

In the Matter of
CENTRAL CITY CONCERN
Case No. 66-08
Final Order of Commissioner Brad Avakian
Issued March 20, 2009

SYNOPSIS

The Agency correctly determined that Requester's Rose Quarter Project was subject to the prevailing wage rate laws if it entered into an agreement to accept public funds after July 1, 2007, and that the affordable housing exemption in ORS 279C.810(2)(d) does not apply to the Project. ORS 279C.800, ORS 279C.810, ORS 279C.840, OAR 839-025-0004(24).

The above-entitled case came on regularly for hearing before Linda A. Lohr, designated as Administrative Law Judge ("ALJ") by Brad Avakian, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on November 4, 2008, in the W. W. Gregg Hearing Room, located at 800 NE Oregon Street, Portland, Oregon.

Assistant Attorney General Johanna Matanich and Patrick Plaza, an Agency employee, represented the Bureau of Labor and Industries ("BOLI" or "Agency"). Attorney Amanda Gamblin represented Central City Concern ("Requester").

Requester called as witnesses: Gerhard Taeubel, BOLI Wage and Hour Division Compliance Specialist; Traci Manning, Central City Concern Housing Director; Craig Kelley, Project Manager; and Christine Hammond, Wage and Hour Division Administrator.

The forum received as evidence:

- a) Administrative exhibits X-1 through X-35, and X-36 through X-38 (received post-hearing);
- b) Agency exhibits A-1 through A-23 (submitted prior to hearing); and
- c) Requester exhibits R-1 through R-12 (submitted prior to hearing).

Having fully considered the entire record in this matter, I, Brad Avakian, Commissioner of the Bureau of Labor and Industries, hereby make the following Findings of Fact (Procedural and on the Merits), Ultimate Findings of Fact, Conclusions of Law, Opinion, and Order.

FINDINGS OF FACT – PROCEDURAL

1) On February 5, 2008, Requester submitted a request for a determination about whether Requester's proposed Rose Quarter Housing Project would be a public works on which payment of the prevailing wage rate would be required under ORS 279C.840. Requester provided a list of the sources and uses of the public and private financing awarded prior to and after July 1, 2007, along with copies of the loan and grant agreements between Requester and public funders and a reservation of funding letter from the Oregon Housing and Community Services Development Department ("OHCS"), dated December 6, 2007.

2) On April 7, 2008, the Agency issued a determination concluding that the Rose Quarter Housing Project will be subject to the prevailing wage rate laws if Requester or the Rose City Housing LLC enters into an agreement with OHCS for a commitment of public funds to support the Project.¹ The Agency concluded that the project is "intended to be privately owned" and over \$750,000 in public funds will be used to fund the project; therefore, the definition of a "public works" under ORS 279C.800(6)(a)(B), as amended effective July 1, 2007, applies to the project if OHCS commits funds to the project. The Agency further concluded that the project is a mixed use development that does not meet the definition of "residential construction" under ORS 279C.810(2)(d)(D) or OAR 839-025-0004(24). Requester was given 21 days to contest the Agency's determination and request an administrative hearing.

3) Requester was served with the determination and thereafter timely requested a hearing.

4) On August 8, 2008, the Hearings Unit issued a Notice of Hearing stating the hearing would commence at 9:00 a.m. on November 4, 2008. The Notice of Hearing included copies of the Agency's determination, a language notice, a Servicemembers Civil Relief Act notification, and copies of the Summary of Contested Case Rights and Procedures and the Contested Case Hearing Rules, OAR 839-050-0000 to 839-050-0445.

5) On August 25, 2008, the ALJ issued an order amending the Notice of Hearing to change the party designation from Respondent to Requester, and to delete the paragraph referring to "the Order of Determination" and replace it with a paragraph referring to "the Agency's Determination."

6) On August 25, 2008, the ALJ issued an order requiring Requester to submit a written statement identifying all of Requester's reasons for contesting the Agency's determination. The order also required the Agency to submit copies of the determination, all materials Requester provided to support its request for a determination, and any other materials the Agency relied upon to reach its determination. The ALJ ordered the participants to submit the statement and documents by September 12, 2008, and notified them of the possible sanctions for failure to comply with the order.

7) The Agency timely submitted the requested documents, marked as Agency exhibits A-1 through A-23, and the ALJ admitted them into the record as exhibits.

