The Need to Address Davis-Bacon Impediments to the Development of FHA Insured Multifamily Housing

Prepared by the Mortgage Bankers Association
FHA Committee, Davis-Bacon Working Group

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Acknowledgments

The Mortgage Bankers Association (MBA) FHA Committee, Davis-Bacon Working Group prepared this White Paper to describe the nature of practical impact of the current application of Davis-Bacon Act requirements that unnecessarily impede the creation of affordable rental housing and housing preservation under HUD/FHA-financed construction and rehabilitation projects.

MBA gratefully acknowledges the FHA Davis-Bacon Working Group for its contributions to the drafting of this white paper and compilation of case studies. In particular, MBA appreciates that the following members have contributed their time and expertise to the development of this white paper and have otherwise supported MBA advocacy on Davis-Bacon issues.

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Overview

The current application of Davis-Bacon wage rates to HUD/FHA-financed projects creates substantial barriers to the development of affordable rental housing, for example, by inflating costs and adding unwarranted administrative complexity. The root causes of these barriers fall into the following three primary categories, which are detailed in Section II below:

i. Multiple Wage Determinations,

ii. Administrative Inefficiencies, and

iii. Outdated Definitions of Residential versus Building Type Construction.

This White Paper is organized with Background in Section I, Primary Issues outlined in Section II, Case Studies representative of the issues detailed in Section III, and Recommended Actions identified in Section IV.
I. Background

The Davis-Bacon Act is a Depression era law enacted to address economic and social issues that arose during that time period. The law was enacted in 1931 to require certain general contractors and sub-contractors to pay prevailing wages on all projects receiving more than $2,000 in federal funding or with guarantees of a federal agency or financed from funds obtained by a pledge or contract of a federal agency.

The regulations that implement the Davis-Bacon and the Related Acts (DBRA) are found in 29 C.F.R. Parts 1, 3 and 5–7. The U.S. Department of Labor is responsible for establishing rules, instructions concerning these laws, which include procedures for wage rates and surveying wages in a given region or area and establishing floors for wages in dozens of different worker classifications. Davis-Bacon was enacted with the laudable goal of assuring proper payment for construction workers for appropriate work. There was some concern that low bidders for federal contract work would reduce employee wages to achieve the lowest bid. The issue is that while the federal government pushes down available funding for affordable housing, Davis-Bacon pushes costs up. Davis-Bacon increases construction costs by up to 37%.  

HUD’s Federal Housing Administration (FHA) programs significantly expanded after the 2008 Great Recession. However, more recently, industry participants noted changes in the application of Davis-Bacon requirements which increased costs or slowed the growth of federal housing assistance.

The Reorganization Plan No. 14 of 1950 authorizes the Secretary of Labor to prescribe standards, regulations and procedures with respect to the administration of labor standards under the various statutes to assure consistent coordination, administration and consistency by the Federal agencies charged with administration of the various acts. The Reorganization Plan no. 14 provides that “The actual performance of enforcement activities … will remain the duty of the respective agencies awarding the contracts or providing the Federal assistance.” This includes the U.S. Department of Housing and Urban Development (HUD) with respect to its insured multifamily programs. Further, the May 1, 1968 All Agency Memorandum (AAM), No. 76 outlines the agreement between DOL and Federal agencies, including HUD and this is reinforced through AAM(s) No. 118, 129 and 177.

HUD-insured housing programs including but not limited to programs under sections 221(d)(4), 220 and 232 generally utilize Davis-Bacon wage standards. Davis-Bacon frequently comes into HUD finance through inclusion under HUD housing laws, such as the U.S. Housing Act of 1937, the Community Development Act of 1974, and the National Affordable Housing Act of 1990. The HUD Secretary’s statutory authority under the Davis-Bacon Act is delegated to the Assistant Deputy Secretary for Field Policy and Management and the Associate Assistant Deputy Secretary for Field Policy and Management. The authority delegated includes “the authority to determine...”

