



STATE OF WASHINGTON  
DEPARTMENT OF LABOR AND INDUSTRIES

Prevailing Wage  
PO Box 44540 • Olympia, Washington 98504-4540  
360/902-5335 Fax 360/902-5300

April 5, 2013

Terry Pottmeyer, President/CEO  
Friends of Youth  
13116 North East 132<sup>nd</sup> Street  
Kirkland, Washington 98034-2306

Re: Applicable Wage Rates, Commercial or Residential - Youth Haven Project, Contract H11K24

Dear Ms. Pottmeyer:

Thank you for your letter dated February 6, 2013, and your later February 25, 2013 confirmation that you wanted me to regard your letter as a request for determination as to whether residential prevailing wage rates could be used for the Youth Haven project, contract H11K24. I appreciate the additional information concerning this project that you've provided in discussions with our staff.

Based on a review of the detailed facts you've provided, which I'll address below, this project qualifies for application of residential prevailing wage rates.

Determinations of the prevailing rate of wage are made by the Industrial Statistician of the Department of Labor & Industries (L&I). Requests for modification of such determinations are addressed pursuant to the enclosed "*Prevailing Wage Determination Request and Review Process.*"

Your request was initiated because staff in our office characterized the Youth Haven project as commercial construction when reviewing the Statement of Intent to Pay Prevailing Wages (Intent) form filed by the general contractor, Olympic General Contrs LLC. We returned the form to the contractor without approval. In our correction notice we identified three elements of the Youth Haven facility which suggest that the project should be considered commercial for prevailing wage purposes. Those three elements, which I will address separately, were:

The Youth Haven program provides "transitional" housing.

Dining facilities at Youth Haven are communal.

The Youth Haven residence includes a community facility or manager's office.

As discussed in our [residential construction policy statement](#) which is posted on line (and enclosed), no one of these elements may necessarily be controlling, but they are factors we consider together in deciding the appropriate wage rate.

The definition of “residential construction” for prevailing wage purposes is given in [WAC 296-127-010\(9\)](#) which states, in part:

...“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...

#### Transitional Housing

The general contractor’s description of the project as “transitional housing” was a factor our staff applied in sending the correction notice requiring commercial construction rates. As you will note, that term appears to conflict with the “solely as permanent residences” use the rule anticipates. Housing projects for temporary or transitional occupancy, such as for purposes of treatment programs or incarceration, do not qualify for application of residential prevailing wage rates. We are aware that because your program serves at-risk youth and does not serve adults, residents must vacate this facility when they become adults. We are not aware of any other time limitations applied to their participation, or residency, in your program and facility. In other words, residence in this program is not time-limited except for the requirement that adults are not served by the program. In the absence of a time limitation, the Youth Haven program and residence facility is not considered temporary and therefore would meet the “permanent” requirement in the prevailing wage residential construction definition.

#### Communal Dining

Residential prevailing wages are not applied to facilities that are used for treatment or other institutional purposes because such purposes do not meet the “solely as permanent residences” language of the rule. Jails, mental health institutions and most dormitories are examples of institutional facilities that lack the solely residential character described in the residential construction definition for prevailing wage purposes. Upon review of additional information you provided, it appears the communal dining facilities within your Youth Haven program, referenced in our “correction notice” as a factor pointing toward commercial wage rates is actually not a commercial or institutional kitchen and dining system. Meals are not prepared for residents by staff. Instead, the kitchen and dining system and facility at Youth Haven is much like an ordinary residential kitchen/dining system. Residents are on their own to prepare their own meals. Based on this additional information, our correction notice is not accurate since this dining arrangement you’ve described fits the character of “residential” for prevailing wage purposes.

Community Facility or Manager's Office

In order for residential prevailing wage rates to apply, facilities must be "...used solely as...residences..." according to the residential construction definition for prevailing wage purposes. Certain projects such as fire stations which serve as both residences and as public facilities are therefore not considered "residential" for prevailing wage purposes. A residence that includes space open to the public would not qualify for residential prevailing wage rates, nor would a residence that incorporates treatment or other commercial activities. In the case of Youth Haven, the residence includes a manager's office, and this was another factor listed in our correction notice indicating a commercial character to the project. However, supplemental information you provided confirms the project does not include a community or public space, nor does the manager's role include any provisions for treatment or counseling services. Family counseling, when necessary, takes place at a separate Friends of Youth location. At the residence, the manager's role is simply to provide an adult presence which would otherwise be lacking. Since the residence and its onsite staff do not serve a treatment or other commercial function, these factors indicate a consistency with a solely residential purpose.

