# WELBY, BRADY & GREENBLATT, LLP

## Construction Report

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# WELCOME

## *Message to our Readers*

Thank you for reading the 32st issue of the Welby, Brady & Greenblatt, LLP Construction Report. We are pleased to bring you a summary of new legal happenings related to the construction industry.

In this issue, we are are presenting Legal Alerts written by our Legal Staff. Alan D. Singer, Partner, discusses When is a Restrictive Covenant Not Enforceable; Zachary A. Mason, Associate, explains What Contractors Need to Know About Prevailing wage Rules Under the "New 421-a" Program; and our Staff contributed to the popular topic, Corporate Officers are Not Directly Personally Liable for the Company's Failure to Comply with New Jersey's Prevailing Wage Act.

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## WHAT CONTRACTORS NEED TO KNOW ABOUT PREVAILING WAGE RULES UNDER THE "NEW 421-A" PROGRAM

*By: Zachary A. Mason*

Zachary A. Mason

If you work in the New York City construction industry, you have probably heard about the "421-a" tax benefit program for real estate developers. However, what most people don't know is that the policy now includes prevailing wage standards for construction contractors. Even though you might never be the one applying for 421-a tax benefits, construction contractors need to know whether the prevailing wage standard applies to them, and if so, how to comply with the rules.

Developers may claim tax exemptions for properties in New York City used for new construction of residential housing with at least some portion of the units reserved for below-market rate housing for eligible middle-to-low income households ("Affordable Housing"). This tax policy was based on Section 421-a of the Real Property Tax Law.

Section 421-a was enacted in 1971 to subsidize the New York construction industry during a period when the city's population was declining by 85,000 people a year and residential construction was at an all-time low. Over the years, the legislature added Affordable Housing requirements for the 421-a tax benefits. "The Old 421-a" expired in January 2016, and the New York legislature codified a revised version of Real Property Tax Law § 421-which the administration calls the "Affordable New York Housing Program", or unofficially, "The New 421-a".

According to the New 421-a, the New York City Department of Finance ("DOF") grants tax exemptions to developers. Developers can generally apply for a "20 Year Benefit" or a "35 Year Benefit" of property tax exemptions, depending on a number of factors including what percentage of their units are rented at below market rate, how many percentage points rents for those units are below market rate, etc.

If a project both (1) contains 300 or more units; and (2) is located in the "Enhanced Affordability Area", the project can be an "Enhanced New Eligible Site" and the developer can apply to DOF for an "Enhanced 35 Year Benefit" – which is a very desirable exemption. If a developer receives

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an "Enhanced 35 Year Benefit", then the developer can receive a 100% property tax exemption for the construction period plus an additional 35 years.

In Manhattan, the Enhanced Affordability Area includes all residential construction south of 96th Street. In Brooklyn and Queens, the Enhanced Affordability Area generally includes neighborhoods within one mile of the East River waterfront: Brooklyn Heights, Downtown Brooklyn, Vinegar Hill, Dumbo, Navy Yard, Boerum Hill, Williamsburg, Greenpoint, Long Island City, and Astoria.

If the construction is for a building with 300 or more units in the designated "Enhanced Affordability Area", then the contractors must comply with the "Prevailing Wage" standards. In its first year of implementation after enactment in 2015, the Prevailing Wage for the Manhattan Enhanced Affordability Area was an average of $60 an hour, and the Prevailing Wage for the Brooklyn and Queens Enhanced Affordability Area was an average of $45 per hour. However, the Prevailing Wage is set to gradually increase in increments of 5% as of April 2020, and every three years thereafter.

The New 421-a also establishes a few exceptions to the Prevailing Wage for otherwise covered tax exemption applicants. The Prevailing Wage does not apply to (1) projects subject to a project labor agreement; (2) condominiums and cooperatives; (3) multiple family housing where at least 50% of the dwelling units are affordable housing restricted to residents with no more than 125% of Area Median Income.

Even if a given project is not bound by the Prevailing Wage because it is not in the Enhanced Affordability Area, but it has 300 or more units, a developer could still elect to comply with the 421-a Prevailing Wage in order to receive New 421-a benefits.

Compliance with the New 421-a Prevailing Wage Mandate

In order to receive tax exemptions under the New 421-a, developers must hire an "Independent Monitor" (a licensed accountant) to submit a "Project-Wide Certified Payroll Report" to the Comptroller within one year of the completion date of the construction project, to certify that construction workers were paid appropriately, and that construction workers were paid the Prevailing Wage where it applies. If the developer was required to pay construction workers the Prevailing Wage but failed to do so, the Project-Wide Certified Payroll Report must state the aggregate amount of the deficiency. If the Project-Wide Certified Payroll Report is not submitted to the Comptroller on time, the developer will be subject to a fine of $1,000 per week, with a maximum fine of $75,000.

