



In the Matter of:

**THE RESIDENCES AT BOLAND
PLACE, RICHMOND
HEIGHTS, MISSOURI**

ARB CASE NO. 2020-0031

DATE: April 30, 2021

**With respect to Wage Rate
Determination related to
FHA Project No. 085-35566**

Appearances:

For the Petitioner:

Robert J. Golterman, Esq.; *Lewis Rice LLC*; Saint Louis, Missouri

For the Respondent, Administrator, Wage and Hour Division:

**Kate S. O'Scannlain, Esq.; Jennifer S. Brand, Esq.; Sarah Kay Marcus,
Esq.; Jonathan T. Rees, Esq.; and Sara A. Conrath, Esq.; *United States
Department of Labor, Office of the Solicitor*; Washington, District of
Columbia**

**Before: James D. McGinley, *Chief Administrative Appeals Judge*, James A.
Haynes and Stephen M. Godek, *Administrative Appeals Judges***

DECISION AND ORDER

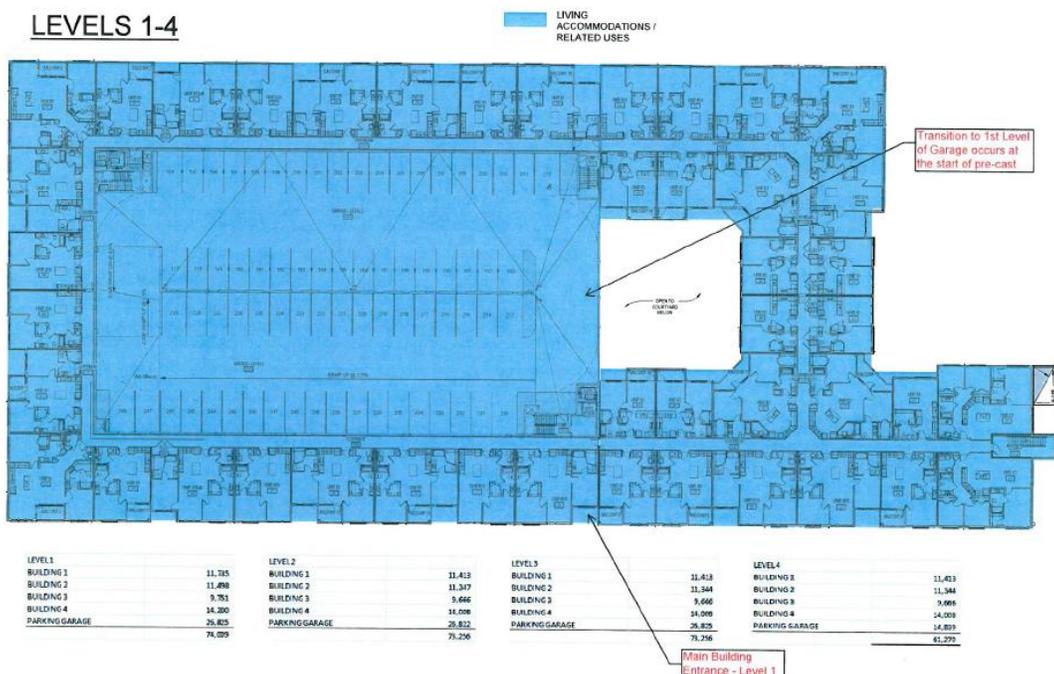
PER CURIAM. This matter is before the Administrative Review Board (Board or ARB) pursuant to the provisions of the Davis-Bacon Act (DBA) and "Related Acts" (DBRA), 40 U.S.C. § 3141 et seq. (2006), and the applicable implementing regulations at 29 C.F.R. Parts 1, 5, and 7 (2020). The DBRA apply DBA labor standards to certain federally-assisted construction projects, such as the project at issue here. P & M Holdings, LLC (Petitioner) is the owner of the project, which is known as "The Residences at Boland Place" (Boland Place). Petitioner seeks review of a determination by the Administrator of the U.S. Department of Labor's Wage and Hour Division (WHD) that a "building" construction wage rate under the DBA applied to Boland Place.¹ As discussed below, we affirm the Administrator's determination.

¹ See 12 U.S.C. § 1715l(d)(4); 29 C.F.R. § 5.1(a).

