



BUREAU of LABOR & INDUSTRIES

BEFORE THE COMMISSIONER OF THE BUREAU OF LABOR AND INDUSTRIES OF THE STATE OF OREGON

In the Matter of:

DEVNW,

Requester.

Case No. 95-23

FINDINGS OF FACT
CONCLUSIONS OF LAW
OPINION
ORDER

SYNOPSIS

The Agency correctly determined that Requester's Evergreen Apartments Project was a public works project, and that the affordable housing exemption in ORS 279C.810(2)(d) does not apply to the Project because it is not "residential construction" as defined by ORS 279C.810(2)(d)(D). ORS 279C.800, ORS 279C.810, ORS 279C.840, OAR 839-025-0004(27).

The above-entitled case came on regularly for hearing before Kari Furnanz, designated as Administrative Law Judge ("ALJ") by the Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on October 31, 2023, via the Zoom video conference application.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by Administrative Prosecutor Isela M. Ramos Gonzalez, an employee of the Agency.

1 Requester DevNW (“DevNW”) was represented throughout the proceeding by Attorney
2 Courtney Caimona.

3 The Agency called Susan Wooley (“Wooley”), BOLI Technical Assistance
4 Coordinator, as its only witness.

5 DevNW called Emily Reiman (“Reiman”), the CEO of DevNW, as its only witness.

6 The forum received into evidence: (a) Administrative exhibits X1 through X19;¹
7 (b) Agency exhibits A1 through A26; and (c) ALJ exhibits ALJ1 and ALJ2.

8 Having fully considered the entire record in this matter, I, Kari Furnanz,
9 Administrative Law Judge, hereby make the following Findings of Fact (Procedural and
10 on the Merits), Conclusions of Law, Opinion, and Order.²

11 **FINDINGS OF FACT – PROCEDURAL**

12 1) On June 27, 2022, DevNW submitted a written request for a coverage
13 determination under ORS 279C.817 (“coverage determination”) as to whether payment
14 at the prevailing wage rate would be required under ORS 279C.840 for the Evergreen
15 Apartments Project (“Evergreen Project”). The request stated that the Evergreen
16 Project will convert “an underutilized church into 18 affordable housing units with full
17 wraparound support services” in the Grant neighborhood of Salem, Oregon. (Ex. A3)

18 2) The Agency issued a coverage determination on August 30, 2022, that
19 contained the following “Conclusions of Law” and “Determination:”
20
21
22

23 _____
24 ¹ Exhibits X12-X19 were filed after the hearing concluded.

25 ² The Ultimate Findings of Fact required by OAR 839-050-0370(1)(b)(B) are subsumed within the Findings of Fact – The Merits.

1 **"Conclusions of Law**

2 "1. The Project will use \$750,000 or more in funds of a public agency for
3 renovation and reconstruction of a building. Therefore, the Project meets the
4 definition of "public works" under ORS 279C.800(6)(a)(B).

5 "2. Under ORS 279C.810(2)(d), projects for residential construction that are
6 privately owned and that predominantly provide affordable housing are not
7 subject to the Prevailing Wage Rate laws. 'Residential construction' is defined in
8 ORS 279C.810(2)(d)(D) as construction, reconstruction, major renovation or
9 painting of single-family houses or apartment buildings not more than four stories
10 in height. While the Project will be privately owned and will predominately provide
11 affordable housing, the Project does not meet the definition of "residential
12 construction" because the Project includes the renovation of a church building,
13 which is neither an apartment building or a single-family home.³ Therefore, the
14 exemption from the Prevailing Wage Rate laws under ORS 279C.810(2)(d) will
15 not apply to the Project.

16 "3. No other exemptions from the Prevailing Wage Rate laws under ORS
17 279C.810 apply to the Project."

18 **"Determination**

19 "Based on the foregoing, the Prevailing Wage Rate laws, ORS 279C.800 to ORS
20 279C.870, and OAR Chapter 839, Division 025, will apply to the Evergreen
21 Apartments project.

22 "This determination is based on the agency's file as of the date of this
23 determination. If any of the project information provided is incorrect or
24 incomplete, this determination may no longer apply. If the project or project
25 documents are modified or supplemented after the date of this determination, this
26 determination may no longer apply. The commissioner may make a different
27 determination if any of the project information is incomplete or incorrect, or if the
28 project or project documents are modified or supplemented after the date of this
29 determination. A new determination may be requested based on the modified or
30 supplemented information or documentation."

31 (Ex. A18)

32 3) On or about August 30, 2022, the Agency served a copy of the
33 determination on DevNW. (Ex. A19)

34 ³ The Determination cited to the Final Order issued in *In the Matter of Central City Concern*, 30 BOLI 94
35 (2009).