In addition to the payroll report obligations of the developer, each contractor and subcontractor to a developer receiving New 421-a tax benefits must submit a "Contractor Certified Payroll Report" to the Independent Monitor no less than 90 days after the completion of their own work. If the contractor or subcontractor does not submit the Contractor Certified Payroll Report within 90 days, the Comptroller can fine the contractor or subcontractor $1,000 per week, with a maximum fine of $75,000.

Though a contractor may not have paid its construction workers the full Prevailing Wage, the statute contains mechanisms for contractors and developers to rectify the deficiency without having to incur any fines. If the construction workers were still paid an average hourly wage *within 15% of the Prevailing Wage*, the developer must pay to the "Fund Administrator" the difference between the Prevailing Wage and the wage actually paid to the construction workers (the "Deficiency Payment"). The Deficiency Payment must be made within 120 days from the developer's submission of the Project-Wide Certified Payroll Report to the Independent Monitor. The Comptroller will then distribute the deficiency payment to the construction workers.

However, if the construction workers were paid an average hourly wage *more than 15% below* the Prevailing Wage, the developer will not only have to rectify the deficiency, but will also be subject to fines and civil penalties. In such cases, the developer will be subject to a fine of $1,000 per week, with a maximum fine of $75,000, until the deficiency is cured. The developer must pay the Deficiency Payment within 120 days from the date of the submission of the Project-Wide Certified Payroll Report to the Independent Monitor. The Comptroller can then distribute the deficiency payment to the construction workers and impose a civil penalty on the developer equal to 25% of the amount of the deficiency (unless the building was "the subject of a job action which results in a work delay").

If construction workers were paid less than the Prevailing Wage, the developer applicant for the New 421-a tax benefits is generally obligated to pay for deficiencies in the payments to the workers, fines, and penalties. However, there is an exception in the case that the developer was the victim of the contractor's (1) "fraud, mistake or negligence"; (2) "fraudulent or inaccurate contractor certified payroll reports"; or (3) "fraudulent or inaccurate project-wide certified payroll reports". In such case, the developer can still be eligible for the New 421-a tax benefits so long as (1) the contractor or subcontractor must still cure the underpayment of the construction workers, and (2) the Comptroller determines "that the underpayment was the result of, or caused by, contractor fraud, mistake, negligence and/or for fraudulent or inaccurate contractor certified payroll reports and/or project-wide certified payroll reports."

**In Practice:**

If you are a contractor or a subcontractor on a residential building project in the five boroughs, you need to know whether the Prevailing Wage Mandate applies to you.

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A smart owner would put this explicitly in the contract documents, but you cannot rely on the owner to inform you of your legal obligations. You should consult with an attorney to determine whether the Prevailing Wage Mandate applies to you on any new project.

Even though it is the owner/developer who applies for the tax exemptions, some of the obligations under the New 421-a law apply directly on the contractor or subcontractor. If the law applies, you may need to submit a Contractor Certified Payroll Report to the Independent Monitor within 90 days of completion of the project.

[1] Note that in the context of this legal alert, the Prevailing Wage Mandate only refers to the wage standards set by the "New 421-a" – and does not refer to prevailing wages as defined by the New York Department of Labor.

[2] Note that the Contractor Certified Payroll Report submitted by the contractor and the Project-Wide Certified Payroll Report submitted by the developer are two very different things; the latter is not just a summary of the former.

*Scan here to learn more about Zachary A. Mason*

## WHEN IS A RESTRICTIVE COVENANT NOT ENFORCEABLE

*By: Alan D. Singer*

Alan D. Singer

It has been common practice, especially in the first half of the twentieth century, for owners of residential subdivisions (hereinafter referred to as "grantors") to include in the deeds to individual lots various restrictions on development. These could include minimum or maximum home sizes, type of homes which could be built, roofing material to be used (usually slate) or restrictions on use such as prohibition against farm animals, storing of recreational vehicles or prohibitions against commercial usages. Often approval of building plans would be reserved to the grantor, which created a problem when that person or entity was no longer in existence.

More recently, these restrictions have taken the form of recorded Declarations of Restrictive Covenants which are binding on "heirs, successors and assigns", in other words, all future owners. As often happens, some of the provisions of the restrictions become obsolete over time or are simply ignored by future owners and the ancient deed restrictions may not be included in later transactions. If there is no interested entity insuring compliance with the original restrictions they may be frequently ignored by later generations.

When there is no enforcement of the restrictions by a grantor or successor in interest to the grantor the question arises as to whether an owner in the chain of title can enforce the restriction against a neighbor who has or is threatening to violate it. The answer, as in most legal issues, is a definite maybe. A recent case in which we represented a defendant (Shehan v. Commisso and Cassano, Supreme Court, Suffolk County) explores that issue. The issue was whether a neighbor (Shehan) could enforce a 1929 deed restriction purportedly prohibiting further subdivision of a lot owned by the defendants, as to which the Planning Board had approved a subdivision of a lot into two building lots.