BACKGROUND

Boland Place is a planned, multi-use development project in Richmond Heights, Missouri. The architectural plans for Boland Place show four above-grade (i.e., above ground) stories on each level, and a Club Level beneath the upper four levels, which sits on top of the Sub Level. For illustrative purposes, we included the Petitioner's three separate and distinct floor plans for the four above-grade stories of residential apartments, the Club Level, and Sub Level, which we discuss in turn.² Petitioner color-coded the residential space or related uses in blue, retail spaces in purple, and the public parking garage areas in green.

1. Floor Plan for the Upper Floor Levels

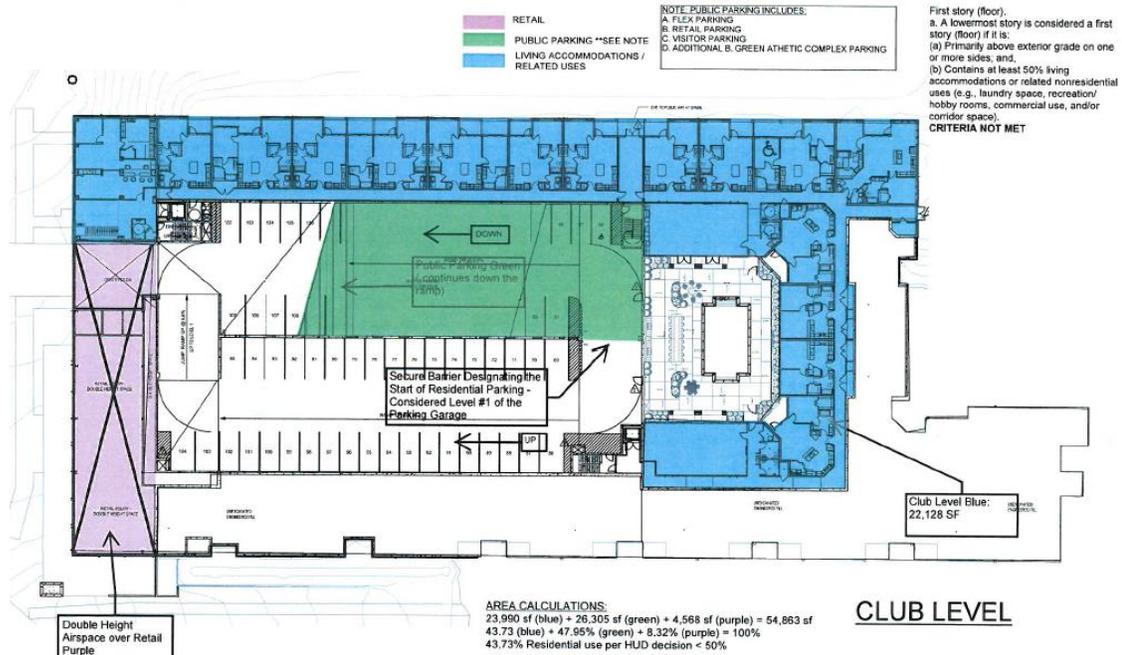


From top to bottom of Boland Place, the first section shows the floor plan for each of the four upper levels. The residential units are located on the perimeter and displayed in blue. The four upper levels have a wood-frame structure, and each level contains approximately 43 apartments. The interior portion (also in blue) is the planned parking lot, which includes a transition or access to the other levels of the garage. The white square represents an “open courtyard” space that runs the entire vertical length of the four levels.

² The Petitioner submitted the floor plans for the four above-grade stories of residential apartments, the Club Level, and Sub Level in its Petition for Reconsideration of the wage rate determination by the WHD’s Branch of Government Contracts Enforcement (BGCE). See Administrative Record (AR) at 123-125.

These four levels are also structurally attached with the garage space at the lower levels. Entry into all levels of the garage is located in the Sub Level.

