage in their program, and most cities without staff to administer their programs admit that regardless of any target, they have no idea what percentage of local hiring is actually achieved. The cities of Richmond and Pasadena do have staff to monitor their programs, and they report an average of 40% and 38% actual local hires respectively.

Would there be a requirement that developers limit their employment advertising to local venues and/or referral agencies?

The intent of local advertising is obviously to ensure that local workers are made aware of local hiring opportunities. In fact, the term “first source hiring” - which is what several cities call their local hiring programs - suggests that local applicants be among the first to be made aware of job openings, if not the first to be interviewed. Local program proponents believe it is critical that employers advertise locally via representatives of the local building and construction trades; the local workforce investment area (NOVA); and other community and educational institutions, but are less concerned with requiring *exclusive* advertising or specific time periods, recognizing that a local workforce may not be available.

Some cities with local hiring programs dictate the number of days that an employer is required to advertise locally (e.g., 10 days in Stockton), but others do not, and only one surveyed city (Berkeley) restricts the employer to advertising *solely* to local venues for any period of time (three days).

Would there be a requirement that developers utilize local job training and/or apprenticeships to fulfill their local hiring obligation?

For labor representatives, this is one of the most important aspects of a local hiring program. Apprenticeships help to promote local hiring (because an apprentice is required to attend training classes near their residence in addition to on-the-job training, most need to live near where they work); help to ensure a pipeline of future trades workers; and support the goals of local workforce areas by increasing the employability of young people, veterans, women and people of color. A good local hiring program, they suggest, would require that 20% of any workforce for which an apprenticeship program exists be filled by apprentices *from a state-certified program* (italics represents emphasis placed on this criteria by proponents of local hiring programs). The City is already required to ensure that developers and contractors working on *publicly-subsidized* projects utilize state-certified apprenticeship programs.

Would developers be required to pay a “fair standard wage”?

The City is also already required by law to ensure that developers and contractors working on *publicly-subsidized* projects pay a prevailing wage established by the state. Local labor representatives have suggested that minimum wage requirements for *purely private* projects also be included in any program developed by the City. Ensuring that local development projects hire local residents is only half the battle, they explain. Getting hired means little to a local resident if the job does not pay enough to allow them to continue living in the area. While not originally anticipated by this study, the payment of “area standard wages” is as important to program proponents as the basic concept of hiring local. It may, in fact, be more important, since the very requirement of an area standard wage would likely eliminate a lot of non-local bidding on local projects, whereas the adoption of a simple local hiring requirement would do little to affect workers’ wages. This is not really an option, however, because case law prohibits adoption of a local minimum wage.

Would the City Monitor Compliance with Program Requirements?

Monitoring a local hiring program could consist of one or more of the following staff activities: data collection, verification, analysis and reporting.

The purpose of monitoring efforts is two-fold:

- to motivate developer/contractor compliance with program requirements, and
- to measure the program’s actual success against its stated objectives

The more complicated the local hiring program (i.e., the more program elements and requirements there are), the more involved the monitoring efforts could be. Monitoring efforts could include:

- collection and review of job hiring plans and projections
- ensuring the contractor advertises locally, in accordance with the guidelines and timelines required by the City
- ensuring the contractor utilizes local apprenticeship programs in accordance with program requirements
- on-site visits to check employee identification against hiring records
- compliance audits of documents such as certified payrolls, cancelled checks, progress payments, quarterly wage and withholding reports, etc.
- compilation of program statistics (number of local residents hired through the program;

- number of local apprentices utilized by the program, etc.)
- preparing periodic program assessment reports for decision-makers

Monitoring by cities with established local hiring programs range from minimal to significant, and are largely dependent on the degree to which the city has assigned staff to the program. Some cities rely on developers and contractors to do their own monitoring and reporting, but the reliability of that data could be compromised due to the lack of an independent, external auditing source or a uniform methodology for analysis.

Most of the cities surveyed by staff do very little monitoring, and very little in the way of assessing or reporting how successful their local hiring or “first source” program is. This includes a number of agencies that performed extensive monitoring when their local hiring program was managed by their former Redevelopment Agency. When the Redevelopment Agency dissolved, however, so did monitoring efforts related to local hiring.

A local hiring program could be implemented without a monitoring component, but both objectives of a monitoring program - motivating compliance and measuring success - would be compromised. Should the City desire a monitoring component, therefore, adequate resources to support it will be important.

Would the Completion of Specific Steps and/or Attainment of Specific Targets be Required, or Would “Good Faith” Efforts Constitute Compliance?