The Court ruled that he could not and dismissed his suit. In so doing the Court relied on existing law which allows a neighbor to seek enforcement of a deed restriction only if that neighbor can prove that the restriction was part of a common scheme or plan throughout the subdivision intending to benefit all owners. In this case there was ample evidence that no such common scheme existed. First, not all of the lots in the subdivision contained the same original deed restriction, and some of them had restrictions which expired by their terms in 1933. Additionally, the grantor had retained the right to impose other or different restrictions in future deeds. Also, the original 28 residential lots, through various re-subdivisions, had now grown to over 40, with three of them improved by a school.

Thus it was found that despite the deed restrictions being said to "run with the land" and inuring to the benefit of subsequent owners, they were not part of a common scheme or plan, so could not be enforced by one owner against another. It may also have been significant that the deeds for both plaintiff's and defendants' properties, going back to at least 1950 did not contain any reference to the original restrictions.

The lesson here is that when dealing with ancient deed restrictions, especially ones which seem to make no sense in contemporary times, it is important to consult with an attorney and thoroughly research the history of and current conditions within the subdivision.

*Scan here to learn more about* Alan D. Singer

# CORPORATE OFFICERS ARE NOT DIRECTLY PERSONALLY LIABLE FOR THE COMPANY'S FAILURE TO COMPLY WITH NEW JERSEY'S PREVAILING WAGE ACT

*By: Welby, Brady & Greenblatt, LLP Legal Staff*

In the case of *Joseph Palmisano, et al. v. CrowderGulf, LLC, et al.*, the United States District Court for the District Court of New Jersey held that corporate officers are not individually liable for a failure to pay prevailing wages under New Jersey's Prevailing Wage Act (the "PWA").

In January 2013 Defendant CrowderGulf, LLC ("Contractor") contracted with the State of New Jersey to perform "waterway debris removal services" from damage caused by Hurricane Sandy (the "Project"). In turn, Contractor subcontracted certain portions of the work to, among others, Defendant Bil-Jim Construction Co., Inc. ("Subcontractor").

The Plaintiffs in the action brought suit individually and on behalf of others similarly situated, alleging that Contractor and Subcontractor failed to pay the prevailing wage for work performed on public projects, including without limitation full prevailing wages, shift differentials, overtime, and double-time for work performed on Sundays and Holidays. Importantly, Plaintiffs also named Subcontractor's President, Vice President and Secretary/Treasurer (the "Individual Defendants") in the action, claiming that, as "officers, principals, directors, supervisors, or managers", the Individual Defendants are personally liable for Subcontractor's failure to comply with the PWA. The Individual Defendants moved to dismiss the Complaint for failure to state a claim, contending that the PWA does not impute personal liability to corporate officers.

When considering a motion to dismiss, the Court is required to accept as true all allegations in the Complaint, and to view the same in the light most favorable to the non-moving party. Ultimately, a complaint should be dismissed only if the well-pleaded alleged facts, taken as true, fail to state a claim. While applying this legal standard, the Court granted the motion of the Individual Defendants, thereby dismissing the claims against them.

Plaintiffs argue that the PWA applies the New Jersey Wage Payment Law's ("WPL") definition of "employer", which would result in the Individual Defendants being held personally liable. Plaintiff asks the Court to invoke the doctrine of *in pari materia.* The Court, however, disagreed with Plaintiff, stating "the doctrine is not invoked to engraft the terms of one statute onto another merely because the general subject matters of the two enactments are similar." The Court further noted that, unlike the Fair Labor Standards Act and the WPL, both of which impose individual liability on officers of a corporation, the PWA "employs the narrowest definition of employer, providing for no individual liability". In further support of its holding, the Court noted the purpose of the PWA is "to establish a prevailing wage level for workmen engaged in public works in order to safeguard their efficiency and general well-being and to protect them as well as their employers from the effects of serious and unfair competition resulting from wage levels detrimental to efficiency and well-being".

**Conclusion:**

New Jersey's PWA does not impute personal liability on principal officers of a corporation for a failure to pay prevailing wages. Though the PWA does not specifically define "employer", the regulations promulgated under the authority of the PWA define "employer" as any natural person, company, firm, subcontractor or other entity engaged in public work". Under this definition, an "employer" under the PWA is limited to the entity or individual that obtains and performs work under the contract, which is the actual contracting entity and not its individual officers.

In the event an employee of your corporation brings an action under the PWA and individually names the corporate officers as defendants, thereby seeking to impose personal liability upon them, such action should be immediately met with a motion to dismiss on behalf of the individually named defendants.

Note that, notwithstanding the case law discussed herein, there may be indirect personal liability pursuant to an indemnity agreement entered into in connection with the issuance of a payment bond on a public project, provided a successful claim is made against any such bond.

[1] The general principle of in pari materia, a rule of statutory interpretation, says that laws of the same matter and on the same subject must be construed with reference to each other. The intent behind applying this principle is to promote uniformity and predictability in the law.