

**In the Matter of**  
**BLANCHET HOUSE OF HOSPITALITY**  
**Case No. 11-10**

**Final Order of Commissioner Brad Avakian**

**Issued February 19, 2010**

**SYNOPSIS**

The Agency determined that Requester's affordable housing project was not "residential construction" and was subject to Oregon's prevailing wage rate laws. The Commissioner held that the Agency correctly determined that Requester's Project was subject to the prevailing wage rate laws because it was not "residential construction" under ORS 279C.810(2)(d), ORS 279C.800, ORS 279C.810, ORS 279C.840, OAR 839-025-0004(24).

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The above-entitled case came on regularly for hearing before Alan McCullough, 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 3, 2009, in the W. W. Gregg Hearing Room, and on November 5, 2009, in the David Wright Room, both located in the State Office Building at 800 NE Oregon Street, Portland, Oregon.

Jeffrey C. Burgess, case presenter and an Agency employee, represented the Bureau of Labor and Industries ("BOLI" or "Agency"). Michael E. Haglund, attorney at law, represented Blanchet House of Hospitality ("Requester"). Brian Ferschweiler, Requester's Executive Director, was present throughout the hearing as the person designated by Requester to assist in the presentation of its case.

Requester called as witnesses: Rich Ulring, President, Requester's Board of Directors; Brian Ferschweiler, Requester's Executive Director; Joseph Pinzone, lead architect for Requester's Project; and Joseph Weston, Portland-area property developer.

The Agency called as witnesses: Lois Banahene, BOLI's Prevailing Wage Rate Compliance Manager, and Susan Wooley, BOLI's Prevailing Wage Rate Technical Assistance Coordinator.

The forum received as evidence:

- a) Administrative exhibits X-1 through X-14;
- b) Agency exhibits A-1 through A-15 (submitted prior to hearing); and
- c) Requester exhibits R-1 through R-12 (submitted at 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 May 21, 2009, Requester submitted a request for a determination about whether Requester's proposed project would be a public works on which payment of the prevailing wage rate would be required under ORS 279C.840. Requester's request included a statement describing the proposed project and its projected uses; its cost and funding sources; a copy of Requester's 100% Schematic Design package; a building rendering; a Disposition and Development Agreement negotiated between Requester and the Portland Development Commission ("PDC") that involved, among other things, transfer of the title of the development site currently owned by the PDC to the Requester; and the conditions precedent to obtaining the title transfer.

2) On June 25, 2009, the Agency issued a determination in which it concluded that Requester's proposed project will be subject to Oregon's prevailing wage rate laws. The Agency based its determination on the following:

- Because \$750,000 or more in funds of a public agency will be used on the project, the project is a "public works" as defined in ORS 279C.800(6)(a)(B).

- Requester's project did not meet the definition of "residential construction" set out in ORS 279C.810(2)(d)(D).
- None of the other exemptions listed in ORS 279C.810(2) apply to the proposed project.

The Agency did not consider any local ordinances or codes in making its determination. Requester was given 21 days to contest the Agency's determination and request an administrative hearing.

3) Requester was served with the determination. On July 9, 2009, Requester filed a request for reconsideration of the Agency's determination in which it argued that its proposed project meets the definition of "residential construction." On the same date, Requester filed a request for hearing.

4) On July 14, 2009, the Agency denied Requester's request that the Agency reconsider its determination.

5) On August 4, 2009, the Agency submitted a request for hearing that included Requester's initial request for determination, the Agency's determination, Requester's request for reconsideration, the Agency's response, and Requester's request for a contested case hearing.

6) On August 5, 2009, the Hearings Unit issued a Notice of Hearing stating that the hearing would commence at 9:00 a.m. on November 3, 2009. 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.

7) On August 11, 2009, 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 18, 2009, and notified them of the possible sanctions for failure to comply with the order.

8) The Agency timely submitted the requested documents, marked as Agency exhibits A-1 through A-15, and the ALJ admitted them into the record as exhibits.

9) Requester timely filed a statement identifying Requester's reasons for contesting the Agency's determination. Requester's stated reasons for contesting the determination were: (a) The project is a "residential building"; (b) The project's soup kitchen is not a "commercial kitchen"; and (c) Requester's project meets the definition of "residential construction" in ORS 279C.810(2)(d)(D). Requester's statement was admitted into the record as an exhibit.