Looking at these several factors together, the absence of a specific limitation on the length of occupants' residencies, the absence of a treatment or other commercial purpose served within the residence, and the absence of a commercial or institutional dining system, are consistent with the definition of residential construction for prevailing wage purpose. Residential construction prevailing wage rates may therefore be used for the project. Please ask the contractor to resubmit the Intent form for approval. Please also advise the contractor that for trades and occupations for which no residential rate exists, the regular (non-residential) rates apply.

This determination is based upon the information you provided. If the facts are different from as stated or change, the answer may be different.

Your interest in prevailing wage compliance is very much appreciated. If you have further questions, please let me know.

Sincerely,



L. Ann Selover  
Industrial Statistician/Program Manager  
[Ann.Selover@Lni.wa.gov](mailto:Ann.Selover@Lni.wa.gov)  
(360) 902-5330

Enclosures

## Prevailing Wage Determination Request and Review Process

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RCW 39.12.015 is the basis for requesting a determination, since it provides:

All determinations of the prevailing rate of wage shall be made by the industrial statistician of the department of labor and industries.

If you disagree with a determination the industrial statistician provides, WAC 296-127-060(3) provides for a review process:

(3) Any party in interest who is seeking a modification or other change in a wage determination under RCW [39.12.015](#), and who has requested the industrial statistician to make such modification or other change and the request has been denied, after appropriate reconsideration by the assistant director shall have a right to petition for arbitration of the determination.

(a) For purpose of this section, the term "party in interest" is considered to include, without limitation:

(i) Any contractor, or an association representing a contractor, who is likely to seek or to work under a contract containing a particular wage determination, or any worker, laborer or mechanic, or any council of unions or any labor organization which represents a laborer or mechanic who is likely to be employed or to seek employment under a contract containing a particular wage determination, and

(ii) Any public agency concerned with the administration of a proposed contract or a contract containing a particular wage determination issued pursuant to chapter [39.12](#) RCW.

(b) For good cause shown, the director may permit any party in interest to intervene or otherwise participate in any proceeding held by the director. A petition to intervene or otherwise participate shall be in writing, and shall state with precision and particularity:

(i) The petitioner's relationship to the matters involved in the proceedings, and

(ii) The nature of the presentation which he would make. Copies of the petition shall be served on all parties or interested persons known to be participating in the proceeding, who may respond to the petition. Appropriate service shall be made of any response.

If you choose to utilize this review process, you must submit your request within 30 days of the date of the applicable industrial statistician's determination or response to your request for modification or other change. Include with your request any additional information you consider relevant to the review.

Direct requests for determinations, and for modification of determinations via email or letter to the prevailing wage industrial statistician:

L. Ann Selover  
Industrial Statistician/Program Manger  
Department of Labor & Industries  
Prevailing Wage  
P O Box 44540  
Olympia, WA 98504-4540  
[Ann.Selover@Lni.wa.gov](mailto:Ann.Selover@Lni.wa.gov)

## Prevailing Wage Determination Request and Review Process

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Direct requests via email or letter seeking reconsideration (redetermination) by the assistant director to:

Elizabeth Smith, Assistant Director  
Department of Labor & Industries  
Fraud Prevention and Labor Standards  
P O Box 44278  
Olympia, WA 98504-4278  
[Elizabeth.Smith@Lni.wa.gov](mailto:Elizabeth.Smith@Lni.wa.gov)

Direct petitions for arbitration to:

Joel Sacks, Director  
Department of Labor & Industries  
P O Box 44001  
Olympia, WA 98504-4001

If you choose to utilize this arbitration process, you must submit your request within 30 days of the date of the applicable assistant director's decision on reconsideration (redetermination). Submit an original and two copies of your request for arbitration to the Director personally, or by mail. The physical address for the Director is 7273 Linderson Way, SW, Tumwater, WA 98501.

WAC 296-127-061 also contains the following provisions regarding petitions for arbitration:

In addition, copies of the petition shall be served personally or by mail upon each of the following:

- (a) The public agency or agencies involved,
  - (b) The industrial statistician, and
  - (c) Any other person (or the authorized representatives of such person) known to be interested in the subject matter of the petition.
- (2) The director shall under no circumstances request any administering agency to postpone any contract performance because of the filing of a petition. This is a matter which must be resolved directly with the administering agency by the petitioner or other party in interest.
- (3) A petition for arbitration of a wage determination shall:
- (a) Be in writing and signed by the petitioner or his counsel (or other authorized representative), and
  - (b) Identify clearly the wage determination, location of project or projects in question, and the agency concerned, and
  - (c) State that the petitioner has requested reconsideration of the wage determination in question and describe briefly the action taken in response to the request, and
  - (d) Contain a short and plain statement of the grounds for review, and
  - (e) Be accompanied by supporting data, views, or arguments, and
  - (f) Be accompanied by a filing fee of \$75.00. Fees shall be made payable to the department of labor and industries.