The argument in favor of mandatory criteria (such as in San Francisco) is captured well by an article prepared by the Brightline Defense Group, a social rights advocacy group based in San Francisco (see Attachment 5). The basic premise is that a program requiring attainment of specific goals and objectives will be much more effective than a program which simply requires that a “good faith effort” be made toward those goals and objectives.

On the other hand, both Richmond and Pasadena claim a higher percentage of local hiring than does San Francisco, despite their reliance on “good faith” efforts as opposed to mandates. In fact, all of the cities surveyed by staff rely on good faith efforts as opposed to firm requirements, probably because the latter would likely not survive a legal challenge.

Would There be Penalties for Non-compliance?

If a developer is subject to, yet fails to demonstrate, either good-faith efforts toward desired goals or the attainment of required program elements, will there be penalties for that failure? If so, what will those penalties be?

Options in this regard are quite varied. Included in the programs of other cities surveyed are the following possible consequences for failure to comply:

- debarment from participating in future City contracts
- termination of the project contract in question
- loss of public funding for the project
- monetary penalties (for violation of a particular civil code or in accordance with an established penalty fee schedule)

Staff's analysis of cities with established local hiring programs also revealed the following two trends:

- No city surveyed imposes penalties for not achieving a specific number or percent of local hiring. Those that do pose the threat of penalties do so for a contractor's or developer's failure to apply "good faith effort" toward those steps the city feels will lead to improved local hiring. For example, failure to meet local advertising goals, place valid job orders for existing and projected position vacancies, or maintain accurate records regarding employment referrals and local residents employed.

This distinction reflects cities' acknowledgement that even the best efforts directed toward advertising, educating and interviewing locally will have limited impact if there are not any local workers with the necessary skills interested in a particular job. In other words, contractors and developers are rewarded and/or penalized on the basis of how hard they try to hire locally, as opposed to how many local hires they actually achieve.

- Staff found a strong and understandable correlation between the degree to which each agency actually enforces its program requirements, and the level of resources it has dedicated to program monitoring. That is, a lack of resources dedicated to monitoring essentially means no subsequent enforcement, regardless of whether or not the threat of penalties is included in a city's ordinance or program guidelines.

FISCAL IMPACT

The adoption of a local hiring program could impact both City revenues and expenditures:

Potential Reductions to General Fund Revenues

Revenues related to permitting *private* projects could be reduced if:

- developers who would otherwise pursue projects in Sunnyvale decide to build elsewhere due to local hiring requirements here; or
- the City decides to offer financial incentives to motivate private developers to participate in a voluntary local hiring program.

The fiscal impact of financial incentives would depend entirely on the incentives approved by City Council, and by the number of private developers taking advantage of the program.

Potential Increase in City Expenditure

Although not required to as a charter city, Sunnyvale has had a long-standing practice to require prevailing wages on its local public works projects, which includes monitoring submission of certified payrolls to assure compliance. This function has been performed by a staff member in the Public Works Department, and requires a certain level of expertise due to the complexity of prevailing wage law. The City has not, however, required payment of prevailing wages on maintenance and repair projects, which are overseen and managed by multiple departments. Last year the Legislature passed SB7, effective January 1, 2015, which expressly requires charter cities, in order to be eligible for certain grants and state funding, to pay prevailing wages for all maintenance and repair projects in excess of \$15,000. Accordingly, the City adopted an ordinance in December 2014 to extend payment of prevailing wages to maintenance and repair projects. In addition, the Legislature passed SB854, which contains additional prevailing wage compliance and monitoring requirements. The extension of

prevailing wage requirements to maintenance and repair projects substantially increases the City's responsibility for compliance monitoring, which now requires additional staff resources. Staff has been absorbing the workload since January 2015 and finds that it can't keep pace with the compliance requirements. A request for additional resources to comply with these new mandates is included as Alternative 1 in this report. Staff believes that analysis and review of ongoing data relative to local hiring in Sunnyvale could be absorbed by this position, so that language could be added to existing public works project contract specifications (and to those *private* projects enjoying a *public* subsidy) to require documentation prior to the start of a project regarding the number of construction jobs projected, and to require along with certified payroll submissions documentation regarding the actual number and percent of local workers and apprentices employed. The same staff responsible for ensuring compliance with certified payroll submissions and prevailing wages could collect this local hiring data and develop periodic status reports. This would allow the City to begin to gather data on actual use of local or nonresident workers.

Program materials encouraging local hiring, *voluntary* efforts, and *self-reporting* by *private* developers could also be developed at no additional cost (development and printing of informational materials to be absorbed within the existing operating budget).