10) On October 12, 2009, the Agency submitted a list of persons it intended to call as witnesses and statements describing their proposed testimony.

11) On October 13, 2009, Requester submitted a list of persons it intended to call as witnesses and statements describing their proposed testimony.

12) 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.

13) The ALJ issued a proposed order on December 4, 2009, that notified the participants they were entitled to file exceptions to the proposed order within 10 days of its issuance.

14) On December 8, 2009, the Agency filed a motion for an extension of time to file exceptions to the proposed order in which the Agency case presenter cited his

workload and noted that Requester's counsel did not object. On December 14, 2009, the ALJ granted the Agency's motion and granted the Agency a 10-day extension.

15) On December 23, 2009, the Agency filed exceptions to the proposed order. On January 4, 2010, Requester filed a response to the Agency's exceptions. The Agency objected to Requester's response. On January 7, 2010, the ALJ issued an order stating that Requester's response would not be considered because there is no provision in OAR 839-050-0000 *et seq* allowing a response to exceptions. The Agency's exceptions have been considered in the Final Order.

### **FINDINGS OF FACT – THE MERITS**

#### **THE “PROJECT”**

1) Blanchet House of Hospitality (“Blanchet House”), an Oregon nonprofit corporation, presently operates a facility located at 340 NW Glisan, Portland, Oregon, that provides food, clothing and shelter to those in need in the Portland community. Blanchet House has operated this facility since 1952. During its entire history, Blanchet House has never charged for the meals it provides on a daily basis and operates its “soup kitchen”<sup>i</sup> solely for charitable purposes.

2) At present, Blanchet House provides housing in a structured setting for up to 29 unemployed men who reside at Blanchet House from a minimum of three months to a year or more. Those residents receive room and board in exchange for 36-42 hours of work per week<sup>ii</sup> related to the operation of Blanchet House's soup kitchen. The soup kitchen serves three meals a day, six days a week, to homeless, low income and working poor of inner northwest Portland, and to community volunteers who work in the soup kitchen, serving 600-800 meals daily. The soup kitchen serves residents three meals a day, seven days a week. Blanchet House's current dining room capacity is 41 persons at a time, and the meal service period is one hour in duration.

3) Blanchet House considers itself to be “first and foremost” a soup kitchen that also provides a transitional housing program.<sup>iii</sup> (Testimony of Ferschweiler)

4) Prospective residents are required to volunteer 16 hours of work before they can become residents at Blanchet House. They are either recruited from Blanchet House’s food line or referred to Blanchet House by outside agencies. All residents are in recovery from alcohol or drug dependence and must remain drug and alcohol free while living at Blanchet House. On average, residents stay three to six months, but some residents have stayed for up to two years. At a minimum, residents must stay at least 90 days. At any given time, six residents at Blanchet House who have been assigned more challenging tasks are considered “unpaid staff” and are required to stay at least six months.

5) With respect to its residents, Blanchet House’s goal is to transition its residents to employment in the community and clean and sober living. Blanchet House requires that all residents must attend 30 AA meetings in their first 30 days of residence.

6) At the time of hearing, 10 of Blanchet House’s 28 residents had lived at the Blanchet House for more than one year.

7) The project for which Requester sought a coverage determination (the “Project”) involves the construction of a new three-story building with a basement at the southwest corner of NW Glisan Street, Portland, Oregon. That corner is presently occupied by the Dirty Duck Tavern and owned by the Portland Development Commission (“PDC”). As part of the Project, the Dirty Duck Tavern will be demolished and the PDC and Requester will swap properties, with Requester becoming the owner of the property on which the Project will be located and the PDC becoming the owner of the property upon which the Blanchet House is currently located. While the Project is under construction, Blanchet House will continue to operate at its present location.

When construction has been completed, Blanchet House will move its current operation into the Project and the existing Blanchet House will be demolished.

8) The Project will have the same mission as the existing Blanchet House and will provide the same services, including a soup kitchen, employment, and housing for its residents.

