

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
OFFICE OF THE ATTORNEY GENERAL**



**ATTORNEY GENERAL
KARL A. RACINE**

May 13, 2019

The Honorable Elissa Silverman
Chair, Committee on Labor and Workforce Development
Council of the District of Columbia

The Honorable Brianne K. Nadeau
Chair, Committee on Human Services
Council of the District of Columbia

Dear Councilmembers Silverman and Nadeau:

The Adams Morgan Hotel Real Property Tax Abatement Act of 2010 (“Abatement Act”)¹ grants the Line Hotel a tax abatement if the Hotel meets seven statutory conditions. You asked whether the Department of Employment Services (“DOES”) may waive those conditions. We conclude that it may not.

The Abatement Act states that the District will waive up to \$46 million of the Hotel’s real property tax,² but in order to receive the abatement, “the development of the real property as a hotel shall comply with the following”:

- (1) It must comply with section 4 of the First Source Employment Agreement Act of 1984 (“First Source Act”)³ and with the District’s certified business enterprise statute;⁴
- (2) At least 51% of construction hours must be performed by District residents and a minimum of 342 construction full-time equivalent employees;
- (3) At least 51% of permanent jobs in the hotel must be filled by District residents, and at least 51% of those residents must be Ward 1 residents;

¹ Effective April 8, 2011 (D.C. Law 18-370; D.C. Official Code § 47-4652).

² D.C. Official Code § 47-4652(a) and (b)(2).

³ Effective June 29, 1984 (D.C. Law 5-93; D.C. Official Code § 2-219.01 *et seq.*).

⁴ *Id.* § 47-6552(c)(1). Specifically, the developer must comply with section 2346 of the Small and Certified Business Enterprise Development and Assistance Act, effective October 20, 2005 (D.C. Law 16-33; D.C. Official Code § 2-218.46).

- (4) All apprenticeships must be reserved for District residents, with a preference for Ward 1 residents;
- (5) The developer must fund a job training program;
- (6) The developer must work with an outside auditor or trade union to ensure local hiring minimums are met and maintained; and
- (7) The development must include at least 4,000 square feet of community and nonprofit incubator space at no community cost.⁵

These seven conditions are mandatory and conjunctive. They are mandatory because they are conditions the Hotel “shall” satisfy.⁶ They are also conjunctive because they are connected by the word “and.” Consequently, the development must meet all seven conditions in order to receive the abatement.⁷ Nothing in the Abatement Act’s language, and nothing we have identified in its legislative history,⁸ suggests that any of these conditions may be waived.

DOES has suggested that the Mayor (and, by delegation, DOES)⁹ may waive conditions in the Abatement Act because one of the Act’s seven conditions is compliance with the First Source Act, and the First Source Act gives the Mayor limited authority to waive certain requirements of *that* Act. That conclusion overreads the First Source Act and is inconsistent with the structure of the Abatement Act.

The only requirements the Mayor may waive under the First Source Act are those imposed by certain provisions contained in the First Source Act. Those requirements and that waiver authority are found in section 4 of the Act,¹⁰ which requires that the beneficiary of any

⁵ D.C. Official Code § 47-4652(c)(1)-(7).

⁶ See *Shall*, BLACK’S LAW DICTIONARY (8th ed. 2004) (defining “shall” principally as “[h]as a duty to”; “is required to,” and identifying this as the “mandatory sense that drafters typically intend and that courts typically uphold”); *Ass’n of Civilian Technicians, Montana Air Chapter No. 29 v. Fed. Labor Relations Auth.*, 22 F.3d 1150, 1153 (D.C. Cir. 1994) (“The word ‘shall’ generally indicates a command that admits of no discretion on the part of the person instructed to carry out the directive”); *Dist. of Columbia v. Reid*, 104 A.3d 859, 869 n.22 (D.C. 2014) (noting that the word “shall” is ordinarily mandatory).

⁷ See *United States v. Lopez-Collazo*, 824 F.3d 453, 458 (4th Cir. 2016) (when three conditions a defendant must satisfy are “listed in the conjunctive,” the defendant “must satisfy all three in order to prevail”); *Bamonte v. City of Mesa*, 598 F.3d 1217, 1225 (9th Cir. 2010) (“[U]se of the conjunctive indicates that *all* of the conditions listed must be met”) (emphasis in original) (quoting *Rodriguez v. Smith*, 541 F.3d 1180, 1186 (9th Cir. 2008)); *United States v. Torres*, 383 F.3d 92, 99 (3d Cir. 2004) (same).

⁸ The Abatement Act was first proposed as a stand-alone bill (Bill 18-969), and was accompanied by a Committee Report. See Cmte. on Finance and Revenue, “Report on Bill 18-969, the ‘Adams Morgan Hotel Real Property Tax Abatement Act of 2010,’” Dec. 6, 2010, available at <http://lims.dccouncil.us/Download/23124/B18-0969-CommitteeReport1.pdf> (last visited May 9, 2019). This bill did not pass, but a modified version of its language was later incorporated into the Fiscal Year 2011 Supplemental Budget Support Act of 2010 (D.C. Law 18-370).

⁹ See Mayor’s Order 1986-66, dated Apr. 22, 1986 (delegating the Mayor’s First Source Act authority to DOES).

