



## PREVAILING WAGE POLICY MEMORANDUM

**DATE:** October 29, 2012

**TO:** All Interested Parties

**FROM:** L. Ann Selover, Industrial Statistician, Prevailing Wage Program Manager

**SUBJECT:** Residential Construction Definition

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### POLICY DISCLAIMER

This policy is designed to provide general information in regard to the current opinions of the Department of Labor & Industries (L&I) on the subject matter covered. This policy is intended as a guide in the interpretation and application of the relevant statutes, regulations, and policies, and may not be applicable to all situations. This policy does not replace applicable RCW or WAC standards. If additional clarification is required, the Program Manager for Prevailing Wage should be consulted.

This document is effective as of the date of print and supersedes all previous interpretations and guidelines. Changes may occur after the date of print due to subsequent legislation, administrative rule, or judicial proceedings. The user is encouraged to notify the Program Manager to provide or receive updated information. This document will remain in effect until rescinded, modified, or withdrawn by the Director or the Director's designee.

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### 1. What are residential prevailing wage rates?

Residential rates exist for a number of prevailing wage categories. Residential rates are generally lower than the corresponding commercial rates. Not all trade and occupation classifications have residential prevailing rates. When the Department of Labor & Industries (L&I) has not established a residential prevailing rate, the regular (commercial) prevailing rate of pay applies for that trade and occupation. This is the case even if the project is a residential building. For example, if there is not a prevailing rate established for residential roofers, then the commercial roofer rate must be used on a residential roof.

This policy addresses how the L&I determines which prevailing rate of wage applies when a trade and occupation has both a residential and commercial prevailing rate, and the building could possibly be classified as residential construction.

### 2. When do residential rates apply?

Residential rates only apply in the limited situation when a building fulfills the requirements for residential construction.

Residential construction is defined in the Washington Administrative Code:

"Residential construction" means construction, alteration, repair, improvement, or maintenance of single family dwellings, duplexes, apartments, condominiums, and other residential structures not to exceed four stories in height, including basement, when used solely as permanent residences. It does not include the utilities construction (water and sewer lines), or work on streets, or work on other structures (e.g., for recreation and business.) [WAC 296-127-010\(9\)](#)

There are two elements to the definition of residential construction:

- 1 - A structure, not exceeding four stories in height.
- 2 - Used solely as a permanent residence.

Unless both elements are satisfied, the building is not considered a residential structure for the purpose of prevailing wage, and all work performed must be paid at the commercial prevailing rate.

### **3. What does the four stories height limit include?**

Under [WAC 296-127-010\(9\)](#), any building that exceeds four stories in height is not residential construction for the purposes of prevailing wage. The four stories height limit includes all underground structures, including but not limited to parking garages and basements.

The following example helps demonstrate the four stories height limit. This example is illustrative and not intended to create additional factors.

#### Example

*Within the height limit:*

- The public works project is a four story apartment building, and
- There is no parking garage or underground facility.

*Not within the height limit:*

- The public works project is a four story apartment building, and
- In addition to the four stories, there is an unfinished basement that residents use for storage.

The building in the first scenario is within the height limit for residential construction because it is four stories, and there are no underground facilities. The building in the second scenario is not residential construction for the purposes of prevailing wage because the underground basement, in addition to the four above-ground stories, means that the building exceeds the four stories limit. All work performed on the building must be paid at the commercial prevailing wage rate.

## 5. What does “solely” mean?

Once L&I determines that the building is within the four stories height limit, L&I then considers the building’s collective circumstances to determine if the building satisfies the second element – that the building will be used solely as a permanent residence. L&I may consider a number of factors to determine if a building satisfies this requirement.

The following list is illustrative of a number of factors L&I may weigh in implementing the remedial Prevailing Wage Act. This list, however, is not exclusive. Application of these factors depends on the facts, which are carefully evaluated on a case-by-case basis. No one factor is necessarily controlling.