8) Requester timely filed a statement, along with declarations signed by three witnesses, to show "what information BOLI had in its possession, over and above what Central City Concern sent to BOLI related to the project, when it made its April 7, 2008, determination" and that it establishes "the clear legislative intent [of the 2007

amendments to prevailing wage rate laws] to exempt affordable housing projects like the Rose Quarter project.” Requester’s stated reasons for contesting the determination were 1) that the definition of residential construction required the Agency to “separate the commercial component of a mixed use project from the residential component and apply prevailing wage laws only if, and to the extent that, each component separately fails to meet the standard,” 2) the Agency must rely on the Portland City Code to define “residential construction” when doing so furthers legislative intent “and that code allows five-over-one mixed use residential housing,” and 3) the Agency “must divide the project into its respective commercial and residential components and apply prevailing wage laws to each only if they separately meet the standard.” Requester stated that because it had not yet received discovery from the Agency, “it may add to or alter the information submitted before or at the hearing scheduled to begin on November 4, 2008.” Requester’s statement and documents, marked as Requester’s exhibits R-1 through R-3, were admitted into the record as exhibits.

9) On October 7, 2008, the ALJ issued an order scheduling a prehearing conference for October 21, 2008.

10) On October 17, 2008, the Agency and Requester each submitted a list of persons they intended to call as witnesses and statements describing proposed testimony.

11) On October 17, 2008, the Agency, through counsel, filed a motion for summary judgment.

12) On October 20, 2008, Requester moved for an extension of time until October 27, 2008, to file a response to the Agency’s motion for summary judgment. The Agency did not object and on October 21, 2008, the ALJ granted the motion.

13) On October 21, 2008, the ALJ issued a public records request advisory to the Agency and Requester.

14) On October 22, 2008, following the October 21 prehearing conference, the ALJ issued an order proposing stipulations for consideration by the participants.

15) Requester timely opposed the ALJ's proposed stipulations and offered a modified version. The Agency did not object to Requester's modifications and the ALJ issued an order summarizing the prehearing conference which included the stipulations made by the participants.

16) Requester timely filed a response to the Agency's motion for summary judgment. On October 28, 2008, the Agency filed a document stating that it intended to file a reply to Requester's response on or before October 30, 2008. By letter dated October 29, 2008, Requester objected to the Agency filing a "reply" brief. The Agency's reply crossed in the mail and was filed on October 29, 2008.

17) On October 31, 2008, the ALJ issued an order denying the Agency's motion for summary judgment.

18) At the start of hearing, the ALJ verbally advised the participants of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

19) During the hearing, Requester, by avowal of counsel, made offers of proof to show that certain witness testimony that was excluded as irrelevant would be consistent with the declarations admitted as exhibits into the record.

20) During the hearing, Requester, by avowal of counsel, made offers of proof describing the testimony of certain witnesses whose testimony was excluded as irrelevant.

21) On November 7, 2008, the ALJ issued an interim order disclosing a post-hearing ex parte communication from a non-party, non-participant that was sent to and read by Commissioner Avakian and forwarded to the ALJ. In the order, the ALJ found that the communication had no relevance to the issues before the forum, but issued an order disclosing the communication and giving Requester the opportunity to rebut its substance. On November 14, 2008, Requester filed a response to the ex parte communication. On November 18, 2008, the Agency case presenter and the Agency's legal counsel filed affidavits disclaiming knowledge of the ex parte communication until after it was delivered to the Agency.

22) The ALJ issued a proposed order on March 3, 2009, that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. Neither the Agency nor Respondent filed exceptions.

FINDINGS OF FACT – THE MERITS

1) Requester plans to develop the Rose Quarter Housing Project ("Project") located at 10 N. Weidler Street in Portland, Oregon.

2) The Project involves the purchase and remodel of the former Ramada Inn Hotel located at 10 N. Weidler Street in Portland, Oregon.

3) The former Ramada Inn Hotel is a concrete building composed of five stories above-grade with below-grade basement and parking, and includes a one-story parking deck attached to the northwest corner of the building. Since 2004, the hotel has housed caretakers, and currently is used as transitional housing for women in recovery. Other than safety upgrades, the hotel has not been remodeled. The safety upgrades are not part of Requester's renovation project.

4) When completed, the Project will provide affordable housing on the upper four stories with the first floor converted to commercial space.

5) The commercial space likely will be occupied by a private non-profit drug and alcohol treatment center.

6) The commercial space will comprise approximately 17,000 square feet.