1 See Frantz, John, Foundation for Economic Education Publication (Feb. 1, 1994).
2 The Davis-Bacon Act of 1931, Executive Legal Summary 266 (Dec. 2016 update).
3 Dunn, Sarah, Quigley, John M., Rosenthal, Larry A., The Effects of Prevailing Wage Requirements on the Cost of Low-Income Housing, Industrial and Labor Relations Review, Vol. 59, No. 1, pages 141, 143–144 (October 2005). See also, Prevailing Wages May Not Prevail in Some States; Missouri Considers Repeal While Maryland Refuses to Expand; All No-Bid Construction Contracts Law Report, NL 8 (April 28, 2017) (Missouri bills argue that prevailing wages artificially raise hourly wages and project costs; Maryland Economic Matters Committee found a 10% gap between lower market wages and higher prevailing wages).
5 See 83 Fed. Reg. 48649 (Sept. 26, 2018) (delegating the HUD Secretary’s Davis-Bacon authority to the Assistant Deputy Secretary for Field Policy and Management and the Associate Assistant Deputy Secretary for Field Policy and Management).
or adopt prevailing wage rates” and to re-delegate that authority to HUD employees.6

HUD’s Davis-Bacon authority is exercised by HUD’s Office of Davis Bacon and Labor Standards (DBLS), which is responsible for HUD’s overall compliance with the Federal prevailing wage requirements applicable to HUD-assisted and insured housing and community development programs covered under the Davis-Bacon and Related Acts, working in coordination with the Department of Labor and the public, through local DBLS regional/field staff.7

HUD’s FHA programs support new construction and substantial rehabilitation of workforce and affordable rental housing and thus are enormously important to the U.S. housing market. The number of U.S. renter households has reached 37 percent—a 50-year peak. Consistent with that increase in demand, rental markets are extremely tight. For example, as of 2016, rental vacancy rates had fallen for seven straight years, to 6.9 percent, the lowest level in more than 30 years.8

II. Issues

MULTIPLE WAGE DETERMINATIONS

This is an inappropriate application of published guidance

There has been a recent shift in the review and issuance of appropriate wage determinations for the HUD programs that is counter to long-standing practice, published policy and guidance. The shift has created a situation where HUD Labor Relations Specialists (LRS) are undertaking what is called a “bucket” approach to evaluating multifamily residential construction in the determination of the applicable Wage Determination. This bucket approach looks at the individual items of construction as listed on Form 2328 and evaluates them as follows:

• Would the individual items, regardless of cost, fall into a “bucket” of Residential, Building, Heavy, or Highway if they were built on their own independently of the overall project?
• Is the aggregate of the individual items equal to $1,000,000?

Accessory structures, regardless of use, independent zoning or function stand on their own in the evaluation of a split-wage determination.

First, the $1 million threshold is unfounded. That threshold appears to be an application of the guidance in AAM 131 that generally, multiple schedules are issued if the construction items are substantial in relation to project cost—more than approximately 20 percent. AAM 131 also recognizes that, when a project is very large, items of work of a different character may be sufficiently substantial to warrant a separate schedule even though these items of work do not specifically amount to 20 percent of the total project cost. Without notice and comment, or any publicly stated rationale, that 1978 language has transformed into a threshold of $1 million, which has increasingly been applied as a bright line rule over the past several years.9

Second, the “bucket” approach in making wage determinations is inconsistent with prior WHD policy and practice of not aggregating individual incidental items of work for purposes of applying the $1 million threshold, as represented on the record by WHD before the DOL Administrative Review Board.10

In addition, the bucketing approach is not supported by long-standing written policy or guidance as outlined in DOL AAMS 150 and 131, HUD Labor Relations Letter LR-96-03 (LR-96-03), or HUD Handbook 1344.1, Rev. 2.