2. Club Level Floor Plan

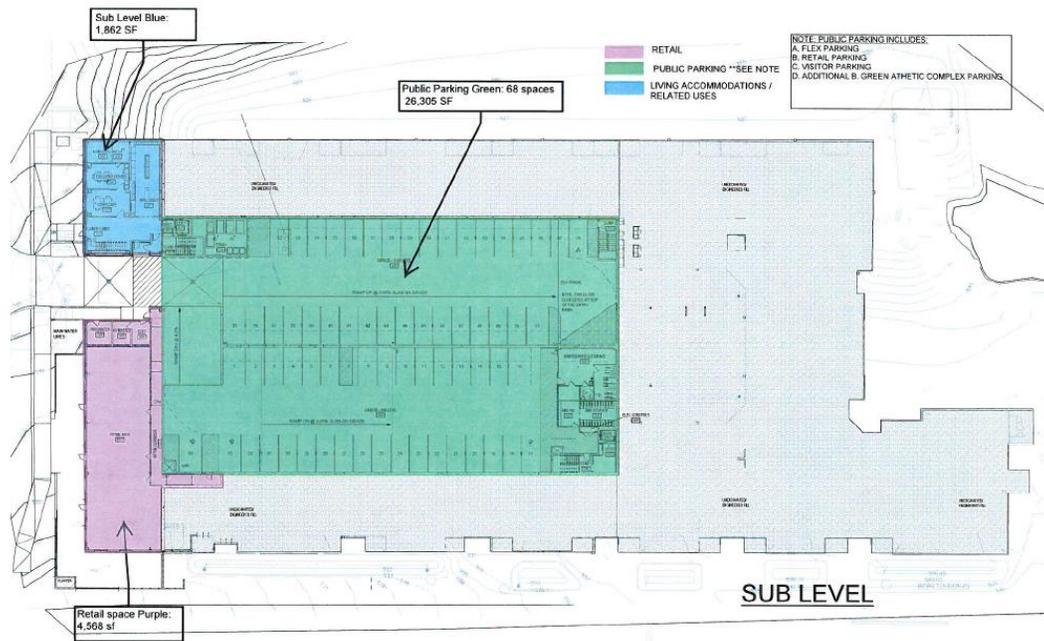


The second floor plan shows the Club Level, which is substantially above ground on two sides. It contains 13 residential apartments and space for related uses, as shown in the blue color in the floor plan above. The floor plan for the Club Level also contains a double-height retail space (purple) that sits on top of the Sub Level, and a public parking area (green). The white color in the middle of the floor plan shows the space for residential parking, while the white color on the right side (within the blue colors on three sides) shows the open courtyard for resident use. The Club Level floor plan shows two entrance doors from the parking garage into the courtyard, one on either side of the secure barrier.

3. Sub Level Floor Plan

The third section of the floor plan shows the Sub Level, which is above ground on only one side and does not have any residential apartment units. The floor plan for the Sub Level includes the double-height retail space (purple) located underneath the Club Level, a public parking garage (green), and some related non-residential space. The area at the top of the ramp up (upper right hand corner of the green shaded area) notes: “this is the Club Level at the top of the entry ramp.” The floor plan displays three sets of stairs, two elevators with connected vestibules, trash, maintenance and storage, and bike storage are also shaded green. The stairs

and elevators connect to each of the upper levels; each level includes entrances to the Project's elevators.



WHD determines the locally prevailing rates for job classifications used on construction projects and issues wage determinations that reflect those rates.³ In determining the proper wage rate classification for a construction project, the Department of Labor (DOL) has distinguished among four general types of construction: building, residential, heavy, and highway.⁴ The WHD generally applies a “residential” construction wage rate determination to apartment buildings of no more than four-stories in height.⁵ In contrast, a “building” construction wage rate applies to apartment buildings of five or more stories.⁶

On October 30, 2018, the Department of Housing and Urban Development (HUD) determined that Boland Place is an apartment complex over four stories in height.⁷ Therefore, HUD applied a “building” construction wage determination to the work on Boland Place, rather than a “residential” wage determination, because

³ See 40 U.S.C. § 3142; 29 C.F.R. Part 1.

⁴ See 29 C.F.R. § 1.3(d). In addition, DOL’s All Agency Memorandum (AAM) AAM No. 130 provides guidance concerning the determination of the appropriate wage determination for specific types of construction. See AAM No. 130 (March 17, 1978) (available at <https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/memo-131.pdf>).

⁵ AAM No. 130 at 4.

⁶ *Id.* at 2-3.

