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& Development

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421-a Legislation Overview and FAQ

This document contains general information about 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.

421-a Legislation Overview

HPD has published rules that govern the implementation of the 421-a statutes. These rules can be found in Chapter 6 of Title 28 of the Rules of the City of New York (<http://24.97.137.100/nyc/rcny/entered.htm>).

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 17, 2007, the Governor signed Chapters 618, 619, and 620 of the Laws of 2007. On February 19, 2008, the Governor signed Chapter 15 of the Laws of 2008. The state legislation contained further reforms to the 421-a tax exemption program and delayed the effective date of some of the LL58 provisions. On June 1, 2010, the Mayor signed Local Law No. 16 of 2010. This legislation further amends the 421-a tax exemption program by retroactively eliminating the requirement that in order for a building to have commenced construction, a building or alteration permit issued by the Department of Buildings must have been based upon plumbing plans approved by such department.

 The Rent Act of 2011, signed by the Governor on June 24, 2011, extended the 421-a Program to June 15, 2015. It also granted some projects up to 72 months to complete construction without undue delay and overrode some undue delay provisions HPD had previously promulgated as part of the 421-a Rules definition of commence in 28 RCNY Section 6-09(a).

The combined state and local legislation included 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 prior GEA included 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 below).

- **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 are 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 a portion of an apartment's billable exempt assessed value (AV) is now eligible for the 421-a tax exemption. The value of a unit above this threshold ("AV cap") is ineligible to receive benefits. For units with an exempt AV above this AV 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 AV cap was originally \$65,000, but it has been increased by 3%, compounded annually, on each taxable status date following August 17, 2008, the first anniversary of the effective date of the State law. Projects that qualify for extended benefits are not subject to the AV cap (see example chart in FAQ section below).
- **Eliminates the negotiable certificate program.** Any property within the GEA must provide on-site affordable housing 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.
- **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 projects with fewer than 50 dwelling units as well as multiple dwellings 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.

421-a Legislation FAQ

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

The State legislation took effect immediately. However, by its terms, it delayed 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 increased from 3 to 4
- Prevailing wage requirements for service workers

After June 30, 2008, the following provisions went 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