¹⁰ D.C. Official Code § 2-219.03.

government-assisted project or contract enter into a local-hiring employment agreement with DOES. The beneficiary must agree that the first source for finding employees to fill jobs created by the project or contract, or to fill jobs covered by the employment agreement itself, will be the First Source Register.¹¹ The Mayor’s waiver authority is found in subsection (e) of that section, which adds specific hiring targets and reporting requirements tailored to the value of the project. The Mayor may “waive the provisions of paragraphs (1), (1A), (1B), or (1C)” in subsection (e) – the hiring targets and reporting requirements – if the beneficiary has made a good-faith effort to comply with the requirements,¹² has entered a special workforce development training or placement arrangement with DOES,¹³ or has met a series of other conditions.¹⁴ There is at least a reasonable argument that DOES could waive any applicable requirements in those paragraphs of the First Source Act¹⁵ without jeopardizing the Hotel’s compliance with the First Source Act portion of the Abatement Act’s condition. Nonetheless, because no part of the Mayor’s waiver authority allows DOES to waive anything beyond paragraphs (1)-(1C), the First Source Act does not allow DOES to actually waive the First Source Act condition itself, or to waive any of the other six conditions the Abatement Act imposes.¹⁶

The structure of the Abatement Act reinforces this conclusion in at least two ways. First, the conditions it imposes are different from, and in many cases go well beyond, what the First Source Act requires. For example, nothing in the First Source Act requires that all apprenticeships on a project be reserved for District residents (Abatement Act Condition 4), that a project’s construction hours be performed by a specified number of full-time equivalent employees (Abatement Act Condition 2), or that a developer prefer residents of a particular ward for either apprenticeships or permanent jobs (Abatement Act Conditions 3 and 4). Indeed, when the Council originally adopted the Abatement Act, none of the Act’s conditions overlapped with

¹¹ See *id.* § 2-219.03(a).

¹² *Id.* § 2-219.03(e)(3)(A)(i).

¹³ *Id.* § 2-219.03(e)(3)(A)(iii).

¹⁴ *Id.* § 2-219.03(e)(3)(A)(ii)(I)-(IV).

¹⁵ The Abatement Act conceivably does not require the Hotel to comply with all conditions in the current section 4 of the First Source Act. The requirement that the Hotel comply with the requirements in section 4 likely refers only to requirements that were part of section 4 when the Abatement Act was adopted. As the Supreme Court recently reaffirmed, “a statute that refers to another statute by specific title or section number in effect cuts and pastes the referenced statute as it existed when the referring statute was enacted.” *Jam v. Int’l Finance Corp.*, 139 S. Ct. 759, 769 (2019). Some of the requirements in paragraphs (1)-(1C), were not part of section 4 when the Abatement Act was adopted. For example, section 4(e)(1A)(A)(iii), which requires that “[a]t least 51% of the skilled laborer hours by trade shall be performed by District residents,” was not incorporated into the First Source Act until 2012. See Workforce Intermediary Establishment and Reform of First Source Amendment Act of 2011, § 2(b), effective February 24, 2012 (D.C. Law 19-84; 58 DCR 11170).

¹⁶ See, e.g., *Jennings v. Rodriguez*, 138 S. Ct. 830, 844 (2018) (authority to parole “for urgent humanitarian reasons or significant public benefit” implicitly excludes authority to parole for other reasons); *Miller v. Clinton*, 687 F.3d 1332, 1343 (D.C. Cir. 2012) (statement that certain individuals are not federal government employees “for purposes of any law administered by the Office of Personnel Management” implies that these employees are federal employees “for purposes of any law *not* administered by OPM”) (emphasis in original).

any requirement in section 4 of the First Source Act.¹⁷ Nothing in the text of the Abatement Act extends the Mayor's First Source waiver authority to these distinct, independent conditions, and we have identified nothing in the Abatement Act's history suggesting that the Council intended to do so. Second, a later Council amendment to the Abatement Act suggests that the Council did not intend for the Act's conditions to be waivable. When the Abatement Act was originally adopted, Condition 2 required that the project's construction hours be performed by at least 756 construction full-time employees.¹⁸ In 2013, the Council decreased that number to 342¹⁹ after being advised that the project would not employ 756 full-time employees.²⁰ That the Council chose to pursue this legislative amendment, rather than inviting the Mayor to waive the condition, strongly indicates that any waiver of the Abatement Act's conditions requires legislation approved by the Council of the District of Columbia.

If you have any questions, please feel free to contact me or Deputy Attorney General Brian K. Flowers.

Sincerely,

A handwritten signature in black ink, appearing to be 'Karl A. Racine', written in a cursive style.

Karl A. Racine
Attorney General for the District of Columbia

¹⁷ The only language in section 4 of the First Source Act that arguably overlaps with the Abatement Act is the skilled-laborer-hours provision in section 4(e)(1A)(A)(iii), which, as discussed above, was not part of the First Source Act when the Abatement Act was adopted.

¹⁸ Abatement Act § 798(b) (58 DCR 1038).

¹⁹ See Adams Morgan Hotel Real Property Tax Abatement Jobs Requirements Clarification Act of 2013, effective December 24, 2013 (D.C. Law 20-61; 60 DCR 12472). This act was part of the overarching Fiscal Year 2014 Budget Support Act of 2013.

²⁰ See Cmte. of the Whole, "Report on Bill 20-199, the 'Fiscal Year 2014 Budget Support Act of 2013,'" at 14, May 22, 2013, available at <http://lims.dccouncil.us/Download/2932/B20-0199-COMMITTEEREPORT.pdf> (last visited May 10, 2019).