

421-a Legislation Overview and FAQ

This document contains general information about recently enacted local and state legislation and is not intended to provide legal advice or to be relied upon in any way by any person or entity. The provisions of the applicable state law, local law, and rules regarding the 421-a tax exemption program are extremely complex. It is therefore important to rely only upon the actual text of the applicable statutes and rules and to consult with an attorney as to their meaning.

HPD is currently beginning the rulemaking process pursuant to the City Administrative Procedure Act, which will include an opportunity to comment on the proposed rules at a public hearing. To the extent that any of the issues discussed herein are also addressed in HPD's proposed rules, they will not be finalized until the rulemaking process is completed. Please check HPD's web site regularly to ensure that you have the most current information. If you have further questions please contact Arden Sokolow at (212) 863-6196.

On December 28, 2006, the Mayor signed Local Law No. 58 of 2006. This legislation, which contains major reforms to the 421-a tax exemption program, became effective on December 28, 2007. On August 24, 2007, the Governor signed Chapters 618, 619, and 620 of the Laws of 2007. On February 21, 2008, the Governor signed Chapter 15 of the Laws of 2008. This state legislation contains further reforms to the 421-a tax exemption program. The combined state and local legislation includes the following major programmatic changes to the 421-a tax exemption program:

- **Expands the 421-a geographic exclusion area (GEA).** Developments in the GEA are required to provide affordable housing in exchange for receiving 421-a tax benefits. The current GEA includes Manhattan from roughly 14th to 96th Streets as well as the Greenpoint/Williamsburg areas of Brooklyn. The GEA has been expanded to include:
 - In Manhattan: all of Manhattan is now covered.
 - In the Bronx: Portions of Claremont and Crotona Park.
 - In Brooklyn: Downtown Brooklyn as well as portions of Red Hook, Sunset Park, East Williamsburg, Bushwick, East New York, Crown Heights, Weeksville, Highland Park, Ocean Hill, Prospect Heights, Carroll Gardens, Cobble Hill, Boerum Hall, and Park Slope.
 - In Queens: Portions of Long Island City, Astoria, Woodside, Jackson Heights, and the East River Waterfront.
 - In Staten Island: Portions of St. George, Stapleton, New Brighton, and Port Richmond.

The Greenpoint-Williamsburg Waterfront area forms a separate GEA in effect since 2005, with different affordability requirements (see FAQ).

- **Eliminates as-of-right 25-year benefits in NPP/REMIC areas.** Only developments that meet on-site affordability requirements or receive substantial governmental

assistance pursuant to an affordable housing program will be eligible to receive 25-year benefits. Projects located in both the GEA and an NPP/REMIC area must meet GEA requirements before receiving extended benefits.

- **Sets a limit on the total amount of 421-a tax benefits that any market-rate unit may receive (AV cap).** Only the first \$65,000 of an apartment's billable exempt assessed value (AV) will now be eligible for the 421-a tax exemption. The value of a unit above this threshold is ineligible to receive benefits. For units with an exempt AV above this \$65,000 cap, owners will pay taxes on the portion of AV above the cap, but still receive tax benefits on the portion of AV below the cap. The \$65,000 cap will be increased by 3%, compounded annually, on each taxable status date following the first anniversary of the effective date of the State law. Projects that qualify for extended benefits will not be subject to the AV cap (see example chart in FAQ section below).
- **Eliminates the negotiable certificate program.** Any property within the GEA must provide affordable housing onsite in order to receive any 421-a tax benefits. Since December 28, 2007, no new written agreements for negotiable certificates projects have been issued. Existing certificates will not expire, and can still be used, with some limitations (see FAQ below).
- **Authorizes HPD to create a dedicated fund for affordable housing.** The Fund will be used to create affordable housing outside of the GEA, focusing on the 15 highest poverty districts in the City.
- **Reserves 421-a tax benefits for buildings with a minimum of four units.** Three-unit buildings are no longer eligible for 421-a benefits unless they are constructed with substantial governmental assistance pursuant to an affordable housing program.
- **Community preference for affordable units in GEA.** Within the GEA, residents of the community board in which the building receiving benefits is located will have priority for purchase or rental of 50% of the affordable units upon initial occupancy.
- **Specified unit and bedroom mix.** Unless preempted by federal requirements, affordable units in the GEA must have either a comparable number of bedrooms as market rate units and a unit mix proportional to the market rate units, or at least 50% of the affordable units must have two or more bedrooms and no more than 50% of the remaining units can be smaller than one bedroom, or the floor area of affordable units must be no less than 20% of the total floor area of all dwelling units.
- **35-year affordability and rent stabilization requirements.** Affordable rental units in the GEA must be kept affordable at initial and subsequent rentals after vacancy and remain rent-stabilized for 35 years after the completion of construction. After the 35 year period, tenants with leases will remain as rent stabilized tenants for the duration of their occupancy. Homeownership projects within the GEA must be affordable upon initial sale. Furthermore, rent registration forms must now be filed with HPD as well as DHCR.