The appropriate wage determination for the construction work and wage rates for a project should be based on the character of the construction work and the standard of comparison for “projects of a character similar to the contract work.”11 This includes the residential apartment units, and all incidental items such as sidewalks, site work, parking areas, utilities, internal roads, pool, and any amenity clubhouse building. This is supported by HUD Handbook 1344.1, AAM130 and 131 and LR-96-03. Specifically, Office of Labor Relations Letter No. LR-96-03 states:

“The primary component, which determines the character of the project and the type of wage schedule that applies, is the housing. Elements such as site work, parking areas,

6 Id.
9 See The Matter of, Central Energy Plant, In re: Contract No. F29621-00-D-0017 at Fort Campbell, Christian County, Kentucky, ARB Case No. 01-057, p. 28 n. 15 (2003); 2003 DOL Ad. Rev. Bd. LEXIS 95; (“the Acting Administrator notes that in 1987 and 1989 published editions of ‘Conducting Surveys for Davis-Bacon Construction Wage Determination: Resource Book,’ the Wage and Hour Division has published that, as a guideline, ‘is a portion of a project that is incidental to the rest of the project, which may be considered in the same category as the main type of construction, ‘means less than $1 million and/or less than 20% of the total value of the project.’”); 2006 DOL Ad. Rev. Bd. LEXIS 1573 (2006); (“the Acting Administrator notes that in 1987 and 1989 published editions of ‘Conducting Surveys for Davis-Bacon Construction Wage Determination: Resource Book,’ the Wage and Hour Division has published that, as a guideline, ‘is a portion of a project that is incidental to the rest of the project, which may be considered in the same category as the main type of construction, ‘means less than $1 million and/or less than 20% of the total value of the project.’”)
10 See City of Ellsworth, Maine, Bayview-Road Wastewater Treatment Facility, ARB Case No. 14-042, 2016, WL, 4288469, p. 32–33 (ARB June 7, 2016) (“Upon review by WHD, the Administrator ruled (in February 20, 2014) that a Heavy wage determination should be added, citing the requirement of multiple wage determinations if the cost of more than one component approximates 20% of the overall project cost or by itself costs more than $750.” (emphasis added)).
There is a problem with applying more expensive wage categories, which presume a more industrial construction than actually exists in housing construction. In some cases being changed after a transaction closes. This situation causes issues for Developers and Lenders in the following ways:

- Creates doubts in the certainty of execution for the FHA programs
- Makes it difficult for Developers to obtain reliable construction bids
- Makes it difficult to maintain cost estimates
- Creates difficulties for Developers to keep General Contractor’s and subcontractor’s committed to a project
- Creates significant difficulties in achieving real-time appeals if an issued Determination is not consistent with the type of project or changes after the transaction has closed and construction contracts are signed. The pre-construction process at the time of Closing is time sensitive. Purchase contracts, pricing, interest rate costs and similar costs are not static and generally increase over time. Real Estate developers have ongoing operating costs during the extra time created by needing to appeal an original inappropriate Determination or a changed Determination.

Recommended Action: We recommend that the Department of Labor issue clear, written guidance that targets issuance of a final determination prior to the issuance of an FHA Firm Commitment. In addition, the Department should clarify the decision-making process for HUD DBLS and all stakeholders.

Further, the Department of Labor should revise its wage determination update process to effectively lock in wage rates earlier in the process (current rules do not lock in wage rates until the date the mortgage is initially endorsed) and develop an interim process to accomplish the same result pending completion of the necessary rulemaking.

RESIDENTIAL VS. BUILDING CONSTRUCTION TYPE

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The story-height standard within residential Davis Bacon Wage determinations has not been modernized since 1985, creating a financial burden on the construction costs of work-force and affordable multifamily housing. Since 1985, modern construction techniques and international building codes have evolved, increasing permissible building height for wood-framed multifamily construction (Type VA and VB). As a result, the multifamily housing industry maintains the position that DBWR residential/building definitions should be modified to reflect current industry building codes and standards of construction.