⁷ Administrator’s Determination at 2.

apartment buildings over four stories are categorized with a “building” wage determination.⁸

On April 9, 2019, Petitioner’s architect requested review of the “building” wage determination, claiming that the building only had four stories because the partially below grade Club Level was not the first story of the apartment complex.⁹ On May 15, 2019, the WHD’s BGCE issued a determination that the Club Level met the requirements to be considered the first floor, and, therefore, HUD had properly classified Boland Place as a five-story building with a “building” wage determination.¹⁰

On July 17, 2019, Petitioner requested reconsideration of BGCE’s determination. At this stage, Petitioner reframed its argument by now claiming that the Club Level and Sub Level should be considered a single “lower level” rather than claiming that the Club Level did not constitute the first story of Boland Place.¹¹ Petitioner alleged that the single “lower level” utilized less than 50% of its space for residential purposes, and, thus, the “lower level” did not constitute a “story” in the apartment complex.¹² On January 9, 2020, the Administrator affirmed the BGCE’s determination.

On February 12, 2020, Petitioner filed a petition for review before the ARB of the Administrator’s ruling that a “building” wage determination applied to the construction work at Boland Place, rather than a “residential” wage determination.

ADMINISTRATOR’S DETERMINATION

The issue in dispute before the Administrator was whether Boland Place is a five-story building (“building” construction wage rate) or a four-story building (“residential” wage rate). Under the DBA, a floor that has at least one side above grade and contains at least 50% residential or related non-residential area is considered the first story for wage determination purposes. The Administrator rejected the Petitioner’s argument that the Club Level and the Sub Level should be considered “a single level or story” that has less than 50% of the space dedicated to living accommodations and related nonresidential uses, thus making Boland Place a four-story building with a “residential” wage rate.¹³ Instead, the Administrator

⁸ *Id.* HUD relied on the Wage and Hour Division’s input to make the determination. *Id.*

⁹ Architect’s Request for Reconsideration at 4.

¹⁰ Administrator’s Determination at 2.

¹¹ Petitioner’s Request for Reconsideration at 2.

¹² *Id.* at 3.

¹³ Administrator’s Determination at 5-6.

determined that Boland Place was a five-story building under the DBA, and, therefore, applied a “building” construction wage rate to the Boland Place project. The present appeal followed.

JURISDICTION AND STANDARD OF REVIEW

This Board has jurisdiction to hear appeals concerning questions of law or fact from the Administrator’s final decisions under the DBA.¹⁴ The ARB’s review of the Administrator’s ruling is in the nature of an appellate proceeding and the Board “will not hear [factual] matters de novo except upon a showing of extraordinary circumstances.”¹⁵ The ARB will assess the Administrator’s rulings to determine whether they are consistent with the DBA and its implementing regulations and are a reasonable exercise of the discretion delegated to the Administrator to implement and enforce the DBA.¹⁶ “In considering the matters within the scope of its jurisdiction,” the Board acts “as fully and finally as might the Secretary of Labor.”¹⁷

DISCUSSION

The issue before us on appeal is whether the Administrator reasonably concluded that Boland Place is five-story building, and, therefore, correctly applied a “building” construction wage rate determination to Boland Place under the DBA. Considering the evidence and arguments the Petitioner submitted to the Administrator at the time, we decide that the Administrator’s determination that a “building” construction wage determination applied to the Boland Place project was a reasonable exercise of her discretion to implement and enforce the DBA labor standards.

Petitioner essentially raises two arguments in challenging the Administrator’s decision. First, Petitioner argues that the Administrator did not have a reasonable basis under the DBA to apply a “building” wage determination for all the construction work at Boland Place, rather than a “residential” wage determination. Second, Petitioner argues that, at the very least, Boland Place is entitled to a “split-wage” determination because the carpentry work

¹⁴ Secretary’s Order No. 01-2020 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board (Secretary’s discretionary review of ARB decisions)), 85 Fed. Reg. 13186 (Mar. 6, 2020). References to the DBA in this decision shall include the DBRA unless otherwise noted. *See* 29 C.F.R. § 5.1(a).

¹⁵ 29 C.F.R. § 7.1 (e); *Terrebonne Par. Juvenile Justice Ctr. Complex*, ARB No. 2017-0056, slip op. at 3 (Sep. 4, 2020) (citations omitted).