- **Prevailing Wage Requirement.** This requirement applies to all persons employed in care or maintenance work at a building receiving benefits who are regularly scheduled to work at least eight hours a week in the building. Exemptions apply to buildings with fewer than 50 dwelling units as well as buildings where at least 50% of the units are affordable to those at or below 125% of AMI and, where rental units, will remain affordable throughout the benefit period.
- **Creates a Boundary Review Commission.** A Boundary Review Commission with members appointed by the Mayor and City Council will reassess the GEA every two years to determine whether the boundaries should be revised. The Commission will issue a biennial report to the Council and the Mayor with recommendations for changes to the GEA or an explanation why no recommendations are being made. The first such report must be made by December 1, 2008.

Frequently-Asked Questions

How does the effective date of the new law affect my project?

The State legislation takes effect immediately. However, by its terms, it delays the effectiveness of many of its provisions as well as those of Local Law 58 until after June 30, 2008. However, several provisions went into effect after December 27, 2007.

After December 27, 2007, the following provisions went into effect:

- Elimination of NPP/REMIC as-of-right extended benefits
- Minimum number of units eligible for benefits increases from 3 to 4
- Prevailing wage requirements for service workers

After June 30, 2008, the following provisions go into effect:

- Expanded GEA
- Required community preference for 50% of affordable units in GEA
- Specified unit and bedroom mix in GEA
- Affordability requirements extended to 35 years in GEA
- AV Cap citywide

Any project that commences construction prior to December 28, 2007 or July 1, 2008, respectively, will not be subject to these new provisions and will still be eligible to receive 421-a tax benefits pursuant to the prior law. Any project that commences construction after the relevant date will be subject to the new provisions (except as otherwise noted).

If my project is in the GEA and construction commences after 6/30/08, how can I receive 421-a tax benefits?

Only buildings receiving substantial governmental assistance pursuant to an affordable housing program, those that set aside at least 20% of their units as affordable (see below), and projects that purchase negotiable certificates from agreements executed prior to 12/28/07 are eligible for 421-a benefits in the GEA.

What are the affordability requirements for a building to receive 421-a benefits in the GEA after 6/30/08?

- If construction is carried out with substantial governmental assistance provided pursuant to a program for the development of affordable housing, at least 20% of the units in the multiple dwelling must meet one of the following requirements:
 - initial and subsequent rentals in multiple dwellings with 25 units or less must be affordable at or below 120% of AMI or;
 - initial and subsequent rentals in multiple dwellings with more than 25 units must be affordable at or below 120% of AMI and cannot exceed an average of 90% of AMI or;
 - homeownership units at initial sale must be affordable at or below 125% of AMI.
- If no substantial governmental assistance is utilized, at least 20% of the units in the multiple dwelling must at initial rental or sale and at all subsequent rentals upon vacancy be affordable at or below 60% of AMI.

If my multiple dwelling is in the GEA and I am not purchasing negotiable certificates, where must my affordable units be located?

The legislation states that all affordable units must be situated onsite and defines "onsite" as within the building or buildings for which benefits pursuant to RPTL § 421-a are being granted. Refer to HPD's proposed rules for further information.

What if my project is in the GEA and I have purchased negotiable certificates from an affordable housing project that entered into a 421-a written agreement prior to December 28, 2006?

Any project newly constructed within the GEA that has purchased the requisite number of certificates is eligible to receive 421-a tax benefits as long as construction commences on or before June 30, 2009. Projects using certificates and commencing construction after June 30, 2009 will be subject to the AV cap.

What if my project is in the GEA and I have purchased certificates from an affordable housing project that entered into a 421-a written agreement between December 28, 2006 and December 27, 2007?

Any project newly constructed within the GEA that has purchased the requisite number of certificates is eligible to receive 421-a tax benefits as long as construction commences on or before June 30, 2008. Projects using certificates and commencing construction after June 30, 2008 will be subject to the AV cap.

If my project is outside the GEA, what are the affordability requirements in order to qualify a project for the 25 year extended tax benefits?

- If the project is located outside the GEA and within a former NPP/REMIC area and begins construction after 12/27/07:
 - If not utilizing substantial governmental assistance, then at least 20% of the onsite units must be affordable to persons at or below 80% of AMI.
 - If utilizing substantial governmental assistance, then such substantial governmental assistance must be provided pursuant to an affordable housing program.