Specifically, the expansion of the story-height standard can be justified via modern day building code definitions. This seemingly simple change to reflect current HUD Multifamily-accepted building codes (e.g., Internal Building Code IBC is referenced in the MAP Guide) would have a
substantial economic impact in reducing rental housing construction costs. This would encourage new construction and be a catalyst for preservation of public, affordable, and workforce housing.

**International Building Code**

The current edition of the International Building Code (IBC) allows for increases in both height and area for Residential Group R buildings (Table S03). Allowed uses include apartments, boarding houses, dormitories, hotels and motels. The permissible increases are applicable when provisions for the fire sprinkler systems and the use of firewalls or fire-resistant rated assemblies are provided, both of which are common elements of today’s multifamily construction techniques.

The primary types of construction for the increase in building height for Residential Group R buildings are Type III and Type V wood construction. With the use of an approved automatic sprinkler system, buildings of Type III A (85 feet) & Type III B (75 feet) construction are permitted to be 5 stories maximum. Buildings of Type VA construction are permitted to be 4 stories maximum (70 feet), and Type VB structures are permitted to be 3 stories (60 feet) maximum. However, with advances in both building design and construction techniques, added benefits are now available for residential structures. Section S10 of the International Building Code (IBC) provides special provisions when a horizontal building separation allowance is provided. This is often referred to as podium or pedestal construction. The base or lower stories of the structure are constructed of non-combustible concrete construction, which is considered Type IA construction. The building base must provide a 3-hour horizontal building separation from the upper floors. When the 3-hour horizontal building separation allowance is provided, the building base and the Type III or Type V structure above shall be considered as separate and distinct buildings. Hence, building heights of up to 85 feet (approximately 6 stories above grade) can be achieved for multifamily wood-framed construction, as depicted by the following IBC graphics:

**PERMISSIBLE INCREASES IN HEIGHT AND AREA UNDER THE 2015 IBC**

<table>
<thead>
<tr>
<th>IBC TABLE S03: BASE HEIGHT</th>
<th>IBC SECTION S04: NFPA 13-COMPLIANT SPRINKLER SYSTEM</th>
<th>IBC SECTION S05: MEZZANINE</th>
<th>IBC SECTION S10: PODIUM</th>
</tr>
</thead>
<tbody>
<tr>
<td>Base Height</td>
<td>NFPA 13 Sprinkler System</td>
<td>Mezzanine</td>
<td>Podium</td>
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Construction Cost

Construction costs are a combination of materials and labor. Construction material pricing is a function of broader supply and demand factors. However, labor costs can be directly affected as a result of HUD’s recognition of a greater building height allowances with residential wage rates. A modernization of story-height standard in HUD Handbook 13441 Chapter 3 would result in construction cost reductions. The following are some statistics regarding the potential cost savings achieved by a recognition of greater building height for residential wage rate projects:

- Studies of 4 vs 5 story buildings which have been cost estimated using both Residential DBWR and Commercial DBWR typically show a discrepancy in cost per square foot of 18% or more, a direct result of the increased building wage rates.
- All structures require a ground floor with foundation and a top floor with roofing. As expected, these floors are the most expensive in multifamily construction. Middle floors without these defining structural features are approximately 5% less to construct. Allowing for additional middle floors within a building creates greater affordability of housing.
- The sub-structure foundation assembly is a necessary component in any multifamily construction project between 3 and 6 stories. Per RSMeans Square Foot Cost Guide 2018, the foundation assembly of a 1- to 3-story building is 4.1% of the total structure cost, yet the foundation assembly within a 4 to 7 story building is just 1.8% of the total structure cost. National construction data supports the concept that greater height to residential buildings represents synergies in cost reductions.