7) Excluding the basement and parking, the commercial space is approximately 19 percent of the total square footage of the building.

8) When completed, the Project will provide approximately 176 units of affordable rental housing.

9) All housing occupants will earn no more than 50 percent of the area median income.

10) The Project involves only one building and has a single architect, William Wilson Architects, and a single general contractor, Howard S. Wright. The Housing Development Center is the only project manager to administer and implement the Project.

11) The Project will be privately owned and supported in part by private funds.

12) The Project received a \$5,000,000 loan from the Portland Development Commission to acquire the Project property. The Project received a \$200,000 grant from Multnomah County for the Project. The City of Portland committed grant monies to the Project totaling approximately \$3,680,000 from the proposed sale of the City's Housing Opportunity Bonds. Agreements with these public agencies were executed before July 1, 2007.

13) As of April 7, 2008, the Oregon Housing and Community Services Department has reserved grant funding for the project totaling \$335,000.

ULTIMATE FINDINGS OF FACT

1) Requester is a non-profit corporation that plans to renovate a five-story former hotel located at 10 N. Weidler Street in Portland, Oregon.

2) The Project is privately owned and Requester has received public funding to support the Project.

3) When completed, the Project will provide affordable housing on the upper four stories with the first floor converted to commercial space.

4) Requester executed public funding agreements in September 2004 and February 2005 which were the project's principal sources of public financing when HB 2140 went into effect on July 1, 2007.

5) The funds Requester received from public entities before July 1, 2007, exceed \$750,000.

6) As of April 7, 2008, a public entity has reserved grant funding for the project totaling \$335,000.

7) The Project involves only one building, a single architect, a single general contractor, and only one project manager to administer and implement the Project.

CONCLUSIONS OF LAW

1) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the subject matter herein. ORS 279C.817.

2) Requester's Rose Quarter Project is a public works under ORS 279C.800(6)(a)(B).

3) Requester's Rose Quarter Project does not qualify for any exemptions under ORS 279C.810.

4) Under the facts and circumstances of this record, and according to the applicable law, the Commissioner of the Bureau of Labor and Industries has the authority to determine whether a project or proposed project is or would be a public works upon which payment of the prevailing wage rate is or would be required under ORS 279C.840. ORS 279C.817.

OPINION

The Commissioner of the Bureau of Labor and Industries (“Agency”) “shall, upon request of a public agency or other interested persons, make a determination about whether a project or proposed project is or would be a public works on which payment of the prevailing rate of wage is or would be required under ORS 279C.840.” Responding to Requester’s February 5, 2008, request, the Agency made a determination that Requester’s Rose Quarter Housing Project (“Project”) would be a public works if Requester accepted public funds after July 1, 2007, the date HB 2140 containing prevailing wage law amendments became law. The Agency further determined that the Project was not exempt under the amended statute’s affordable housing exemption. Requester subsequently brought this case under ORS 279C.817(4), which states “the commissioner shall afford the requester or a person adversely affected or aggrieved by the commissioner’s determination a hearing in accordance with ORS 183.413 to 183.470.”

Requester contends that “HB 2140 only allows the 2007 law to be applied to public contracts entered into after July 1, 2007” and the Agency improperly applied the 2007 statute to “all of the public contracts supporting the [Project].” Requester further contends that, even if the Agency applied the correct law, the Project is exempt under the amended statute’s affordable housing exemption, and that the Agency 1) erroneously interpreted ORS 279C.810(2)(d)(D) and the term “residential construction” to forbid the separation of the Project’s commercial and residential components, 2) refused to rely on the Portland City Code to define the Project as exempt under the definition of “residential construction,” and 3) ignored the statutory mandate found in ORS 279C.825(2) to separate the Project’s commercial and residential components and apply prevailing wage laws to each only if they separately meet the standard.

A. The Agency correctly applied the 2007 prevailing wage law as amended and determined that Requester’s Rose Quarter Housing Project will be a public works if the Project accepts public funds after July 1, 2007.

The term “public works” was redefined by the Oregon Legislature, effective July 1, 2007,ⁱⁱ and states, in pertinent part:

“(6)(a) A ‘public works’ includes, but is not limited to:

“ * * * * *

“(B) A project for the * * * major renovation * * * of a privately owned building * * * that uses funds of a private entity and \$750,000 or more of funds of a public agency * * *.”

ORS 279C.800(6)(a).