- If the project is located outside the GEA and not within any former NPP/REMIC area:
 - If not utilizing substantial governmental assistance, then at least 20% of the units must be affordable to households not exceeding 100% of AMI as long as the average household income in the affordable units is at or below 80% of AMI.
 - If utilizing substantial governmental assistance, then such assistance must be provided pursuant to an affordable housing program.

What exactly is the AV cap and how is it calculated?

421-a is an exemption on the increased value of a property due to construction. An AV cap is a limitation on the maximum benefit available to a residential unit. The cap limits the maximum AV upon which the exemption is calculated to \$65,000. Units will only receive 421-a benefits on the first \$65,000 of billable exempt assessed value. Any AV above this threshold will be ineligible to receive benefits. The AV cap applies to any multiple dwelling that is not entitled to extended benefits. In other words, if a project is entitled to extended benefits either because it is at least 20% affordable or is governmentally-assisted, it will not be subject to the AV cap.

Within the GEA, the AV cap is only applicable for projects using negotiable certificates after the commencement of construction deadlines specified above (after June 30, 2008 for certificates generated from written agreements executed between 12/28/06 and 12/27/07 and after June 30, 2009 for certificates generated from written agreements executed before 12/27/06).

The example below illustrates how an AV cap affects tax payments:

	per building <i>Without an</i>	per unit (10 units) <i>Without</i>	<i>With an</i>

	<i>AV cap</i>	<i>an AV cap</i>	<i>AV cap</i>
Calculation of Exempt AV before AV cap			
Post-Construction Billable AV <i>(AV of newly constructed building)</i>	\$1,000,000	\$100,000	\$100,000
Pre-Construction AV (Mini-Tax AV) <i>(AV of property in year prior to construction)</i>	<u>\$150,000</u>	<u>\$15,000</u>	<u>\$15,000</u>
Exempt AV (Post-Const minus Pre-Const)	\$850,000	\$85,000	\$85,000
Calculation of AV subject to AV cap			
Exempt AV without AV cap	\$850,000	\$85,000	\$85,000
<u>AV Cap (\$65,000 per unit)</u>	<u>n/a</u>	<u>n/a</u>	<u>\$65,000</u>
Exempt AV above the cap	\$0	\$0	\$20,000
Calculation of AV subject to Taxes			
Pre-Construction AV (Mini-Tax AV)	\$150,000	\$15,000	\$15,000
AV above the cap	<u>\$0</u>	<u>\$0</u>	<u>\$20,000</u>
Total Taxable AV	\$150,000	\$15,000	\$35,000
First Year of Tax Liability tax rate of 12.737%	\$19,106	\$1,911	\$4,458

During the phase-out periods of the exemption (years 3-10 for the 10-year exemption, years 12-15 for the 15-year exemption, years 13-20 for the 20-year exemption, and years 22-25 for the 25-year exemption), the owner begins to pay increasing portions of the real property tax on the exempt AV.

How does the AV cap affect non-residential space in my building?

- Any commercial, community facility, or accessory use space that would otherwise be eligible for 421-a and is contained in its own tax lot without any residential units would be subject to the \$65,000 AV cap.
- Within a tax lot containing residential and either commercial units, community facility, or accessory use space, the non-residential space would collectively be considered as equivalent to a single unit. The AV cap on such a tax lot would be calculated by multiplying (a) the number of residential dwelling units plus one, by (b) \$65,000. In other words, all of the non-residential space would collectively be considered as equivalent to a single residential dwelling unit.

What happens if I construct a 3-unit building?

Unless it is constructed with substantial governmental assistance pursuant to an affordable housing program, any such project that commences construction after December 27, 2007 will not be eligible for any 421-a tax benefits.

What are the exceptions to the new regulations?

- Grandfathering
 - Construction commenced before a certain date (see above).
 - Litigation relating to a contract for the purchase of real property.
 - Building seeking benefits is located on a site requiring environmental remediation construction and seeking an Environmental Completion certificate.

- The Greenpoint-Williamsburg waterfront is subject to different affordability restrictions and is not subject to most of the recent restrictions imposed by state and local laws.

What construction requirements must my project fulfill by the specified date (in most instances, on or before June 30, 2008) in order to qualify for benefits under the prior law?

Local Law 58's definition of commencement of construction remains valid for purposes of the commencement deadlines imposed by both state and local law. Local Law 58 provides that construction shall be deemed to have commenced on the date immediately following the issuance by the Department of Buildings ("DOB") of a building or alteration permit for a multiple dwelling (based on architectural, plumbing, and structural plans approved by DOB) on which the excavation and the construction of initial footings and foundations commences in good faith, as certified by an architect or professional engineer licensed in New York State, provided that the construction of such multiple dwelling has been completed without undue delay, as certified by such architect or professional engineer. For projects that combine new construction and the concurrent conversion, alteration or improvement to a pre-existing building or structure, Local Law 58 provides that construction shall be deemed to have commenced on the date immediately following DOB's issuance of an alteration permit for the multiple dwelling (based upon architectural, plumbing, and structural plans approved by DOB) on which the actual construction of such conversion, alteration, or improvement of the pre-existing building or structure commences in good faith, as certified by an architect or professional engineer licensed in New York State, provided that the construction of such multiple dwelling has been completed without undue delay, as certified by such architect or professional engineer.