- Incidental uses - such as treatment or counseling facilities, classrooms, administrative offices, employment and other commercial activities;
- Complete dwelling units - each unit contains all aspects of an abode, including full kitchen and bathroom;
- Terms of any lease or rental agreement;
- Living arrangement exempt under [RCW 59.18.040\(1\)](#);
- Any use restrictions, including covenants and easements.

To qualify as residential construction, the building must be used “*solely* as a permanent residence.” “Solely” means the building cannot contain non-residential facilities. For the purpose of prevailing wage, a building is either entirely residential or entirely commercial. A building cannot be split into sections for the purpose of paying some work at a lower residential prevailing rate, while paying other work on the same building at a higher commercial prevailing rate.

If the building houses any commercial activity, then the building is not solely residential and all work performed must be paid at the commercial prevailing wage rate. Work can only be paid at a residential rate when a building is solely residential and does not contain any commercial activity.

The following are two examples of how the factors identified above may be used to determine if a building is solely residential. These examples are illustrative and not intended to create additional factors.

### Example 1

#### *Solely Residential:*

- The public works project is a two story apartment building; and
- Each apartment is a self contained unit, with its own kitchen and bathroom; and
- There are no common areas or administrative offices on site; and
- The second floor houses a coin-operated laundry room that the residents share and is not open to the public.

#### *Not Solely Residential –therefore commercial prevailing rates apply to the entire building:*

- The public works project is a two story apartment building; and

- Each apartment is self-contained, with its own kitchen and bathroom; and
- There are no common areas or administrative offices on site; and
- There is a professional dry cleaner on the first floor which is used by apartment residents and the general public.

The building in the first scenario is solely residential because each unit is self contained and there are no common areas or administrative offices. The presence of the coin-operated laundry room does not take the building out of residential construction because the laundry room is not a commercial activity. The building in the second scenario is not solely residential because the professional dry cleaner on the first floor is a commercial activity. All work performed on the second building must be paid at the commercial prevailing wage rate.

### Example 2

#### *Solely Residential:*

- The public works project is a three story building with ten residential units; and
- Each unit is self-contained with its own kitchen and bathroom; and
- There is a small common room that is occasionally and infrequently used for resident counseling.

#### *Not Solely Residential - therefore commercial prevailing rates apply to the entire building:*

- The public works project is a three story building with ten residential units; and
- None of the units have their own kitchen or bathroom. Residents use common bathrooms, and share the kitchen and dining room facilities; and
- Staff provides ongoing counseling and support services to residents from the on-site administrative office.

The building in the first scenario is solely residential because each unit is self contained with its own kitchen and bathroom. The small common room is not intended as a commercial counseling facility. Rather, it is a non-commercial room that is periodically used for counseling of facility residents only, and is not used for providing counseling services to members of the general public.

In contrast, the building in the second scenario does not have self-contained units. The residents share the bathrooms, kitchen, and dining room facilities. The building's purpose is to provide on-site counseling to its residents. The presence of the ongoing counseling and support makes the entire building commercial. All work performed must be paid at the commercial prevailing rate.

## **6. What does “permanent” mean?**

For the purposes of residential construction, the building must be used “solely as a *permanent* residence.” “Permanent” refers to both the purpose of the building, and the nature of the occupants’ use. L&I considers the permanent nature of the building on a case-by-case basis in light of the collective circumstances. It is best understood as a two step analysis.

In step one, the L&I analyzes the purpose the structure.

- (1) Is the building intended to be a residence, permanently?
  - a. If no, then the analysis is complete.
  - b. If yes, then the analysis continues with step two.

Any intent other than a residence – including, but not limited to a boarding school, hospital, fire station, correctional institution, dormitory or treatment facility – is not residential construction for the purposes of prevailing wage.

Example of Step One – Building Purpose

*Permanent Residence:*

- The building is a housing facility for homeless individuals who have completed a substance abuse treatment program, and
- There are no treatment facilities on site, and
- A covenant runs with the land limiting the land's use to residential housing.