1 4) DevNW submitted a letter requesting reconsideration of the determination
2 on September 14, 2022. On September 28, 2022, BOLI's former Commissioner Val
3 Hoyle responded to the request for reconsideration, stating that BOLI's "conclusion
4 remains unchanged." (Exs. A20, A26)

5 5) On September 19, 2022, DevNW submitted a request for a hearing. (Exs.
6 A21-A25)

7 6) On July 7, 2023, the forum issued a Notice of Hearing to DevNW,
8 DevNW's attorney, and the Agency setting the time and place of hearing for 9:30 a.m.
9 on Tuesday, August 15, 2023, via video conference. The Notice of Hearing also stated
10 that the matter was assigned to ALJ Kari Furnanz. Together with the Notice of Hearing,
11 the forum sent a copy of BOLI's August 30, 2022, coverage determination, which
12 contained the information required by ORS 183.413; a language notice; a document
13 entitled "Servicemembers Civil Relief Act (SCRA) Notification" and a copy of the forum's
14 contested case hearings rules, OAR 839-050-000 to 839-050-0445. (Ex. X2)

15
16 7) After the Agency and DevNW's counsel indicated by email that they
17 consented to accept filings by email, the ALJ issued an interim order on July 14, 2023,
18 stating that parties could file documents by email and containing instructions for the
19 temporary filing procedures. The interim order also required DevNW to file a written
20 statement identifying all of its reasons for contesting the Agency's determination, and
21 required the Agency to file copies of the Agency's determination, all materials provided
22 by DevNW under OAR 839-025-0005(1)-(4), and any other materials the Agency relied
23 upon to reach its determination. The order also stated that the parties must submit the
24 statement and documents no later than August 1, 2023, and notified them of the
25

1 possible sanctions for failure to comply with the order. The order further noted that
2 PWR determination hearings are governed by the procedures set forth in OAR 839-050-
3 0000 to OAR 839-050-0430 and described the order of the presentation of evidence
4 and scope of the hearing. (Ex. X3)

5 8) On August 1, 2023, the Agency filed its submission of documents and
6 names of witnesses, and DevNW filed a written statement. (Exs. X4-X5)

7 9) On August 10, 2023, the Agency filed an unopposed motion to postpone
8 the hearing. The ALJ issued an interim order granting the motion on August 11, 2023,
9 and set a video prehearing conference to take place on August 16, 2023, at 9:30 a.m.
10 (Exs. X6-X7)

11 10) On August 14, 2023, the Agency filed a Notice of Change of
12 Administrative Prosecutor indicating that the case had been reassigned to
13 Administrative Prosecutor Isela Ramos Gonzalez. (Ex. X8)

14 11) The Agency filed a "corrected" Agency Submission and an Amended
15 Agency Submission on August 14, 2023, to include Exhibit A17 in the list of the
16 Agency's exhibits. (Exs. X9-X10)

17 12) A virtual prehearing conference was held on August 16, 2023, at 9:30 a.m.
18 via Zoom. Chief Prosecutor Rachel Diamond-Cuneo and Administrative Prosecutor
19 Isela Ramos Gonzalez appeared on behalf of the Agency. Attorney Courtney Caimona
20 appeared on behalf of DevNW. Following the conference, the ALJ issued an interim
21 order rescheduling the hearing to begin on October 31, 2023, at 9:30 a.m., a date and
22 time all parties indicated they were available. Further instructions regarding participation
23 in a video conference hearing were attached to the interim order. (Ex. X11)
24
25

1 13) At the start of the hearing, the ALJ orally advised the Agency and DevNW
2 of the issues to be addressed, the matters to be proved and the procedures governing
3 the conduct of the hearing. (Statement of ALJ)

4 14) The Agency and Dev NW stipulated that the Evergreen Project is a public
5 works project under ORS 279C.800(6)(a)(B). (Stipulation of the Participants)

6 15) During the cross-examination of Reiman, the ALJ denied the Agency's
7 request that the forum take judicial notice of how many stories were in a 50-foot-tall
8 building. The number of stories in a building is not a "judicially cognizable fact" and was
9 not "of general, technical, or scientific" fact within the "specialized knowledge" of the
10 ALJ. See OAR 839-050-0320.

11 16) After the hearing, the ALJ issued an interim order on November 1, 2023,
12 summarizing rulings made during the hearing, which were as follows:

13 "1. The Agency was instructed to supplement the record by filing copies of
14 the Department of Labor Memorandum and the *Yaquina Hall* Determination
15 referenced during testimony. (The Agency complied with this request on
16 October 31, 2023, and the documents were marked as Exhibits ALJ1 and
ALJ2.)

17 "2. The parties were instructed to file post-hearing briefs on the subject of the
18 'residential construction' exemption in ORS 279C.810(2)(d)(d). It would also
19 be helpful for the parties to address (1) the factual similarities and/or
20 differences between the project this matter and the project *In the Matter of*
21 *Central City Concern*, 30 BOLI 94 (2009), and (2) whether the method of
statutory construction used in *Central City* is still applicable or if the analysis
has been impacted by any recent Oregon Supreme Court or Court of Appeals
decisions. The briefs are limited to 20 pages each, and the Agency may file a
5-page rebuttal. The briefing schedule is as follows:

- 22 • The Agency's brief must be filed by November 17, 2023.
- 23 • Requester's brief must be filed by December 8, 2023.
- 24 • The Agency's rebuttal must be filed by December 15, 2023.