¹⁶ *William J. Lang Land Clearing, Inc.*, ARB Nos. 2001-0072 through -0079; ALJ Nos. 1998-DBA-00001 through -00006, slip op. at 5 (ARB Sept. 28, 2004).

¹⁷ 29 C.F.R. § 7.1 (d).

on the wood frame structure of the “building” should be classified as “residential.” We will address both arguments in turn.

1. “Building” Construction or “Residential” Construction Wage Determination

Under the DBA, the Secretary of Labor must determine locally prevailing wage rates based upon wages paid to “corresponding classes of laborers and mechanics employed on *projects of a character similar* to the contract work” of the relevant locality “in which the work is to be performed.”¹⁸ In determining “projects of a character similar,” the DOL has different wage determinations distinguished by four general types of construction: building, residential, heavy, and highway.¹⁹

Whether an apartment building is classified as “residential” or “building” construction for wage determination purposes depends, in part, on the apartment structure’s number of stories – five or more stories indicates that a “building” classification applies, while four or fewer stories means “a residential” classification applies.²⁰

Levels that are below grade typically count as basement levels, not as a “story” in an apartment “building” for wage determination purposes. However, when the lowermost level is partially below grade, the level can count as the “first story” of an apartment “building” when it:

- (a) is primarily above exterior grade on one or more sides,²¹ **and**
- (b) contains at least 50% living accommodations or related nonresidential uses.²²

On January 9, 2019, the Administrator affirmed the BGCE’s determination that a “building” construction wage determination applied because the Club Level is the first story and, therefore, Boland Place has five stories.²³ Moreover, the Administrator rejected the Petitioner’s argument that the Club Level and Sub Level are a “single level” because there is “substantial area of floor space at the Club

¹⁸ 40 U.S.C. § 3142(b) (emphasis added); *see also* 29 C.F.R. § 1.2.

¹⁹ *See* 29 C.F.R. § 1.3(d); *see also* AAM No. 130.

²⁰ AAM No. 130 at 3-4.

²¹ This component is undisputed because the Club Level and Sub Level are above exterior grade on one side. Petition for Review at 3.

²² *See St. Francis Hosp. Renovation Project*, No. 85-11, at 4 (WAB Jan. 30, 1986). Three other criteria can be used to determine whether a lowermost level is the “first floor,” but those criteria are not at issue here. *Id.*

²³ Administrator’s Determination at 5-6. *See also* BGCE’s Determination at 3.

Level that sits atop much of the floor space of the Sub Level.”²⁴ Similarly, “it appears that of the two levels, only the retail space (4,568 square feet) on the Sub Level is open into the Club Level above it.”²⁵

On appeal, Petitioner disputes the Administrator’s application of a “building” wage determination, rather than a “residential” wage determination. Petitioner claims that the Administrator had no reasonable basis to conclude that Boland Place is five stories. Similarly, the Administrator erred in concluding the Sub Level and Club Level are separate levels. Instead, the Administrator should have considered the Club Level and Sub Level as “a single lower level” due to Boland Place’s “unique structure.”²⁶ Petitioner further alleges that the “single lower level” has a residential use of 43.73%, and a total commercial use of 56.27%. Thus, Petitioner alleges that the one “lower level” should not count towards the number of stories because it has a residential use of less than 50%.

Petitioner’s argument for a single “lower level” is unpersuasive because: (1) Petitioner fails to clearly articulate why Boland Place’s “unique structure” requires that the Sub Level and Club Level constitute a single “lower level,” and (2) the Sub Level and Club Level each have their own floor plan, and the Club Level has “substantial area” over the Sub Level.

We agree with the Administrator’s determinations that the Club Level and Sub Level are separate levels, that the Club Level is the first story of Boland Place, and that Boland Place is five stories. Accordingly, the Administrator’s ruling that a “building” wage determination applied to Boland Place was a reasonable exercise of her discretion.²⁷ We find the Administrator reasonably concluded that a “building” construction wage determination applied to Boland Place under the DBA. Therefore, we affirm the Administrator’s determination.

²⁴ Administrator’s Determination at 4.