The Agency and Requester stipulated that the Project is a major renovation of a former hotel that will be privately owned and is supported by private funds. Requester does not dispute that the Project received a \$5,000,000 loan from the Portland Development Commission (“PDC”), a \$200,000 grant from Multnomah County, and a \$3,680,000 grant from the City of Portland to further the Project, or that the PDC, Multnomah County, and City of Portland are public agencies as that term is defined in ORS 279C.800(5). However, Requester argues that ORS 279C.800(6), as amended in 2007, does not apply to “public contracts” entered into before July 1, 2007, and, that if the funding sources are analyzed under the 2005 prevailing wage rate law, the funds are not “funds of a public agency.” Requester’s argument fails as a matter of law.

The text of HB 2140 provides the terms on which the 2007 legislation takes effect. In addition to stating the effective date, the legislation specifically exempts one type of project from the application of the PWR law amendments – those funded in whole or in part by bonds issued by the State Treasurer before July 1, 2007. Or Laws 2007 c. 764 § 48(3). Requester does not dispute and credible evidence shows that the Project does not contain revenue from State bond issues – only from the City of Portland. Therefore, the Agency correctly observed during the hearing that while it has

not sought to retroactively apply the amended definition of “public works” to the Project based solely on agreements executed prior to July 1, 2007, the Project is not exempt from the 2007 amendments. The Agency specifically determined that if the project is revised to include a funding commitment from Oregon Housing and Community Services (“OHCS”), the Project will be subject to the current definition of “public works” under ORS 279C.800(6)(a)(B).ⁱⁱⁱ

The legislation also provides that the amendments contained in HB 2140 “apply only to public contracts first advertised, but if not advertised then entered into, on or after the effective date of this 2007 Act.” Or Laws 2007 c. 765 § 48(1). Requester argues that the agreements executed prior to July 1, 2007, are “public contracts” based on the plain, ordinary meaning of the term; therefore, pursuant to HB 2140, the 2007 statute cannot apply to those agreements. Citing *Merriam-Webster’s Dictionary*, Requester maintains that by considering the definitions of “public” and “contract,” one could reasonably conclude “that an agreement between two parties, one of which being the government or a relation thereto, is a ‘public contract.’” While that definition is consistent with Requester’s theory, resort to dictionary definition to ascertain legislative intent is not necessary in this case. The Public Contracting Code consists of ORS chapters 279A, 279B, and 279C. ORS 279A.010(1)(bb). As used in the Public Contracting Code, “public contract” means:

“a sale or other disposal, or a purchase, lease, rental or other acquisition, by a contracting agency of personal property, services, including personal services, public improvements, public works, minor alterations, or ordinary repair or maintenance necessary to preserve a public improvement. ‘Public contract’ does not include grants.”

ORS 279A.010(1)(z). This definition was renumbered in 2007, but otherwise remained unchanged. Or Laws 2007 c. 764 § 1. Accordingly, none of the agreements funding Requester’s Project - the City of Portland grant, the Multnomah County grant, and the PDC loan for this Project - is a public contract. This conclusion is also consistent with

the context of Section 48(1) in HB 2140. HB 2140, as introduced, did not amend the Prevailing Wage Rate Law portion of the Public Contracting Code. Yet similar language stating that the amendments to the Code “apply only to public contracts first advertised, but if not advertised then entered into, on or after the effective date of this 2007 Act” was included in the original bill. See HB 2140 A-Eng. Section 30 (2007). Only after amendments to the Prevailing Wage Rate Laws were added to HB 2140 were two subsections added to Section 48 that specifically address the bill’s effect on public works projects. See HB 2140 B-Eng. Section 48(2) & (3) (2007).

One of those subsections is contained in Section 48(2), which provides that the 2007 amendments to the Prevailing Wage Rate Laws “do not apply to development and disposition agreements signed by an urban renewal agency before the effective date of this 2007 Act in connection with public-private projects for which no contracts for construction are advertised.” The City of Portland grant, the Multnomah County grant, and the PDC loan for this Project are not development and disposition agreements signed by an urban renewal agency. While PDC may be an urban renewal agency, evidence shows it did not own the Project property and therefore did not enter an agreement for its disposition.

The only evidence of legislative intent with respect to the application of the 2007 Prevailing Wage Rate Law amendments to specific projects is the language stating the amendments will not apply to certain agreements, i.e., “public contracts” and “development and disposition agreements entered into by an urban agency.” Requester’s Project does not include those types of agreements. At the same time, the legislature made it clear that the only public works projects that will be wholly exempt from application of the 2007 amendments are projects with bond issue funding when the

State Treasurer issued the bonds before July 1, 2007. Requester's Project includes a grant funded by bonds issued from the City of Portland, not the State.