25 "3. If a party would like a copy of the hearing recording, they may file a
written request and copies of the recording will be provided to all parties."

1 (Ex. X12)

2 17) The Agency submitted a written request to receive a copy of the recording
3 of the hearing. The ALJ issued an interim order granting the request on November 7,
4 2023, and instructed the Contested Case Coordinator to provide copies of the recording
5 to the parties. The Contested Case Coordinator provided a copy of the audio recording
6 of the hearing to the parties on November 8, 2023, by placing it in a shared Dropbox
7 folder. (Exs. X13-X14; Hearing Record)

8
9 18) On November 9, 2023, the Agency submitted a request to extend the
10 deadline to file the Agency's post-hearing brief from November 17, 2023, to November
11 28, 2023, because the administrative prosecutor will be out on protected leave, which
12 constituted good cause for an extension of time. DevNW filed a response opposing the
13 request on November 10, 2023, because an attorney from the Oregon Department of
14 Justice ("DOJ") would be preparing the Agency's brief, there were previous
15 postponements in the case and due to concerns about having "a similar amount of time
16 as the Agency" to prepare a closing brief. To attempt to address these concerns, the
17 forum set the following briefing schedule to provide DevNW with the same amount of
18 time as it originally had to prepare its closing brief after the Agency submitted its brief
19 (21 days):

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- The Agency's closing brief was due on or before Tuesday, November 28, 2023.
 - DevNW's closing brief was due on or before Tuesday, December 19, 2023.
 - The Agency's rebuttal brief was due seven (7) days after DevNW's closing brief was filed. (In other words, if DevNW filed its closing brief *before* December 19, 2023, the Agency's due date was to be calculated by adding seven days to the date DevNW files its brief.)
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1 (Exs. X15-X16)

2 19) On November 27, 2023, the Agency filed its post-hearing brief. DevNW
3 filed its post-hearing brief on December 19, 2023. The Agency filed a rebuttal brief on
4 December 22, 2023. (Exs. X17-X19)

5 20) On February 5, 2024, the ALJ issued a Proposed Order that notified the
6 participants that they were entitled to file exceptions of the Proposed Order within 10
7 days of its issuance. DevNW filed exceptions on February 15, 2024.

8 21) BOLI's Commissioner issued a memorandum to Administrative Law Judge
9 Kari Furnanz on August 27, 2024, delegating the authority to enter a final order in this
10 proceeding, pursuant to ORS 183.411, 651.060(3) and OAR 839-050-0420(6). (Forum
11 File)
12

13 **FINDINGS OF FACT – THE MERITS**

14 1) DevNW is the assumed business name of Corvallis Neighborhood
15 Housing Services, Inc., a private nonprofit corporation. (Testimony of Reiman)

16 2) Reiman has been the CEO of DevNW since 2014. (Testimony of Reiman)

17 3) DevNW is the sole owner of Cottage Street, LLC, a private nonprofit
18 limited liability corporation that purchased and owns the property located at 905 and 925
19 Cottage St. in Salem, Oregon, with the intent to create affordable housing units.
20 DevNW is in the process of developing the Evergreen Apartments at that site.
21 (Testimony of Reiman; Ex. A3)
22

1 4) The Evergreen Project involves converting the Evergreen Presbyterian
2 Church and an adjacent single-family home used as the church's parsonage⁴ into
3 affordable housing units. DevNW originally applied to re-zone the property as
4 commercial space so that an office would be located inside the parsonage house.
5 However, the plans were revised to convert the parsonage into housing units.
6 Immediately prior to DevNW's purchase of the property, the church used the parsonage
7 as a residential rental property. (Testimony of Reiman; Ex. A3, pp. 1, 49)

8 5) When complete, the Evergreen Project will provide 17 units of affordable
9 housing.⁵ The former church building will consist of 10 one-bedroom units and 3 studio
10 units. The parsonage will be converted into two one-bedroom units and two studio
11 units. All of the units will have full kitchens and full bathrooms. (Testimony of Reiman;
12 Ex. A3, p. 1)

13 6) When DevNW initially submitted its request for determination to BOLI, it
14 was in the planning stage of the project. At the time of hearing, construction had begun.
15 Everything but the exterior walls of the church and parsonage had been demolished,
16 and the contractor was in the process of constructing the interior. Because the Wage
17 and Hour Division's coverage determination stated that the residential housing
18 exemption did not apply, workers on the project were paid the prevailing rate of wage.
19 (Testimony of Reiman)
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24 ⁴ A parsonage is a residence that a church provides to its clergy member. (Testimony of Wooley)

25 ⁵ The original plans provided for 18 affordable housing units, but that was reduced due to design changes that were implemented to reduce costs. (Testimony of Reiman)