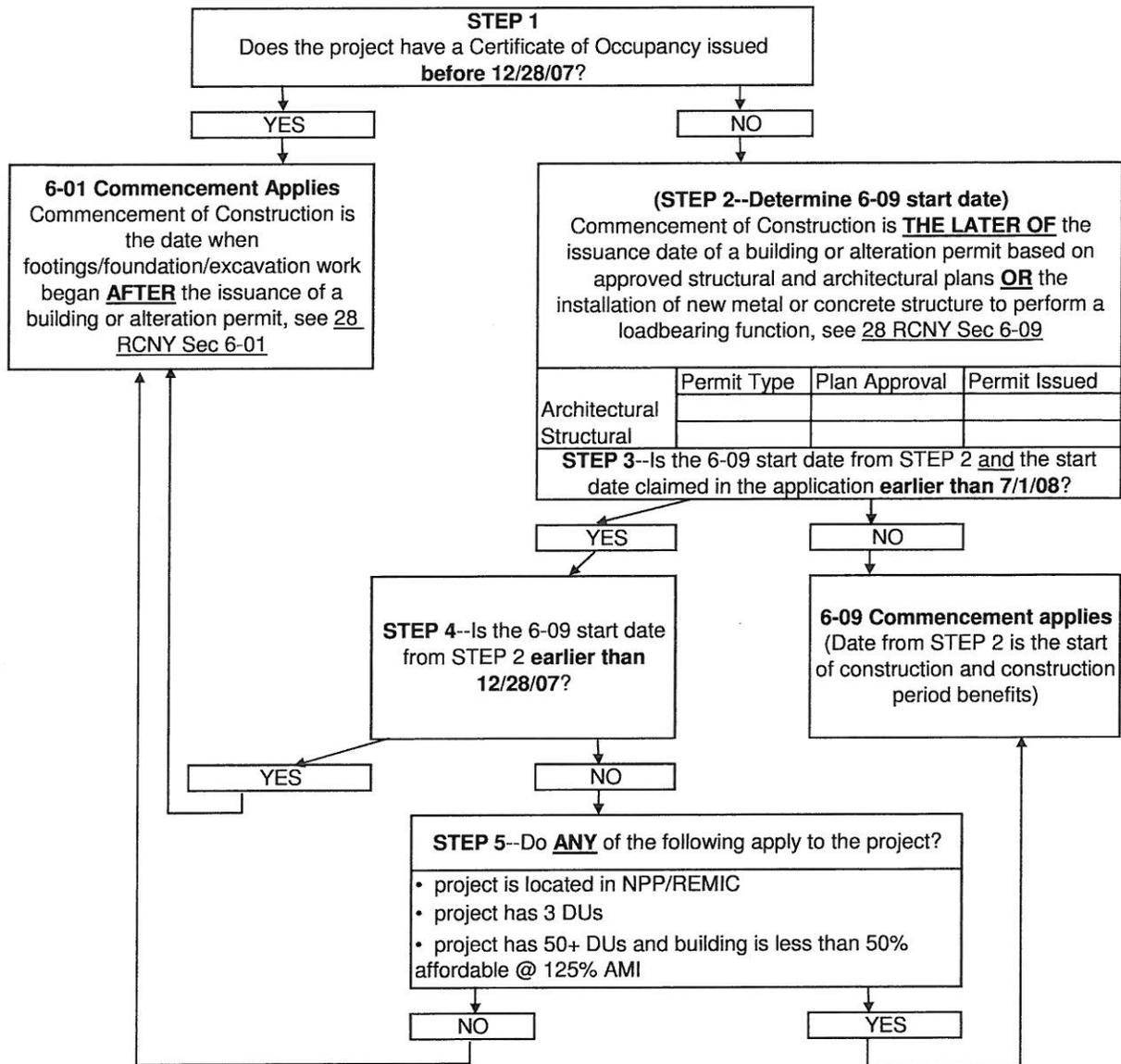
Any project that commenced construction prior to December 28, 2007 or July 1, 2008, respectively, will not be subject to these new provisions and will still be eligible to receive 421-a tax benefits pursuant to the prior law. Any project that commenced construction after the relevant date will be subject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

2) *How are the commencement of construction dates for my project determined for both applicability of the new provisions in the statute and rules as well as for determining the beginning of my construction period benefits for my project?*

The project must satisfy all statutory and regulatory requirements of 421-a in effect at the time of issuance of the Certificate of Eligibility in order to be eligible for benefits.

Only one commencement of construction date will be applied to each project and will be used for determining applicability of new statutes and rules as well as for determining the beginning of the construction period benefits.

The commencement of construction standard applied to projects is as follows:



3) 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.

4) 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 upon vacancy in multiple dwellings with 25 units or less must be affordable at or below 120% of AMI or;
 - initial and subsequent rentals upon vacancy 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.

5) 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. See also the definition of onsite in the 421-a Rules.

6) 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.

7) 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.

8) 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.

9) 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 AV cap limits the maximum AV upon which the exemption is calculated. Units will only receive 421-a benefits on the billable exempt assessed value below the AV cap. 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 Without an AV cap	per unit (10 units) Without an AV cap With an AV cap	
Calculation of Exempt AV before AV cap			
Post-Construction Billable AV (AV of newly constructed building)	\$1,000,000	\$100,000	\$100,000
Pre-Construction AV (Mini-Tax AV) (AV of property in year prior to construction)	<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
AV Cap (\$65,000 per unit)	<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

* The example uses the original AV cap of \$65,000, but the AV cap has been increased by 3%, compounded annually, on each taxable status date following August 17, 2008, the first anniversary of the effective date of the State law.

10) 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.

11)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.

12)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.



Undue Delay and the Rent Act of 2011

13)What is undue delay?