The cost of developing a local hiring program to be included in future *private* projects through contract tools would require a one-time cost estimated at \$50,000 (consultant costs to conduct a study assessing local workforce needs and economic conditions to justify a program, as well as to establish targets and other elements of the program). Ongoing costs would be highly dependent on Council's desired program elements and on the level of developer participation, but could require up to two staff members to administer (\$270,000 annually).

PUBLIC CONTACT

Public contact was made by posting the Council agenda on the City's official-notice bulletin board outside City Hall, at the Sunnyvale Senior Center, Community Center and Department of Public Safety; and by making the agenda and report available at the Sunnyvale Public Library, the Office of the City Clerk and on the City's website.

Additional efforts to secure the input of public stakeholders was made via identification of this issue as a "Featured Project" on the City website's homepage, with a link to a specific informational page describing public input opportunities.

Three meetings were held to solicit public input during the month of March. One meeting specifically targeted the input of labor representatives; another targeted the input of developers, builders and contractors. A third meeting was conducted to gather input from any and all interested parties.

Several requests were also honored from individual and small group stakeholders requesting separate meetings with staff to discuss related issues.

ALTERNATIVES

1. Approve an additional position, one Administrative Analyst at a cost of \$140,000 annually (\$3.4 million over 20 years), in the FY 2015/16 Recommended Budget for the purpose of monitoring certified payroll submissions related to *public construction* and *public maintenance* projects in order to a) ensure compliance with state-mandated prevailing wage requirements, and b) add language to existing *public* project contract specifications, and to those *private* projects

enjoying a public subsidy, to require documentation prior to start of project regarding the number of construction jobs projected, and to require along with certified payroll submissions documentation regarding the actual number and percent of local workers and apprentices employed.

2. Adopt a value-based policy statement to formally *encourage* local developers and contractors on public and private projects to make outreach efforts for local hiring, to use state-certified local apprenticeship or jobs training programs, and to pay prevailing wages, with no monitoring or record-keeping. Cost limited to developing and printing informational materials, and to be absorbed in existing operating budget.
3. Prepare a budget supplement for \$50,000 to conduct an assessment of local workforce needs and economic conditions to justify creation of a local hiring program (establishment of targets and other local hiring elements) for consideration in future development agreements and/ or the development of future precise plans or specific plans. Council to make a final determination regarding the \$50,000 budget supplement during adoption of the 2015/2016 budget in June. Ongoing operating costs to implement any such program are currently estimated at \$270,000 (the cost of two, full-time administrative analysts), but would not be finalized or appropriated by Council until completion of the \$50,000 assessment..
4. Do not adopt a local hiring policy or program.

STAFF RECOMMENDATION

Alternatives 1 and 2: 1) Approve an additional position, one Administrative Analyst at a cost of \$140,000 annually (\$3.4 million over 20 years), in the FY 2015/16 Recommended Budget for the purpose of monitoring certified payroll submissions related to *public construction* and *public maintenance* projects in order to a) ensure compliance with state-mandated prevailing wage requirements, and b) add language to existing *public* project contract specifications, and to those *private* projects enjoying a public subsidy, to require documentation prior to start of project regarding the number of construction jobs projected, and to require along with certified payroll submissions documentation regarding the actual number and percent of local workers and apprentices employed.

This alternative would ensure the City's compliance with new state mandates governing labor compliance, as well as begin to provide the City with ongoing data about how local and non-local workers are utilized on construction projects.

2) Adopt a value-based policy statement to formally *encourage* local developers and contractors on public and private projects to make outreach efforts for local hiring, to use state-certified local apprenticeship or jobs training programs, and to pay prevailing wages, with no monitoring or record-keeping. Cost limited to developing and printing informational materials, and to be absorbed in existing operating budget.

The goals and objectives of such a statement would be supportive of Council's general interest in making Sunnyvale a more affordable place to live, but an emphasis on encouraging participation would avoid the serious legal questions raised by mandatory local hiring efforts on the part of private developers. Recognizing that a program reliant on voluntary participation by private developers may not be effective, staff also explored the possibility of adopting a local prevailing wage requirement for private construction projects in the City of Sunnyvale (a possible deterrent to developers or contractors employing non-local workers willing to work for low wages). Based on a 1995 decision of the United States Court of Appeals, Ninth Circuit, however, this is not a viable option.

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ATTACHMENTS

1. 2014 Study Issue Paper: Examine Ways to Increase Local Hiring in Major Developments
2. Summary of Local Hiring Proposal from Working Partnerships
3. Public Input from Eric Christen, Bergelectric
4. Survey of Cities With Local Hiring Programs
5. Brightline Defense Project Article