1 7) The Evergreen Project will not exceed four stories, and DevNW received
2 zoning approval for a maximum building height allowance of 50 feet. (Testimony of
3 Reiman; Ex. A20, p. 7)

4 8) The existing walls and the façades of the church and parsonage will
5 remain in place. The foundation and exterior windows that do not need to be replaced
6 for egress purposes will also stay intact. The roof of the church had to be replaced
7 because the contractor determined that it was not sufficient. (Testimony of Reiman;
8 Ex. A20)

9 9) The Evergreen Project will use more than \$750,000 in funds of a public
10 agency. (Stipulation of the Parties)

11 10) When complete, the Evergreen project will remain privately owned and will
12 predominantly provide public housing in that all apartment units will be restricted to
13 occupants with incomes no greater than 60 percent of the area median income.
14 (Testimony of Reiman; Ex. A18, pp. 1-2)

15 11) The zoning approval process for construction of the Evergreen
16 Apartments was initially contentious in that there was significant neighborhood
17 opposition to the project. Ultimately, DevNW requested approval from the City of Salem
18 to change the zoning of the property from "RS" (Singing Family Residential with
19 Religious Special Use) to "RH" (Multiple Family High-Rise Residential).
20

21 In order for the Evergreen Project to proceed, DevNW committed to preserving
22 the walls of the church and as much of the exterior as possible so that the completed
23 project would look like the church building that had been in the neighborhood for more
24 than 100 years. More specifically, the zoning application described the project as a
25

1 “reuse of the existing buildings, with no increase in building footprint or height” and
2 stated that the design for the proposed use “prioritizes the historic character of the
3 existing buildings.” (Testimony of Reiman; Ex. A20, pp. 82-83)

4 12) Both witnesses were credible. (Entire Record)

5 **CONCLUSIONS OF LAW**

6 1) The undersigned Administrative Law Judge, by delegation of the
7 Commissioner, has jurisdiction over this matter. ORS 279C.817(4).

8 2) DevNW has an interest in whether the proposed Evergreen Project to
9 construct apartments in Salem, Oregon, would be a public works on which payment of
10 the prevailing rate of wage is or would be required under ORS 279C.840, and it
11 requested a Determination of that question by the Commissioner of the Bureau of Labor
12 and Industries, in the manner required by, and in compliance with OAR 839-025-0005.

13 3) A Determination was issued, and DevNW properly sought, pursuant to
14 OAR 839-025-0005(7) and ORS 279C.817(4), a hearing under ORS 183.415 in order to
15 challenge the Determination.
16

17 4) The Evergreen Project is a public works project under ORS
18 279C.800(6)(a)(B) and is not subject to the residential construction exemption of
19 279C.810(2)(d)(D).

20 5) Payment of the prevailing rate of wage to workers on the Evergreen
21 Project would be required under ORS 279C.840.

22 6) Pursuant to ORS 279C.817(1), the undersigned Administrative Law
23 Judge, by delegation of the Commissioner of the Bureau of Labor and Industries, has
24 the authority under the facts and circumstances of this case to make the determination
25

1 about whether the Evergreen Project would be a public works on which payment of the
2 prevailing rate of wage would be required under ORS 279C.840.

3 **OPINION**

4 The Agency “shall, upon request of a public agency or other interested persons,
5 make a determination about whether a project or proposed project is or would be a
6 public works on which payment of the prevailing rate of wage is or would be required
7 under ORS 279C.840.” ORS 279C.817(1). DevNW sought a determination as to
8 whether the proposed Evergreen Project is a public works on which payment of the
9 prevailing wage rate will be required under ORS 279C.840. The Agency determined that
10 the Evergreen Project was a public works project and that the prevailing wage rate
11 applied.

12 DevNW subsequently brought this case under ORS 279C.817(4), which states
13 “the commissioner shall afford the requester or a person adversely affected or
14 aggrieved by the commissioner’s determination a hearing in accordance with ORS
15 183.413 to 183.470.” ORS 279C.840(1) requires that the prevailing wage rate must be
16 paid to workers “upon all public works” by all contractors and subcontractors unless a
17 statutory exemption applies. “Public works’ includes, but is not limited to:

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19 “A project that uses \$750,000 or more of funds of a public agency for
20 constructing, reconstructing, painting or performing a major renovation on a road,
21 highway, building, structure or improvement of any type.”

22 ORS 279C.800(6)(a)(B). The parties stipulated that the Evergreen Project is a public
23 works project under this statute. (See Finding of Fact – Procedural, #14)

24 ORS 279C.810(2)(d) provides that the Prevailing Wage Rate Laws, ORS
25 279C.800 to 279C.870, do not apply to “[p]rojects for residential construction that are

1 privately owned and that predominantly provide affordable housing.”⁶ There is no
2 dispute that the Evergreen Project will be privately owned and will predominantly
3 provide affordable housing. (See Finding of Fact – The Merits, #10) However, the
4 parties disagree as to whether the Evergreen Project is “residential construction.”