The forum cannot find that the legislature intended to apply retroactively the amended definition of "public works" in ORS 279C.800(6)(a)(B) to a project for which the agreements were completed prior to July 1, 2007. But, neither Requester's Project nor its associated funding agreements are exempt from application of the 2007 amendments. As a result, if the Project is revised to include a funding commitment from OHCS, the Project will be subject to the current definition of "public works" under ORS 279C.800(6)(a)(B).

B. The Agency correctly determined that Requester's Rose Quarter Housing Project is not exempt from prevailing wage rate laws if the Project accepts public funds after July 1, 2007.

ORS 279.810(2)(d) provides that the Prevailing Wage Rate Laws, ORS 279C.800 to 279C.870, do not apply to "[p]rojects for residential construction that are privately owned and that predominantly provide affordable housing." The terms "affordable housing," "predominantly" and "privately owned" are defined or otherwise addressed in ORS 279C.810(2)(d). The Agency and Requester stipulated that the Project is intended to be privately owned and the apartment units that will be created during the hotel remodel will provide affordable housing under the income limits set forth in the definition of "predominantly." However, the Agency concluded in its April 7, 2008, determination that the Project is not "residential construction" for purposes of this exemption. As defined in ORS 279C.810(2)(d):

"'Residential construction' includes the construction, reconstruction, major renovation or painting of *single-family houses or apartment buildings not more than four stories in height* and all incidental items, such as site work, parking areas, utilities, streets and sidewalks, pursuant to the United States Department of Labor's 'All Agency Memorandum No. 130: Application of the Standard of Comparison "Projects of a Character Similar" Under Davis-Bacon and Related Acts,' dated March 17, 1978. However, the commissioner may consider different definitions of

residential construction in determining whether a project is a residential construction project for purposes of this paragraph, including definitions that:

“(i) Exist in local ordinances or codes; or

“(ii) Differ, in the prevailing practice of a particular trade or occupation, from the United States Department of Labor’s description of residential construction.” (Emphasis added)

ORS 279C.810(2)(d)(D).

The Agency and Requester agree that “residential construction” is an inexact term. See *Springfield Education Assn. v. School Dist.*, 290 Or 217, 223-24 (1980)(distinguishing exact terms “which impart relatively precise meaning” from inexact terms “which are less precise,” and noting that “[t]o determine the intended meaning of inexact statutory terms, in cases where their applicability may be questionable, courts tend to look to extrinsic indicators such as the context of the statutory term, legislative history, a cornucopia of rules of construction, and their own intuitive sense of the meaning which legislators probably intended to communicate by use of the particular word or phrase”). The Agency and Requester also agree that to determine the term’s intended meaning the question is what did the legislature intend by using that term. *Id.* at 224. They disagree, however, on the correct analytical framework for interpreting the term.

Requester maintains that the Agency has the authority to interpret a statute’s terms, but only within the legislative intent and overall purpose and policy of the term. Requester acknowledges that legislative intent is determined by using the methodology prescribed by the Oregon Supreme Court in *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610-12 (1993).

However, Requester contends that under *Springfield*, the Agency, “because of its assistance in drafting and pushing the statute through the legislature,” is obliged to use its own “intuitive sense of the meaning which legislators probably intended to

communicate by use of the particular word or phrase” when considering the purpose and policy of the term. Requester misapplies *Springfield*. The Court stated that it is the courts that “look to intrinsic indicators such as the context of a statutory term, legislative history, a cornucopia of rules of construction, and *their own intuitive sense of the meaning which legislators probably intended to communicate by use of the particular word or phrase.*” *Springfield* at 224. (Emphasis added)

Moreover, in order to effectuate the complete policy judgment that particular terms represent, the Oregon Supreme Court has held that “determining the general policy of a statute is a matter of statutory construction *controlled by the PGE framework.*” *Bergerson v. Salem-Keizer School District*, 341 Or 401, 412-13 (2006). (Emphasis added) Although the issues in *Bergerson* and *Springfield* were whether the agency’s interpretation of a *delegative* term was within the range of discretion allowed by the more general policy of the statutes at issue, interpretation of inexact *or* delegative terms is a matter of statutory construction “controlled by the *PGE framework,*”^{iv} and not *Springfield* as Requester contends. The Agency correctly applied the *PGE* methodology to interpret the meaning of the affordable housing exemption in this case. The forum thereby adopts the Agency’s analysis and its conclusions in their entirety as follows.