- Local Law 58 of 2006 provided that construction must be completed without undue delay in order to ensure that projects in the GEA that commenced before the new affordability requirements kicked in actually got built in a timely fashion. However, Local Law 58 of 2006 did not define what "undue delay" meant. HPD's rules initially provided an undue delay "safe harbor" consisting of 36 months from the later of the issuance by the Department of Buildings of a building or alteration permit for a multiple dwelling (based upon architectural and structural plans approved by such department), the installation of metal or concrete load-bearing structure or December 28, 2007 (Local Law 58 of 2006's effective date). The Rent Act of 2011 allows up to a 72-month undue delay safe harbor only for certain projects that meet the criteria in State law (see below).

14)How does the Rent Act of 2011 impact my project?

- On June 24, 2011, the State enacted a 421-a extender that also included a provision allowing new multiple dwellings that commenced construction between January 1, 2007 and June 30, 2009 to have an additional 36 months to complete construction without undue delay (i.e., a total of 72 months) if they apply for the Preliminary Certificate of Eligibility by one year from the effective date of the act, June 24 2011. However, even

those projects entitled to a 72-month undue delay safe harbor are still expressly limited to a maximum of 36 months of construction period benefits.

15) By when must I submit my application for a Preliminary Certificate of Eligibility (PCE) to qualify for the 72-month completion without undue delay deadline granted in the Rent Act of 2011?

- The PCE application must be filed by June 24, 2012.

16) HPD's rule amendments published on April 14, 2011 allowed undue delay safe harbor extensions beyond 72 months for a limited number of circumstances (i.e. size and complexity of the project, foreclosures, etc.). Can HPD still grant extensions to the undue delay completion of construction deadline in the aftermath of the State law?

- No. As the State law indicates, only projects that commenced construction between January 1, 2007 and June 30, 2009 and that file the PCE application within one year of the State 2011 Rent Act's effective date (i.e., by June 24, 2012) have 72-months to complete construction without undue delay.

17) If my project commenced construction before January 1, 2007 or after June 30, 2009 but I submit the PCE application before May 14, 2012 OR my project was the subject of a mortgage foreclosure/lien enforcement proceeding before May 14, 2012, can my project still get 72 months to complete without undue delay in accordance with HPD's rules?

- No, the State law allows only a limited category of projects to qualify for a 72-month completion without undue delay deadline. HPD does not have the authority to provide further extensions.

18) What happens if my project does not complete within the applicable 36- or 72-month completion without undue delay deadline, is it still eligible for 421-a benefits?

- Yes, it might still be eligible for 421-a. The project's failure to complete without undue delay would mean that it must provide affordable units onsite or purchase Negotiable Certificates in order to qualify for 421-a benefits.

19) What parts of the HPD rule amendments published April 14, 2011 (effective May 14, 2011) survived the Rent Act of 2011?

- Undue delay does not apply to projects that meet the affordability requirements in RPTL 421-a(7) or that are located outside the Geographic Exclusion Area before or after the statutory changes in effect July 1, 2008.
- Projects that meet the affordability requirements or that are located outside the GEA before or after the statutory changes in effect July 1, 2008 are not subject to the “multibuilding project” definition.
- The April 2011 Rule amendment conforms to Local Law 16 of 2010, which eliminated the requirement that the Department of Building’s issuance of a building or alteration permit be based on approved plumbing plans.
- The April 2011 Rule amendment requires proof of the recordation of the restrictive declaration to be submitted at the time of the application for a Preliminary Certificate of Eligibility.

20) Are projects within the Greenpoint Williamsburg Waterfront Exclusion Area (RPTL 421-a(6)) subject to the completion without undue delay requirement?

- No, it is outside the Geographic Exclusion Area.

The completion of construction standard applied to projects is as follows:

Determining 421-a Completion without Undue Delay

(NYS 2011 Rent Act, 6/24/2011)

Docket:	
Address:	
Borough:	
Block:	
Lot:	