5 ORS 279C.810(2)(d)(D) states:

6 “‘Residential construction’ includes the construction, reconstruction, major
7 renovation or painting of single-family houses or apartment buildings not more
8 than four stories in height and all incidental items, such as site work, parking
9 areas, utilities, streets and sidewalks, pursuant to the United States Department
10 of Labor’s ‘All Agency Memorandum No. 130: Application of the Standard of
11 Comparison ‘Projects of a Character Similar’ Under Davis-Bacon and Related
12 Acts,’ dated March 17, 1978. However, the commissioner may consider different
13 definitions of residential construction in determining whether a project is a
14 residential construction project for purposes of this paragraph, including
15 definitions that:

- 12 (i) Exist in local ordinances or codes; or
- 13 (ii) Differ, in the prevailing practice of a particular trade or occupation, from
14 the United States Department of Labor’s description of residential
15 construction.”

15 ***Background and Discussion of the Parties’ Positions***

16 The Agency contends that the Evergreen Project is for the “major renovation” of
17 a church building. In support of its position, the Agency references the administrative
18 rules adopted in support of ORS 279C.810 and the final order issued in *In the Matter of*
19 *Central City Concern*, 30 BOLI 94 (2009).

22 ⁶ “Housing” has the meaning given that term in ORS 456.055. ORS 279C.800(2). “Housing’ means
23 housing of all kinds, including but not limited to single-family dwellings, multifamily dwellings, emergency
24 shelters, dwelling accommodations, living accommodations, manufactured dwelling parks, residential
25 units, housing projects or other dwellings.” ORS 456.055(8). “‘Housing unit’ or ‘unit’ means a single-
family dwelling, a single apartment or other single dwelling. ORS 456.055(9). “Affordable housing’
means dwelling units that may be purchased or rented, with or without government assistance, by
persons of eligible income.” ORS 456.055(1).

1 DevNW disagrees, asserting that the Evergreen Project consists of the
2 "construction" of new apartments. It contends that the project in *Central City* is
3 distinguishable from the Evergreen Project and that the Agency interprets "residential
4 construction" inconsistently from the definition found in OAR 839-025-004(6) and in the
5 Agency's previous determination decisions. More specifically, DevNW points to the
6 factual differences between the Evergreen Project that distinguish it from the one at
7 issue in *Central City*.

8 The first distinction involves the use of the two properties. *Central City* involved a
9 mixed-use property consisting of mixed residential and commercial use, whereas the
10 Evergreen Project will be solely for residential use. The *Central City* Final Order
11 concluded that "residential construction" in ORS 279C.810(2)(d)(D) did "not include the
12 major renovation of a five-story hotel into a mixed-use building with apartments and
13 commercial space." In *Central City*, the ground floor of the property was to be used for
14 commercial purposes and the upper four stories would provide affordable housing.
15 *Central City*, 30 BOLI at 98. Excluding the basement and parking, the commercial
16 space in *Central City* comprised approximately 19 percent of the building's total square
17 footage. *Id.* By contrast, the Evergreen Project will consist of apartments only.⁷ (See
18 Finding of Fact - The Merits, #5)

19
20 Secondly, the requester in *Central City* stipulated that the project was a "major
21 renovation of a former hotel." 30 BOLI at 100. DevNW did not stipulate that the
22

23
24 ⁷ DevNW originally applied to re-zone the property as commercial space so that an office could be located
25 inside the parsonage. However, the plans were revised to convert the parsonage into housing. (See
Finding of Fact- The Merits, #4)

1 Evergreen Project is a “major renovation” of a church and contends that it is for the
2 “construction” of apartments.

3 Third, the *Central City* project was five stories tall, whereas the Evergreen project
4 will not exceed four stories in height.

5 Fourth, *Central City* involved the purchase of a hotel that had not been physically
6 altered from its original construction before it was purchased with the intent to remodel.
7 In this matter, when DevNW purchased the property before construction began, it
8 consisted of a church and a parsonage house used as a residential rental property.

9 Finally, DevNW contends that the statutory interpretation “methodology cited to
10 by *In the Matter of Central City* has been superseded by statute and the methodology”
11 in *State v. Gaines*, 346 Or 160, 206 P3d 1042 (2009).

12 There are enough differences between the *Central City* project and the
13 Evergreen Project that the same conclusion cannot be adopted without further analysis.
14 Accordingly, the forum will proceed to examine the facts in this case using the current
15 methods of statutory interpretation.
16

17 ***Statutory Interpretation***

18 In interpreting a statute, the forum’s task is to give effect to the legislative intent
19 behind the statute. ORS 174.020. To determine intent, primary weight is given “to the
20 statutory text in context, with appropriate additional weight accorded to any relevant
21 legislative history.” *State v. Parkerson*, 371 Or 716, 722 (2023) (citing *City of Portland*
22 *v. Bartlett*, 369 Or 606, 610, 509 P3d 99 (2022); *State v. Gaines*, 346 Or 160, 171-72,
23 206 P3d 1042 (2009)).
24
25

1 When interpreting a statute that is part of a regulatory framework, one must first
2 determine whether the term is an “exact” term, an “inexact” term, or a “delegative” term.
3 *Kaser v. Pub. Employees Ret. Sys.*, 317 Or App 498, 502, 506 P3d 1134 (2022), *rev*
4 *den*, 370 Or 214 (2022) (citing *Blachana, LLC v. Bureau of Labor and Industries*, 354 Or
5 676, 687, 318 P3d 735 (2014)).