## 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 [pwl@Lni.wa.gov](mailto:pwl@Lni.wa.gov) or (360) 902-5335.

**Selover, Ann (LNI)**

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**From:** Seiover, Ann (LNI)  
**Sent:** Monday, February 25, 2013 9:07 AM  
**To:** 'Terry Pottmeyer'  
**Cc:** Loomis, Deborah (LNI); 'Rand Redlin'; Peppin, Nathan B (LNI)  
**Subject:** RE: Prevailing Wage Letter

Terry Pottmeyer,

Please forgive my delay in acknowledging your letter of February 6, 2013 in which you request that I reconsider my designation of the Friends of Youth, Youth Haven, Contract H11K24 as subject to commercial prevailing wage requirements.

As a point of clarification, I have not previously considered this project and whether residential or commercial rates are correct for the work performed. Rather, the guidance you attached to your request for my attention to this matter is a correction notice one of our industrial relations agents provided.

I am regarding your letter as a request for a determination as to which rates, commercial or residential, are applicable to the project at issue. Typically, the target for issuance of determinations is 60-90 days from date of their receipt. However, I will do my very best to provide you with a response just as soon as I am able.

If you have questions regarding this process, or if you have any further information you want me to consider as part of the determination, please let me know.

Regards,

Ann

*S. Ann Selover*

Industrial Statistician/Program Manager  
Prevailing Wage  
Department of Labor and Industries  
(360) 902-5330  
[Ann.Selover@Lni.wa.gov](mailto:Ann.Selover@Lni.wa.gov)

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**From:** Terry Pottmeyer [<mailto:terry@friendsofyouth.org>]  
**Sent:** Saturday, February 23, 2013 6:22 PM  
**To:** LNI RE Prevailing Wage Worker 1  
**Cc:** Selover, Ann (LNI); Loomis, Deborah (LNI); 'Rand Redlin'  
**Subject:** RE: Prevailing Wage Letter

Hello Nathan,

I thought it would be a good idea to check in on next steps; we don't want to miss an important opportunity to have our case reviewed. Thanks for letting us know what happens next and when we might expect a response on our appeal.

**To:** 'pw1@Lni.wa.gov.'  
**Cc:** Rand Redlin; Allison Garr; Cindy Sullivan  
**Subject:** Prevailing Wage Letter  
**Importance:** High

Please accept that attached letter as a request to reconsider the prevailing wage determination on our Youth Haven construction program. Thank you,



Terry Pottmeyer  
President/CEO  
Friends of Youth

Please note our new address:  
13116 NE 132<sup>nd</sup> Street  
Kirkland, WA 98034  
[www.friendsofyouth.org](http://www.friendsofyouth.org)  
425.869.6490 x313



13116 NE 132nd St.  
Kirkland, WA 98034-2306

TELEPHONE

425.869.6490

FACSIMILE

425.869.6666

WEB

friendsofyouth.org

February 6, 2013

Ms. L. Ann Selover  
Prevailing Wage Program Manager  
Washington State Labor and Industries  
PO Box 44540  
Olympia, WA 98504

RE: Friends of Youth, Youth Haven, Contract H11K24, Correction Notice #544173

Dear Ms. Selover,

Friends of Youth respectfully requests that you reconsider your designation of our project as subject to commercial prevailing wage. Our Youth Haven program supports runaway and homeless youth and youth in crisis and it is intended to support these young people in a family home environment. In fact, for many years we operated this program under a foster home license.

These young people come to us traumatized, frightened and alone. We have set up our program to operate as a family home—with shared dining, common living areas, and shared bedrooms. It is our hope, and our goal, to return as many young people as possible to their families, and we are pleased that over 75% of the time we are able to do so. Normalizing the environment and creating a safe and welcoming home is key to our success.

As we undertook construction for a new home, and planned and budgeted for this undertaking, we did so with the understanding that building a house meant a residential prevailing wage. We planned our budget and fundraising accordingly. As you can imagine, most of this planning happened well in advance of your policy memorandum from October of this year.

The decision to treat our project as subject to commercial prevailing wage has added significant expense. Please let us know how best to pursue our request for reconsideration.

Respectfully,

Terry Pottmeyer  
President/CEO



REC'D FEB 08 2013