Impacts

A change in the story-height standard would have multiple positive outcomes on the HUD FHA insured multifamily markets. HUD and DOL’s alignment with International Building Code allowed story height for multifamily construction could:

- **SIMPLIFY ADMINISTRATION**
  - Determination of story-height can be a complex process based upon the current logic analysis. Simplification to a height above grade, consistent with IBC, would make determinations more formulaic and less interpretive.
- **REDUCE CONSTRUCTION COSTS**
  - A reduction in construction costs within the FHA multifamily insurance markets would occur. An 85’ tall 6-story building would save an estimated 18% on construction cost from the lower residential wage determination alone. Combine this construction savings with the added of 1 or 2 additional floors of units, where these interstitial floors are less expensive to build than the foundation and roof levels units.
- **INCREASE COMMUNITY SERVICES AND SPACES**
  - The current 4-story standard forces many FHA developers to re-engineer their 5 and 6 story buildings to achieve lower construction costs. This reduction in building size not only results in less NOI, but often includes removing ground level retail, supportive service or community spaces. The current story standard forces developers to maximize residential units at the expense of community services and spaces.
- **INCREASE PRODUCTION OF AFFORDABLE AND WORKFORCE HOUSING**
  - Ultimately changes in the story height standard would encourage greater production of affordable and workforce housing. Revised standards for residential vs. commercial determination in multifamily construction would encourage more properties to seek FHA mortgage insurance. In addition, the Rental Assistance Demonstration (RAD) program would greatly benefit from this change.

**Recommended Action**: We recommend that the Department of Labor and The Department of Housing and Urban Development reconsider the matter of what constitutes a Residential vs. Building wage determination based on the story-height standard and modernize the definition to align with IBC Standards.
III. Case Studies

CASE STUDY 1
Section 232: Replacement Skilled Nursing Facility, 185-beds, Illinois

The project is a 185-bed replacement skilled nursing facility where the licensing for the beds was being acquired from the County to replace an old dilapidated building originally constructed in 1847. The arrangement with the County had a hard close and in-the-ground date that, if it were not met, would require the Developer to shut down the existing old building and displace/move roughly 100 elderly residents.

The Firm Commitment on this transaction was delayed by roughly 4 weeks waiting for a wage determination from the LRS. The Commitment was finally issued after significant effort and time was spent by the Development team and the Lender to reach out to the Department of Labor (DOL) and congressional contacts to get attention. The delay in the wage determination caused more than a 1-month delay in the closing, and the Developer had to spend funds to get the County to grant an extension of the contract. In addition, this situation created significant administrative burdens for everyone involved including the DOL staff and HUD ORCF staff. We understand that the review for the applicable wage determination was delayed pending approval by not just the Regional Office of Labor Relations (ROLR) but it had to be escalated to the Department of Labor. The project was a simple single-story building and clearly and easily fell into the category of a Building Wage as defined by HUD Handbook 1344.1, Rev. 2, AAM 130 and Labor Relations Letter LR-96-03. This was fully detailed in the Firm Application as well as the independent cost review.

CASE STUDY 2
Section 221(d)(4): 288-Unit, Market Rate, Green Multifamily Development, Florida

The project is a 288-unit market-rate property built to Energy Star Certification standards and, while the project is 100% market rate, the rents are affordable to persons between 56% and 140% of the Average Household Income for the area. The project was a 12-building garden style “stick-built” apartment building with each building containing no more than 3 stories. There was a modest clubhouse/leasing office that housed the amenity space. Each of the living units contained full kitchens, private bathrooms, living space, closet space and lockable entries; all of the elements that commonly make up a housing unit.

The Firm Commitment for this transaction was issued on August 9, 2017. The Commitment included a single Residential wage determination. Upon receipt of the Firm Commitment, the Lender worked with the Development team to rate-lock the transaction and proceed to closing. Roughly 10-days after receipt of the Commitment, the Lender was notified that the single wage determination was issued in error, and that the project should have been issued both a Residential Wage determination and a Heavy Wage determination. The Heavy Wage Determination was applied to some, but not all, of the site work based on the justification that as separate units some of the work like utilities, lawn work and site work for parking and sidewalks were separate units of construction, even though these items were clearly “incidental to” and necessary for the construction and support of the housing.