6 In its post-hearing brief, the Agency contends that ORS 279C.810(2)(d)(D)
7 contains delegative terms, and argues that the Agency’s interpretation should be
8 “reviewed for consistency with the range of discretion granted by the legislature” as the
9 Oregon Supreme Court set forth for delegative terms in *Springfield Education Assn. v.*
10 *School Dist.*, 290 Or 217, 229, 621 P2d 547 (1980). However, in *Central City*, the
11 parties agreed that the term “residential construction” in ORS 279C.810(2)(d) was an
12 “inexact” term and the forum accepted that designation. 30 BOLI at 103. The forum
13 concludes that the term “residential construction” is an inexact term because it
14 represents a complete expression of legislative policy, but requires the agency to
15 engage in interpretation to determine whether a particular project falls within the
16 statutory meaning of the terms. See, e.g. *Coffey v. Bd. of Geologist Examiners*, 348 Or
17 494, 508, 235 P3d 678 (2010) (concluding that “negligence” and “gross negligence”
18 were inexact terms).

19
20 With inexact terms, “courts tend to look to extrinsic indicators such as the context
21 of the statutory term, legislative history, a cornucopia of rules of construction, and their
22 own intuitive sense of the meaning which legislators probably intended to communicate
23 by use of the particular word or phrase.” *Springfield*, 290 Or at 224. Inexact terms are
24 a “complete’ expression of legislative policy, but are less precise” in that “[a]n inexact
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1 term often requires an agency to determine what the legislature intended by the term,
2 and that determination is a question of law.” *PNW Metal Recycling, Inc. v. Dept. of*
3 *Envtl. Quality*, 371 Or 673, 695, 540 P3d 523 (2023) (citing *Springfield*, 290 Or at 224).
4 An agency’s interpretation of an inexact term is reviewed “to ensure that it is consistent
5 with the legislature’s intent” using “the usual methods for statutory interpretation.”
6 *Blachana, LLC v. Bureau of Labor and Industries*, 354 Or 676, 687, 318 P3d 735
7 (2014).

8 Analyzing an inexact term “begin[s] with the statute’s text to analyze the meaning
9 of the disputed term, ‘pay[ing] careful attention to the exact wording of the statute.”
10 *Kaser*, 317 Or App at 502 (quoting *DCBS v. Muliro*, 359 Or. 736, 745, 380 P3d 270
11 (2016)). The legislature did not define the term “residential construction” as used in
12 279C.810(2)(d)(D). “When interpreting a term or phrase that the legislature has not
13 specifically defined,” one must first consider “the ‘plain, natural, and ordinary’ meaning
14 of the term.” *SAIF v. Ward*, 369 Or 384, 394-95, 506 P3d 386 (2022) (quoting *Muliro*,
15 359 Or at 745-46).
16

17 The parties assert that the heart of the dispute in this case is whether the
18 Evergreen Project involves (a) the “major renovation” of a church or (b) the
19 “construction” of an “apartment building”.⁸ The Agency contends that because the
20 Evergreen Project involves remodeling an existing church building, it is not “residential
21

22 ⁸ ORS 279C.810(2)(d)(D) also includes “reconstruction” as part of the definition of “residential
23 construction.” “‘Reconstruction’ means highway and road resurfacing and rebuilding, the restoration of
24 existing highways and roads, and the restoration of buildings and other structures.” OAR 839-025-
25 0004(27). As the Agency pointed out in its post-hearing brief, “restoration” commonly means “a bringing
back to or putting back into a former position or condition.” *Webster’s Third New Int’l Dictionary* 1936
(unabridged ed 2002). Since the church will not be put back into its former condition as a church, the
Evergreen Project does not involve “reconstruction.”

1 construction.” DevNW argues that the project should be considered to be “construction”
2 because “it entails the initial construction of new apartments where the church formerly
3 stood.” (DevNW’s Post-Hearing Brief, p. 5)

4 As explained in greater detail below, the forum concludes that when there is a
5 “major renovation” of an existing building, both the original status of the structure and
6 the final result must be “single-family houses or apartment buildings not more than four
7 stories” in order to satisfy the “residential construction” exemption.

8 Definitions in Agency’s Rules

9 1. Text

10 To interpret the statute’s text, the forum will look to the common meanings of the
11 terms “construction” and “renovation.”⁹ The common meaning of the word “construct” is
12 “to form, make, or create by combining parts or elements: BUILD, FABRICATE.”
13 *Webster’s Third New Int’l Dictionary* 489 (unabridged ed 2002). The Agency used the
14 following definition of “construction” when making its determination:
15

16 “‘Construction’ means the *initial* construction of buildings and other structures, or
17 additions thereto, and of highways and roads. ‘Construction’ does not include the
18 transportation of material or supplies to or from the public works project by
19 employees of a construction contractor or construction subcontractor.”