²⁵ *Id.*

²⁶ Petition for Review at 3. Petitioner seems to argue that Boland Place has a “unique structure” because there is a grade differential from the northeast to the southwest corner of the site, which allowed for the construction of a large “lower level,” with retail, residential, and parking uses. *Id.* at 3-4.

²⁷ In addition, Petitioner argues that “other factors” should be considered in support of a “residential” wage determination because the “project does not readily fall within any category.” However, Boland Place readily falls into the category of a “building” wage determination because it is clearly five stories. Thus, in light of our holding that Boland Place is a five-story apartment building, we do not address the “other factors” raised by Petitioner.

2. Split-Wage Determination

Petitioner argues that, if the Board affirms the Administrator’s “building” wage determination, Boland Place is at least entitled to a “split-wage” determination whereby the carpentry work on the wood frame structure is classified as “residential.”²⁸ Petitioner claims it first requested a “split-wage” determination before the Administrator. However, as detailed below, Petitioner requested a “split-wage” determination for the first time on appeal. Under our well-established precedent, the Board declines to consider arguments that a party raises for the first time on appeal.²⁹

Petitioner claims that its argument for a “split-wage” determination on appeal cannot be fairly characterized as a “new” argument before the Board, but is “best viewed as a more detailed exposition of an issue already placed before the Administrator.”³⁰ However, Petitioner’s request on appeal for a “split-wage” determination is distinct from Petitioner’s argument before the Administrator for a “residential” wage determination, and no legal legerdemain can make it otherwise.

Before the Administrator, Petitioner explained that the project “is essentially a split wage job.”³¹ However, Petitioner’s “split wage” reference was in the context of its request for a “residential” wage determination.³² Petitioner was merely showing that if the Administrator issued a “residential” wage determination, it would have a “minimal impact” on wages because local bargaining agreements would still require different wages for certain workers.³³ In other words, Petitioner highlighted “split wages” only to persuade the Administrator to apply a “residential” wage rate, not as a request for the Administrator to issue a “split-wage” determination.³⁴

²⁸ Petition for Review at 8.

²⁹ *Privler v. CSX Transp., Inc.*, ARB No. 2018-0071, ALJ No. 2018-FRS-00021, slip op. at 3 (ARB Mar. 24, 2020).

³⁰ Petitioner’s Reply Brief at 14-15.

³¹ Petitioner’s Request for Reconsideration at 4.

³² Administrator’s Response Brief at 26, n.11.

³³ Petitioner’s Request for Reconsideration at 3.

³⁴ Petitioner also never raised arguments consistent with a request for a split-wage determination or cited to relevant authority for such a determination. In contrast, on appeal, Petitioner clearly argues for a split-wage determination. Petitioner claims that, in accordance with AAM No. 130 and 131, the residential carpentry work on the four-story wood frame is “substantial,” amounting to 18.45% of the total project cost. Thus, Petitioner contends Boland Place is entitled to a split-wage determination. However, these arguments are noticeably absent from Petitioner’s arguments before the Administrator, which further illustrates how Petitioner first raised the split-wage determination on appeal.

In addition, the Administrator contends that Petitioner first requested a split-wage determination on appeal. Thus, the Administrator claims it could not have erred by failing to issue a split-wage determination because the issue was not presented for consideration to the Administrator.³⁵ Indeed, Petitioner does not argue on appeal that the Administrator erred by failing to issue a split-wage determination. Instead, Petitioner claims that Boland Place is entitled to a split-wage determination.

The Board determines that Petitioner first requested a split-wage determination on appeal. Thus, it is a new argument, which the Board declines to consider. Moreover, because the issue was not before the Administrator, the Administrator could not have erred when she did not issue a split-wage determination.³⁶

CONCLUSION

We hold that the Administrator's ruling that a "building" wage determination applied to Boland Place was a reasonable exercise of her discretion. In addition, we decline to address whether Boland Place is entitled to a "split-wage" determination because the issue was first raised on appeal. Accordingly, we **AFFIRM** the Administrator's determination.

SO ORDERED.

³⁵ Administrator's Response Brief at 27.

³⁶ Petitioner also requests oral argument pursuant to 29 C.F.R. § 7.14. However, having resolved the issues before the Board, we decline Petitioner's request for oral argument.