An appeal was requested the very next day on August 29, 2017. As of this date, a response has never been received. The result was a delay in closing trying to appeal the decision. As a decision was not to be provided in any kind of timely manner the Developer had to fund more than $200,000 in additional site construction costs which was roughly an increase of 6%. Additionally, administrative burdens were created for the General Contractor, the Lender, HUD MF asset management staff and Labor Relations staff by requiring them to manage and ensure enforcement of multiple wage determinations for individual pieces of the site development that are incidental to and necessary for the creation of the residential housing.
CASE STUDY 3
Section 221(d)(4): Garden Style Multifamily Development, Green Certification, Virginia

The following example is presented in a timeline manner to illustrate both the issues of inappropriate application of multiple wage determinations (changing from three to two and ultimately to four) as well as timing of issuance (with a final change from two wages to four after initial endorsement). Both of these issues compound and add to the cost and administrative burden of providing affordable housing.

11/16/2018
HUD DBLS wage decision issued with three wage scales:

- Residential wage decision: VA180044 Mod 1: 05/04/2018 applies to the construction of the residential apartments, earthwork, site utilities, roads and walks.
- Building wage decision: VA180011 Mod 2: 10/19/2018 applies to the Accessory Structures: Clubhouse, Fitness Center and Maintenance Buildings.
- Heavy wage decision: VA180034 Mod 0: 01/05/2018 applies to the storm sewer and drainage, excavation control, site improvements and lawns and planting.

11/21/2018
Lender appealed the three-wage determination to DOL.

2/4/2019
Lender appealed the wage decisions, seeking a single wage schedule. Specifically, the lender questioned why the clubhouse, fitness center, maintenance shed, and mail kiosks would receive building wages. They are all one-story, same slab on grade as the apartments, same roof material, same drywall and exterior siding, similar kitchen, as an apartment. The lender supported the appeal with documents from the architect and GC indicating that the same material, equipment, and labor skills are used for construction of the apartments as well as the clubhouse, fitness center, maintenance shed, and mail kiosks.

3/12/2019
DOL responded to the appeal, reversed the original decision, and applied four wage scales, based on NO NEW information. Same 2326B and 2352BL. The response included the following language:

Because it does not comply with AAM 130 and 131 guidance, or relevant Wage Appeals Board and Administrative Review Board decisions, the Branch of Government Contracts Enforcement Letter to “Lender” dated January 15, 2019 is withdrawn effective with this letter. The following wage determinations apply to construction of the (name project intentionally deleted) Apartments project:

1. Residential wage determination (WD) VA 180044 Mod 1 (5/4/18) to construction of the residential apartments — items 1 to 35 on the 2326 form for Master-New Construction dated September 18, 2018;
2. Building WD VA 180011 Mod 1 (10/19/18) applies to the accessory structures (clubhouse, fitness center and maintenance buildings);
3. Heavy WD VA 180034 Mod 0 (1/5/18) applies to earthwork, site utilities and site improvements, and lawns and plantings — items 1, 10, 25 and 34 on the 92328 form dated September 18, 2018; and
4. The applicable highway WD to roads and walks — item 9 on the 92328 form dated September 18, 2018.

CASE STUDY 4
Section 221(d)(4): Market Rate, Green Multifamily Development in an Opportunity Zone, Colorado

The project is a 207-unit market rate property designed to Energy Star Certification standards in an Opportunity Zone with substantial support by the City for the development of the site which was directly adjacent to RTD local transit center and the City town offices.

The project was a 9-building “stick-built” apartment building with each building containing no more than 4 stories. The amenity space including the fitness center, community room and leasing office were situated in one of the 4-story residential buildings and there was a single 1-story clubhouse building to service the exterior pool. Each of the living units contained full kitchens, private bathrooms, living space, closet space and lockable entries; all elements that commonly make up a housing unit.