In the context of the Local Law 58 definition, practitioners have asked the following questions and HPD has provided the indicated answers, some of which are included in the proposed rules:

What qualifies as commencement of construction?

Construction must commence on or before the effective date of the specific provision. It will be considered the later date of a building or alteration permit and the installation of a metal or concrete load bearing structure, footing or caisson (or if a combination building, then the later date of the alteration permit and the beginning of work). The architect or professional engineer will provide an affidavit that the excavation and construction of initial footings and foundations (or for combination projects, the actual construction of the conversion, alteration or improvement) commenced in good faith.

Is a foundation permit sufficient to satisfy the permit requirement?

No. Local Law 58 requires both the start of construction and a building or alteration permit for a multiple dwelling. Though a foundation permit can be issued without any architectural or mechanical plans, a building permit is contingent upon these plans. Therefore, work based solely on a foundation permit could not be deemed the commencement of construction within the meaning of the statute.

If a full building permit is required, can a building commence foundation work under a foundation permit, but still vest if it obtains a building permit prior to the relevant commencement of construction deadline?

Yes. The project would comply with both requirements of the "commencement of construction" definition in that (a) DOB will have issued a building or alteration permit based upon architectural, plumbing, and structural plans approved by DOB, and (b) the developer will have commenced in good faith the excavation and construction of initial footings and foundations.

If the foundation allows piles or caissons, can the driving of the first pile or sinking of the first caisson be considered the start of foundation work?

Yes, but construction must be completed without undue delay. The architect or professional engineer must provide an affidavit both at the front end (that the excavation and construction of initial footings and foundations commenced in good faith) and at the back end (that the multiple dwelling was completed without undue delay) of construction. We would deem completion within 36 months from commencement as a guideline for construction being "completed without undue delay."

Provided you have satisfied the building permit requirement, can you vest by pouring a foundation, driving a pile or sinking a caisson while excavation of the remainder of the site or a contiguous site is still underway?

Yes, but construction must be completed without undue delay (see the answer to the previous question for details).

In addition, if all buildings in multibuilding projects are contiguous and owned by the same entity, the commencement of the first building before the applicable deadline qualifies the entire project under the old law, provided that all of the buildings in the

project have their permits before the applicable deadline and are completed within 36 months from the commencement of the first building. The periods of construction and permanent real property tax exemption benefits granted pursuant to the Act will commence simultaneously for all of the multiple dwellings in such multibuilding project from the time the first building in such multibuilding project commences receiving such benefits.

What is the definition of “a contiguous site” for purposes of commencement?

Tax lots that are adjacent for at least 10 (ten) linear feet with the only permitted separations due to streets or street intersection. If separated by a street or intersection, the sites must overlap their frontage by 10 linear feet.

What is the definition of “common ownership” for purposes of qualifying contiguous sites?

Entities that are controlled by a common owner would qualify.

Can a project that commences construction by the relevant deadline (in most instances, on or before June 30, 2008) later amend the building permit after that deadline to add square footage, incorporate an additional lot in the footprint, enlarge the building, and/or redesign the base of the building?

We would allow projects to amend the plans that were the basis for the initial DOB building or alteration permit provided that the amendments do not increase the project's floor area by more than 35%. Amendments to the grandfathered project could increase projects through the addition of new lots, an increase in the floor area or the purchase of development rights. This would include as-of-right residential projects that received their initial DOB building permits before the commencement deadline, but thereafter received a ULURP approval authorizing the addition of square footage not exceeding 35% of the original floor area.

What is the definition of “completion without undue delay”?

All projects will be deemed to be completed without undue delay if construction is completed within 36 months. This applies to both single and multiple building projects. Any project that is not completed within 36 months would not automatically be disqualified, but would have to provide HPD with satisfactory documentation of completion without undue delay. HPD would consider factors specified by rule to determine whether or not the project could reasonably have been completed in a shorter period of time. Such factors may include fires or other casualties that cause damage to completed construction work and severe, prolonged, and unavoidable labor stoppages or industry-wide material shortages.

The 36 month limit would be counted from the later of December 28th, 2007, the permit, or the start of work. The architect or professional engineer will be required to provide an affidavit both at the front end (that the excavation and construction of

initial footings and foundations commenced in good faith) and at the back end (that the multiple dwelling was completed without undue delay) of construction.