The PGE analysis begins by examining the text and context, applying statutory and judicially developed rules of construction that bear directly on how to read the text, such as to give words of common usage “their plain, natural, and ordinary meaning.” *PGE* at 611; ORS 174.010. If more than one meaning is possible after examining the text and context, then legislative history must be examined to determine legislative intent. *Id.* at 611-12. If the legislative history does not clarify the meaning of the statute, then general maxims of statutory construction are considered. *Id.* at 612.

In this case, the Agency correctly concluded that the Project is not “residential construction.” The meaning of the phrase “not more than four stories in height” in ORS 279C.810(2)(d) is exact. The Project in this case involves a building five stories in height, exceeding the height limitation in ORS 279C.810(2)(d) by one story.

The meaning of the term “apartment building” is less exact, but when given its plain, ordinary meaning, establishes that the Project is neither a single family home nor an apartment building. “Apartment building” is commonly defined as a “building containing a number of separate residential units and usually having conveniences (as heat and elevators) in common.” *Webster’s Third New Int’l Dictionary* 98 (Unabridged ed 2002). The evidence is undisputed that the Project involves a former Ramada Inn hotel, which is not an apartment building. In common parlance, a “hotel” is:

“a building of many rooms chiefly for overnight accommodation of transients and several floors served by elevators usually with a large open street-level lobby containing easy chairs, with a variety of compartments for eating, drinking, dancing, exhibitions and group meetings (as a salesmen or convention attendants) with shops having both inside and street-side entrances and offering for sale items of particular interest to a traveler, or providing personal services (as hairdressing, shoe shining), and with telephone booths, writing tables, and washrooms freely available.”

Webster’s at 1095. Although both types of buildings are habitable, their construction form and uses differ.

The Agency and Requester stipulated that the Project is for the purchase and remodel of a hotel. Requester’s project documents describe the Project as the purchase and remodel of the Ramada Inn hotel.^v There is no dispute that when the building was purchased, the building was a hotel. According to Requester, the building has not been physically altered from its initial construction before Requester’s purchase and no remodel work has begun.^{vi} The fact that Requester has used the hotel to provide transitional housing to its clients does not change the character of the structure.

There is no evidence the Project to renovate a five-story hotel has changed since the Agency issued its April 7, 2008, determination.

To be exempt under ORS 279C.810(2)(d), “residential construction” must involve the construction, reconstruction, major renovation or painting of a single family house or an apartment building. The term “construction” is defined in OAR 839-025-0004(5) as meaning “* * * the initial construction of buildings and other structures, or additions thereto * * *.” Because the Project involves the remodel of an existing hotel, it cannot be characterized as “construction.”

The term “reconstruction” is defined in OAR 839-025-0004(22) to mean “* * * highway and road resurfacing and rebuilding, the restoration of existing highways and road, and the restoration of buildings and other structures.” The term “restoration” means “bringing back to or putting back into a former position or condition.” *Webster’s* at 1936. Because the Project would convert an existing hotel building into a mixed-use structure comprised of both commercial space and apartments, the Project cannot be considered a restoration. The Project’s proposed conversion will change the entire character of the building and, therefore, does not meet the definition of residential construction under the “reconstruction” component.

As the Project does not involve construction or reconstruction, the applicable definition is under OAR 839-025-0004(11), which provides that “major renovation” means “the remodeling or alteration of building and other structures within the framework of an existing building or structure and the alteration of existing highways and roads, the contract price of which exceeds \$50,000.” While this definition describes the type of work to be done on the Project site, the fact that the work will be performed on a hotel makes the exemption inapplicable. The Project does not entail the “major

renovation” of a single family home or an apartment building, but of an existing hotel building.

As the Agency points out, the legislature knows how to draft a law so that it has the intended effect, and it did so when it amended the prevailing wage rate law in 2007. OR Laws 2007 c. 764. In addition to retaining the former definition of a “public works” in ORS 279C.800(6)(a)(A), the legislature created the definition under subparagraph (B) by expressly including in the term “public works”

“[a] project for the construction, reconstruction, major renovation or painting of a privately owned road, highway, building, structure or improvement of any type that uses funds of a private entity and \$750,000 or more of funds of a public agency.”