After substantial work with the Development team for more than 1-year on the preparation of a Firm Application, the project was withdrawn by the Development team because they could not get a General Contractor in the Denver Metro area to provide sub-contractor bid costs for the project due to the requirement of Davis Bacon and the concern of the potential for multiple wage determinations and the difficulties in administering that type of a contract. The Development team determined that costs and uncertainties were simply too great to continue with pursuing FHA insured financing through HUD programs and, after this effort, sought an alternative source of financing.

CASE STUDY 5
Section 220: Mixed Income, Brownfield/Urban Renewal Multifamily Development with New Market Tax Credits in an Opportunity Zone, Michigan

The project is a 215-unit mixed income building in an Opportunity Zone with substantial support by the City for the development of the site which is a Brownfields clean-up and would have added a fresh-food Grocery Store to an area considered a “food desert” in addition to 20% of the units for individuals at 50% and 60% of Area Median Income.

The project was a single 7-story building with the amenity space including the fitness center, community room and leasing office were situated in the building. Each of the living units contained full kitchens, private bathrooms, living space, closet space and lockable entries; all elements that commonly make up a housing unit.

The evaluation of the appropriate wage decision was determined using the “bucket” approach described in the issues section above. The specific example of this approach is shown in the wage below; we have intentionally deleted information that identifies the project. As noted, the evaluation “bucketed” the dependent other components of the construction project and separated them from the residential project to give them their own classification. This is inappropriate and not consistent with the long-standing written guidance; DOL AAMs 130 and 131 HUD Labor Relations Letter LR-96-03. As stated in the issues section above the guidance states:

"Based on the information above, we believe that the residential WD applies to the construction of the (name of project intentionally deleted) Apartments project for the following:

- the earthwork, site utilities, roads and walks, site improvements, and lawns and planting associated with the project's construction.
- HUD has identified the clubhouse, fitness center, maintenance building, and mail kiosks as building construction. The $1,185,619 cost of the clubhouse, fitness center, maintenance building, and mail kiosk is well over the $1 million guideline, therefore, consistent with AAM No. 130 and AAM No. 131, the building WD applies to these items as well."
“The primary component, which determines the character of the project and the type of wage schedule that applies, is the housing. Elements such as site work, parking areas, etc., are incidental in that their purpose is to support the housing. Other items which may be incidental to housing construction include swimming pools, community buildings, storage sheds, carports and on-site management offices. However, such items constructed alone, without accompanying housing construction, would be the primary component and, accordingly, the character of the project and the type of wage schedule that applies would be determined on that item alone.”

The “bucket” method that first separates components of the construction from the overall primary nature of the project and then tries to aggregate the pieces to force a determination of a component as not being incidental is not appropriate.

Documentation from that project is inserted below.

CASE STUDY 7

Section 221(d)(4): 5-Story, 57-unit, Multifamily Development with 9% Tax Credits, Texas

The project is a 57-unit, 9% tax credit structure, 5 stories tall. The contractor does not use any labor sources or skillsets in the 5-story product that are not already utilized in the 4-story product. The change in design requires NO new labor or expertise. Nevertheless, commercial/building wage rates are expected to apply.

- Total construction costs are expected to be about $129 per square foot, for all 5 story code and structural requirements IF BUILT in the Davis Bacon residential wage category.
- In contrast, total construction costs are expected to be about $145 per square foot for the same structure and design IF BUILT in the Davis Bacon commercial/building category (which is what we anticipate currently). That amounts to a $750k–$800k cost increase. This is enormous increase for a 57-unit project.