*Not a Permanent Residence:*

- The building is a residential treatment facility for homeless individuals currently enrolled in a substance abuse treatment program, and
- Substance abuse treatment is provided on site, and
- The facility treats patients who live at the facility and patients who do not.

The building in the first scenario succeeds at step one because it is intended to be a residence permanently and its purpose is to provide housing. There is no treatment or other non-residential facilities on site, and the covenant weighs in favor of the building's classification as a permanent residence. The building in the second scenario does not satisfy step one because it is not intended to be a residence permanently and the main purpose is to provide substance abuse treatment. The residential nature of the facility is secondary to its treatment services, which are provided to patients who do live both on and off site.

In step two, the L&I weighs the nature of the occupants' use of the structure.

- (2) What is the nature of the occupants' use?
  - a. If the occupants generally intend to stay in the building for such a length of time that they regard it as home, then the building is more likely to be considered residential construction.
  - b. If the nature of the occupants' stay is only temporary, such as for the duration of the occupants' participation in a particular program, then the building is less likely to be considered residential construction.

The following are examples of how the above steps may be used to determine whether or not a building is a permanent residence. These examples are illustrative and are not intended to create additional factors. In each of the following examples, the building is three stories in height, and

all units are self contained with their own full kitchen and bathroom. The presence of additional facts may change the analyses and resulting determinations.

### Example of Step Two – Nature of Occupant Use

#### *Permanent Residence:*

- The building is the same housing facility for homeless individuals who have completed a substance abuse treatment program as in step one, and
- Residents sign a one-year lease, and
- Occupancy is not conditioned upon enrollment in any treatment program or receipt of social services.

#### *Non-Permanent Residence:*

- The building is the same residential treatment facility for homeless individuals currently enrolled in a substance abuse treatment program as in step one, and
- Residents typically stay at the facility for one to four weeks, and
- Occupancy is dependent upon enrollment in a substance abuse treatment program and occupants leave the facility upon completion of the treatment program.

The building in the first scenario is residential construction because it succeeds at both step one and step two of the analysis. In step two, the nature of the occupant use is such that the occupants regard the building as home. Residents sign a one year lease, and their stay is not dependent upon enrollment in any treatment program.

The building in the second scenario did not satisfy step one of the analysis and so would normally not continue with step two. However, to illustrate the nature of the analysis, assume that the building in the second scenario continues to step two. The building would nevertheless fail at step two because the nature of the occupant use is only temporary. Occupants typically stay at the facility for only one to four weeks, and leave the facility after completing the substance abuse treatment program. Therefore, the building is not a permanent residence and all work performed must be paid at the commercial prevailing wage rate.

### **7. Other work classifications are not dispositive.**

For the purposes of prevailing wage law, [WAC 296-127-010\(9\)](#) is the only applicable definition of “residential.” Building codes, job titles, and other classifications made outside of the Washington prevailing wage context are not used to determine whether residential or construction prevailing rates apply.

### **8. Awarding agency responsibility and liability.**

A law adopted by the 2009 Washington State Legislature, effective July 26, 2009, amends [RCW 39.12.030](#) regarding awarding agency public works contract specifications, and requires that if the awarding agency determines the work meets the definition of “residential construction,” the contract must include that information.

Additionally, the law provides that “if the hourly minimum rate of wage stated in the contract specifies residential construction rates and it is later determined that the work performed is commercial and subject to commercial construction rates, the state, county, municipality, or political subdivision that entered into the contract must pay the difference between the residential rate stated and the actual commercial rate to the contractor, subcontractor, or other person doing or contracting to do the whole or any part of the work under the contract.”

L&I encourages contract awarding agencies to exercise caution in designating “residential construction” rates in contract specifications, and is available to provide assistance on the issue. A review of Prevailing Wage Policies [08012012](#) and [08062012](#) may be helpful. For further information, please contact L&I, Prevailing Wage, at [pw1@Lni.wa.gov](mailto:pw1@Lni.wa.gov) or (360) 902-5335.