The legislature used the terms “road,” “highway,” “building,” “structure,” or “improvement” of any type as the subject of the designation. In the exemptions from the definition of “public works,” the legislature clearly defined the term “residential construction” at ORS 279C.810(2)(d)(D). Had the legislature intended to include as “residential construction” the construction, reconstruction, major renovation or painting of structures other than single family houses or apartment buildings, it could have done so. Whether the omission was by design or by default, the Agency and this forum are prohibited from inserting language that the legislature has omitted. *Tee v. Albertson’s, Inc.*, 148 Or App 384, 389 (1997); ORS 174.010.

A final element of the statutory definition of “residential construction” is that it applies “pursuant to the United States Department of Labor’s All Agency Memorandum No. 130: Application of the Standard of Comparison ‘Projects of a Character Similar’ Under Davis-Bacon and Related Acts, dated March 17, 1978.” This memorandum and a subsequent clarifying memorandum, All-Agency Memorandum No. 131, dated July 14, 1978, confirm that the major renovation of a five-story hotel is not residential construction. Under All Agency Memorandum No. 130, construction projects are

generally classified as building, heavy, highway, or residential. Building construction is described as “the construction of sheltered enclosures with walk-in access for the purpose of housing persons, machinery, equipment, or supplies. It includes all construction of such structures, the installation of utilities and the installation of equipment, both above and below grade level, as well as incidental grading, utilities and paving.” Examples of building construction are provided and include hotels and motels of any height and apartment buildings that are five stories and above. The Project, a five story hotel, meets this description. Residential construction, however, is described in All Agency Memorandum No. 130 as involving “single family homes or apartment buildings of no more than four (4) stories in height.”

All Agency Memorandum No. 131 clarifies that when a project includes different categories of construction, multiple wage schedules may be used. If work of a different category is incidental to the overall character of the project or is not a substantial amount of construction in itself, only one wage schedule is necessary. Generally, work that is less than 20 percent of the total project is incidental, except when the work is substantial by itself. Evidence shows the majority of work on the Project involves the renovation of a hotel, which is classified as building construction. As the Agency points out, even if that portion of the Project that will create affordable housing is construed as residential construction, the Project would become a mix of construction types. Additionally, credible evidence supports the Agency’s contention that the new commercial space – 17,000 square feet - is a substantial project by itself. While the commercial space is approximately 19 percent of the total square footage of the building, evidence shows that calculation does not include the sections of the basement and parking that the commercial tenants and customers will occupy. Consequently, that

portion of the Project is not incidental and the Project cannot be identified as residential construction in keeping with the memoranda.

Under the “residential construction” definition, the Agency is authorized to consider different definitions of “residential construction” in determining whether a project is residential construction. However, the Agency’s discretion is limited to what the legislature has identified as the type of different definitions that may be considered.

ORS 279C.810(2)(d)(D) provides in pertinent part:

“[T]he commissioner may consider different definitions of residential construction in determining whether a project is a residential construction project for purposes of this paragraph, including definitions that:

“(i) Exist in local ordinances or codes; or

“(ii) Differ in the prevailing practice of a particular trade or occupation, from the United States Department of Labor’s description of residential construction.”

Requester provided no evidence or identified any definition of “residential construction” in a local ordinance or code that applies to the renovation of a five-story hotel of concrete construction. The Portland City Code defines “residential structure,” but not “residential construction.” Although the definition refers to “any building or other improvements designed or intended to be used for residential purposes,” it does not define “construction,” and although it applies to “any building,” it does not define “residential.” Portland City Code § 24.15.14 (2007). Requester also refers to Portland City Code provisions that provide for wood frame construction designed for apartment occupancies. However, the Agency correctly points out that those provisions do not define “residential construction,” nor is the use of wood framing in new construction relevant to the renovation of an existing hotel constructed of concrete. The Agency’s discretion to consider different definitions of residential construction is limited to definitions of “residential construction.” The Portland City Code contains no such definition. Similarly, Requester provided no evidence or identified any relevant

definitions of “residential construction” that differ in the prevailing practice of a particular trade or occupation from the United States Department of Labor’s description of residential construction.