19 OAR 839-025-0004(6) (emphasis added).

20 The common meaning of the term “renovation” is “the act or process of
21 renovating: making over; revival.” *Webster’s Third New Int’l Dictionary* 1923

22
23 ⁹ It is appropriate to “consult dictionary definitions to determine the meaning of such terms ‘on the
24 assumption that, if the legislature did not give the term a specialized definition, the dictionary definition
25 reflects the meaning that the legislature would naturally have intended.” *State v. Branch*, 362 Or 351,
357, 408 P3d 1035 (2018) (quoting *Comcast Corp. v. Dept. of Rev.*, 356 Or 282, 296, 337 P3d 768
(2014)).

1 (unabridged ed 2002). To “renovate” means “to restore to a former state (as of
2 freshness, soundness, purity, or newness of appearance); make over: renew <~ a
3 house>.” The Agency’s administrative rule defines “[m]ajor renovation” as “the
4 remodeling or alteration of buildings and other structures within the framework of an
5 existing building or structure and the alteration of existing highways and roads, the
6 contract price of which exceeds \$50,000.” OAR 839-025-0004(14).

7 2. Context

8 The dictionary definitions and the Agency’s rules are considered in context with
9 the purposes¹⁰ of the prevailing wage rate statutes, which are:

10 “(1)To ensure that contractors compete on the ability to perform work
11 competently and efficiently while maintaining community-established
12 compensation standards.

13 (2)To recognize that local participation in publicly financed construction and
14 family wage income and benefits are essential to the protection of community
15 standards.

16 (3)To encourage training and education of workers to industry skills standards.

17 (4)To encourage employers to use funds allocated for employee fringe benefits
18 for the actual purchase of those benefits.”

19 ORS 279C.805. The Agency’s rules and, in particular, the use of the term “initial
20 construction” are consistent with the dictionary definitions and this policy.

21 DevNW argued that the Agency’s interpretation incorrectly limits “residential
22 construction” in that it does not account for the use of the term “includes” in the
23 definition. In particular, DevNW states that the use of the term “includes” in the
24 “residential construction” exemption suggests that it is not “limited to the construction,
25 reconstruction, major renovation or painting of single-family houses or apartment

¹⁰ Statements of statutory policy provide a useful context for interpreting statutes. See *Sundermier v. PERS*, 269 Or App 586, 595, 344 P3d 1142, *rev den*, 357 Or 415, 356 P3d 638 (2015).

1 buildings * * *.” (Dev-NW’s Posting Hearing Brief, p. 2) It argued that the items listed
2 after “includes” are examples of “residential construction,” but that the term is not limited
3 to those items. However, even if the definition of “residential construction” is not limited
4 to those specific examples, DevNW did not articulate what similar term should be
5 included with the examples listed in ORS 279C.810(2)(d)(D). Accordingly, the use of
6 the term “includes,” does not suggest that the Agency’s interpretation was incorrect.

7 3. Legislative History

8 Finally, the forum looks at whether legislative history provides further guidance
9 as to the legislature’s intent. The Agency’s post-hearing brief referenced Senate and
10 House hearings discussing House Bill (HB) 2140, which included the residential
11 construction exemption language that was eventually adopted as ORS
12 279C.810(2)(d)(D). Testimony from multiple supporters of the bill reveals that the
13 residential construction exemption was part of a compromise between many
14 stakeholders, including labor associations, BOLI’s former commissioner, construction
15 contractors, and affordable housing nonprofit organizations. See Audio Recording,
16 House Committee on Business and Labor, House Bill 2557,¹¹ February 21, 2007. The
17 bill was non-controversial and was intended to provide clarity as to what projects would
18 be subject to prevailing wage rates. *Id.*¹² Notably, none of the hearings included
19 testimony regarding the matter at issue in this case, namely whether the conversion of
20 an existing non-residential building into residential housing qualifies as “residential
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22

23 ¹¹ The “residential construction” exemption was part of prevailing wage rate statutory revisions that
24 eventually became part of HB 2140.

25 ¹² See also Audio Recording, Senate Committee on Education and General Government, HB 2140, May
2007.

1 construction.” Accordingly, the forum concludes that the legislative history does not
2 support DevNW’s argument that the Agency’s rules differ from the legislature’s intent.

3 Taking into consideration the statute’s text (including common dictionary
4 definitions), the statute’s context, and legislative history, the forum concludes that the
5 definitions in OAR 839-025-0004 are consistent with the legislature’s intent.