The owner/developer had previously determined to go with funding sources that require Davis Bacon. Now that the owner/developer understands the Davis Bacon classification change required when going from 4-story product to 5-story product, he is actively looking for funding sources for which Davis Bacon does not apply.
IV. Recommended Actions

i. The Department of Labor should issue clear, written, publicly available guidance to all stakeholders regarding the appropriate method for wage determinations for residential housing. Specifically, such guidance should restore the prior policy and practice of favoring a single residential wage decision for multifamily housing projects, including incidental items, based on the overall residential character of the project. In addition, that guidance should clarify that the "bucket" method described above and the $1 million threshold for separate wage rate determinations should be dropped in favor of a rough guide of 20 percent of the total project cost, consistent with AAM 131. Training should be implemented to ensure that HUD personnel implement the appropriate methods to review and issue wage determinations for residential housing based on the overall “character” of the project being delivered. The above case studies show there is a lack of clarity with respect to published guidance that has long standing history and concurrence by the Department of Labor.

ii. A reliable wage determination should be issued and locked in at the time of Firm Commitment. The basic tenet of the FHA insured programs require that all construction costs and underwriting are complete at the time the Firm Application is submitted to HUD and an independent cost analysis is part of the application process. When a wage determination is issued late in the process or even after a Firm Commitment there is typically limited ability to absorb additional cost. This type of change requires re-bidding by the general contractor and the subcontractors and creates issues with external contracts.

iii. The Department of Labor should also revise its wage determination update process to effectively lock in wage rates earlier in the process (current rules do not lock in rates until the date the mortgage is initially endorsed).

iv. The Department of Labor/Wage and Hour Division should adopt a policy of not increasing the number of schedules for the project on appeal. We urge DOL/WHD to adopt a policy of not increasing the number of schedules when a multiple-wage determination is reconsidered on appeal. The appeals process takes time, and projects should be able to proceed during the time of an appeal with certainty as to the least-favorable possible outcome. Case Study 3, above, is an example of a wage decision that increased the number of schedules on appeal. On appeal to WHD, a prior WHD decision with two wage schedules was modified to four wage schedules. We understand from an April 2, 2019 meeting with WHD that WHD subsequently reversed its action (in that case, applying four wage schedules) in favor of letting the prior decision with two wage schedules stand, which outcome was consistent with our recommendation.

v. Training should be implemented to ensure that ROLR’s and LRS’s understand the responsibilities and authorities of the Office and its delegates so that appropriate and timely wage determinations can be issued without holding up Firm Commitments. The above case studies show there is a lack of clarity with respect to roles, responsibilities and delegations of authority.
vi. DOL and DBLS should reemphasize the chain of authority that has been granted to the DBLS through The Reorganization Plan No. 14 of 1950, AAMs No. 76, 118, 129 and 177 and delegations of authority. This chain allows for the administration of DBRA for HUD programs to be handled through HUD’s Office of Field Policy and Management, which oversees the Office of Davis Bacon and Labor Standards.12

vii. We also urge WHD and HUD to work together to reduce the incidence of disruptive changes that occur late in the process, even after the closing of a transaction in some cases. We also urge WHD to provide more transparency to HUD and to stakeholders as to the Davis-Bacon policies and interpretations that apply to FHA-financed projects, and as to the relative roles and responsibilities of WHD and HUD personnel, including the scope of authority delegated to HUD.

viii. The Department of Labor and The Department of Housing and Urban Development should consult on the matter of what constitutes a Residential vs. Building wage determination based on the Story-height standard. As noted above, the story-height standard has not been modernized since 1985. Modern construction techniques and international building codes have evolved, increasing permissible building height for wood-framed multifamily construction (Type VA and VB) to 85-feet. It is appropriate that Davis Bacon Wage determinations for Residential vs. Building definitions be modified to reflect current industry building codes and standards of construction with the positive outcomes including but not limited to: Simplification of Administration of wages; Reduction in construction costs; Increases in community services and spaces; Increased production of affordable and workforce housing.

12 See 83 Fed. Reg. 48649 (Sept. 26, 2018) (delegating the HUD Secretary’s Davis-Bacon authority to the Assistant Deputy Secretary for Field Policy and Management and the Associate Assistant Deputy Secretary for Field Policy and Management, and to re-delegate that authority to HUD employees); and see also https://www.hud.gov/program_offices/davis_bacon_and_labor_standards (describing the Office of Davis-Bacon and Labor Standards).