Based on the text and context of ORS 279C.810(2)(d)(D), the definition of “residential construction” does not include the major renovation of a five-story hotel into a mixed-use building with apartments and commercial space. For a statute to be ambiguous there must be at least two reasonable interpretations of the disputed statutory terms. *State v. Cooper*, 319 Or 162, 167 (1994). A reasonable interpretation refers to an interpretation that is “not wholly implausible.” *State v. Owens*, 319 Or 259, 268 (1994); *State v. Stamper*, 197 Or App 413, 417 (2005), *rev den*, 339 Or 230 (2005). The term “residential construction” does not lend itself to more than one reasonable interpretation in this context. Based on a plain reading of the statute, residential construction does not include construction, reconstruction, major renovation or painting of hotels and even if it did, it does not include structures more than four stories in height. Furthermore, the Project itself is of mixed residential and commercial use due to the substantial commercial component on the ground floor and related areas.

Absent any apparent ambiguity, there is no need to examine legislative history. When the legislature’s intent is clear from the text and context, further inquiry is unnecessary. *PGE*, 317 Or at 611.

Requester’s attempt to provide declarations of witnesses who collaborated with the Agency prior to the passage of HB 2140 as purported evidence of legislative intent is misguided. Under *PGE*, and its progeny, the best evidence of legislative intent is the statute itself. *PGE*, 317 Or at 610-11. *See also, e.g., Cooper*, 319 at 166 (“the best evidence of the legislature’s intention and the first level of analysis is to examine the text and context of the statute); *Owens*, at 319 Or 810 (“[w]e begin with the text * * * which

provides the best evidence of the legislature's intent). The Agency's interpretation of ORS 279C.810(2)(d)(D) is reasonable and Requester has offered no legislative history to support a different interpretation.

C. The Agency was not required to divide the Project before making its determination.

Alternatively, Requester argues that the Agency was required to divide the Project pursuant to ORS 279C.827(2), which provides that

“[[i]f a project is a public works of the type described in ORS 279C.800(6)(a)(B) or (C), the commissioner shall divide the project, if appropriate, after applying the considerations set forth in subsection (1)(c) of this section to separate the parts of the project that include funds of a public agency or that will be occupied or used by a public agency from the parts that do not use funds of a public agency and will not be occupied or used by a public agency.”

The Agency's initial task, pursuant to ORS 279C.817, was to “make a determination about whether a project or proposed project is or would be a public works on which payment of the prevailing rate of wage is or would be required under ORS 279C.840.” The Agency made that determination based on information provided by Requester. Requester contested the Agency's determination on the ground that it was erroneous and not consistent with legislative intent.

Nothing in ORS 279C.840 requires the Agency to address whether a project should be divided, and that issue is not properly before this forum. Even if it were an issue, all of the information in the record militates against division. The Agency must divide a project only if appropriate and in light of the considerations listed in ORS 279C.827(1)(c). Requester provided no information to support its contention that the Project must be divided. Indeed, if anything, the record establishes that the Project is not appropriate for division because there is no physical separation of the project structures, the project involves only one building, has one single architect, a single general contractor and one single project manager to administer and implement the

Project. Additionally, Requester has not identified any parts of the Project that will not use public funds. Although the Agency was not required to address whether division of the Project is appropriate under ORS 279C.827 in its determination, the evidence establishes that the Project is for the renovation of a single building using public funds and cannot be divided.

Requester's principal disagreement with the Agency's determination from the outset has been that the Agency failed to effectuate legislative intent by determining that Requester's Project was not "residential construction" of affordable housing as contemplated in ORS 279C.810(2)(d)(D). However, the record shows the Agency properly ascertained the legislature's intent from the statute's text and context, and correctly concluded that Requester's Project, a renovation of a five-story hotel, would be subject to the prevailing wage rate laws if public funds were committed to the Project after July 1, 2007. The Agency's determination therefore is affirmed.

ORDER

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

ⁱ When the Agency issued its determination, OHCS had announced its intent to fund the Project with public funds, but had not entered into any agreement committing the funds.

ⁱⁱ Or Laws 2007 c. 764 § 49.

ⁱⁱⁱ OHCS had not made any commitment to funds when the Agency made its determination or when the hearing commenced. OHCS only had reserved grant funding for the project totaling \$335,000 as of April 7, 2008. See Finding of Fact – The Merits 13.

^{iv} Notably, interpretation of the term "residential construction" does not require a legislative policy determination by the Agency; thus, the term is not delegative. Requester and the Agency have agreed that the term is not so precisely defined to be an "exact term," but rather is an "inexact term," subject to interpretation for consistency with legislative intent.

^v See Finding of Fact – The Merits 2.

^{vi} See Finding of Fact – The Merits 3.