6 Application of the Rules to the Current Project

7 Having determined that the Agency’s rules are consistent with legislative intent,
8 the forum proceeds to examine the application of the rules to the Evergreen Project. As
9 previously noted, the Agency defines “construction” as:

10 “[T]he *initial* construction of buildings and other structures, or additions thereto,
11 and of highways and roads. ‘Construction’ does not include the transportation of
12 material or supplies to or from the public works project by employees of a
construction contractor or construction subcontractor.”

13 OAR 839-025-0004(6) (emphasis added). “‘Major renovation’ means the remodeling or
14 alteration of buildings and other structures within the framework of an existing building
15 or structure and the alteration of existing highways and roads, the contract price of
16 which exceeds \$50,000.” OAR 839-025-0004(16).

17 In its zoning application materials, DevNW informed the City of Salem that it
18 intended to preserve the walls of the church and as much of the exterior as possible so
19 that the completed project would look like the church building that had been in the
20 neighborhood for more than 100 years. (Finding of Fact - The Merits, #11) More
21 specifically, the zoning application described the project as a “reuse of the existing
22 buildings, with no increase in building footprint or height” and stated that the design for
23 the proposed use “prioritizes the historic character of the existing buildings.” *Id.* The
24 walls and façade of the church and parsonage will remain intact. (Finding of Fact - The
25

1 Merits, #8) Because the Evergreen Project will retain the original structures and
2 preserve the character of the buildings, the forum concludes that the Evergreen Project
3 involves the “major renovation” of a church, rather than the “initial construction” of an
4 apartment building. Accordingly, the “residential construction” exemption of ORS
5 279C.810(2)(2)(D) does not apply.

6 DevNW argues that the Agency has not applied its rules consistently because, in
7 other circumstances, it focused on the “end result” of a project, whereas in this case it
8 focuses on “the original status of the structure at issue (a former church).” First,
9 DevNW cites to examples of the Agency issuing Determinations which conclude that the
10 “residential construction” exemption applies to the construction of affordable housing on
11 “bare land.” However, those situations are not analogous to the present case because,
12 upon review, this project doesn’t involve “initial construction,” which contemplates
13 construction from bare land; instead, it involves transforming an existing non-residential
14 building into housing, or “major renovation.” In fact, both the original status of the
15 structure and the final result must be “single-family houses or apartment buildings not
16 more than four stories” in order to be “major renovation” of “residential construction.”
17 ORS 279C.810(2)(D).¹³ Secondly, DevNW references a project involving the
18 renovation of a former care facility into affordable housing units. (See Ex. A2) That
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20
21 ¹³ The residential construction exemption of ORS 279C.810(2)(d)(D) also refers to the Department of
22 Labor’s “All Agency Memorandum No. 130: Application of the Standard of Comparison “Projects of a
23 Character Similar” Under Davis-Bacon and Related Acts,” dated March 17, 1978. The All Agency
24 Memorandum is similar to the text of the statute, and states that “(r)esidential projects for Davis-Bacon
25 purposes are those involving the construction, alteration, or repair of single family houses or apartment
buildings of no more than four (4) stories in height.” Reference to the words “alteration” and “repair” in
this Memorandum reveals that the construction of the sentence makes sense only if both “alteration” and
“repair” apply to both the original status of the structure (single family house or small apartment building)
and its final result. Considering that the legislature specifically referenced this Memorandum in the
statute, it follows that the text of the statute carries forward this same structure.

1 does not demonstrate an inconsistent application because the Agency's determination
2 in that case references existing "residential units" that the developer intended to
3 upgrade. Finally, DevNW cites to guidance from the U.S. Department of Housing and
4 Urban Development ("HUD") issued on June 13, 1990, regarding the rehabilitation of a
5 townhouse into an overnight transient shelter. The HUD guidance does not assist
6 DevNW's position in that it contains a memorandum from the Office of the General
7 Counsel for Equal Opportunity and Administrative Law advising that "in order for a
8 property to qualify for the residential property exclusion" from the federal Davis-Bacon
9 Act, "*both its physical design and the intended use * * * must be residential.*" (Ex. A1, p.
10 4) (Emphasis added) As discussed in greater detail above, the primary building on the
11 site was a church and the construction plans were drawn with the purpose of
12 maintaining the existing framework of the church and of the having the building continue
13 to look like a church upon completion. (See Finding of Fact – The Merits #11)
14 Accordingly, HUD's guidance is consistent with the Agency's decision in this matter
15 because the "physical design" of the primary building on the property will continue to be
16 a church.
17

18 In conclusion, the Agency correctly determined that the Evergreen Project is
19 subject to the prevailing wage rate laws and, therefore, the Agency's determination is
20 affirmed.

21 EXCEPTIONS TO THE PROPOSED ORDER

22 DevNW submitted three Exceptions, which were considered before issuing this
23 Final Order.
24
25

ORDER

NOW, THEREFORE, as authorized by ORS 279C.817, the Agency's determination, issued pursuant to ORS 279C.817, is hereby **AFFIRMED**.



Kari Furnanz, Administrative Law Judge
Bureau of Labor and Industries

ISSUED ON: 9/5/24

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