9) At the Project, all residents will be tested for alcohol when they return to the building and will be drug tested once a week. There will be a resident curfew of 10 p.m. and residents returning to the building after that time will not be allowed inside.

10) SERA, a Portland architectural firm, is responsible for designing the Project and is being paid \$685,000 for its work. Joseph Pinzone, one of SERA's principal architects, is in charge of SERA's work.

11) The Project will be privately owned and supported by private funds and more than \$750,000 in public funds.

12) The anticipated cost of the Project is \$10,597,267. The sources of funding for the Project include:

- \$5,397,267 in Anticipated Proceeds from Capital Campaign.
- \$1,000,000 in Estimated Net Land Exchange Value.
- \$2,000,000 in anticipated New Market Tax Credits.
- \$2,000,000 from the PDC (committed, but will not be paid until the Project has met criteria specified in an "Agreement for Disposition and Development" entered into between Requester and the PDC.)
- \$200,000 from Green Investment Fund Grant.

13) The Project will have three floors built over a below-ground basement, and will provide housing for up to 51 residents.

14) The Project's basement will have a water storage area for storing collected rain water (2005 square feet; solely related to use by and on behalf of residents); storage areas for food and bikes for residents, non perishables and general

building storage, and a resident weight/exercise room (2,545 square feet – solely related to use by and on behalf of residents); and food storage area (1,835 square feet) for the soup kitchen.

15) The Project's first floor will have a waiting area that will accommodate 50-70 persons while they await their turn to eat, a separate resident entrance, guest bike parking, a dining room with 20 tables and 80 chairs, a kitchen in which food is prepared for residents and Blanchet House's guests, cold storage, a loading zone, a multi-purpose room, a counseling office to be used by a future counselor, a nurse station to provide medical services to residents and guests, janitor/handyman closet, two public restrooms, and offices for Blanchet House's executive director and manager. In total, the first floor will cover 9,310 square feet. Of that total, 3,558 square feet will be primarily related to use by and on behalf of residents.

16) The Project's second and third floors will be solely for use by residents and Blanchet's onsite manager. Each floor will have double and single occupancy units ("units") and a large common bathroom. One single unit that will be occupied by Blanchet House's paid onsite manager will have a private bathroom. No other units will have a private bathroom and no units will have cooking facilities. None of the units will have locks on the doors, phones, or cable television (televisions are not supplied and will only be available through donation). Each unit will have a bed, a nightstand, a small dresser, and a built in closet for each resident. Residents will not be allowed to have guests in their rooms.

17) The second floor will have a central restroom with showers, sinks, and toilets/urinals; a laundry room with washer and dryer; a personal supply closet that contains toilet paper, shampoo, soap, razors and shaving cream provided to residents by Blanchet House; a small non-smoking TV room with cable and

an under-counter fridge, microwave and coffee maker; a large TV room for smokers with cable and two full size refrigerators, microwave and coffee maker, public phone, storage for videos, books, board games, couches and chairs for TV viewing, and a table for playing cards; and a janitor's closet that contains typical janitorial supplies used primarily by residents.

Approximately one-fourth of the second floor will be the outdoor, flat roof of the first floor that will be a common area accessible to all residents. Including the outdoor area, the second floor will be 9,660 square feet in size.

18) Like the second floor, the third floor will also have a public restroom with showers, sinks, and toilets/urinals; a laundry room with washer and dryer; a personal supply closet that contains toilet paper, shampoo, soap, razors and shaving cream provided to residents by Blanchet House; and a janitor's closet that contains typical janitorial supplies used primarily by residents.

In addition, the third floor will also have: a learning center that has basic computers with "no internet" and a community board for such things as job postings, bus schedules, rehab programs and services; a clothing storage room containing donated items for residents' use with an internal lockable cabinet for newer and more expensive donated items. In total, the third floor will be 7,130 square feet in size.

19) Neither the second or third floors will have stoves except for the microwave ovens on the second floor TV rooms.

20) The Project contains an option for a future fourth floor containing separate units that would house 24 additional residents. The future fourth floor is also planned to have a public restroom with showers, sinks, and toilets/urinals; a laundry room with washer and dryer; a personal supply closet that contains toilet paper, shampoo, soap, razors and shaving cream provided to residents by Blanchet

House; and a janitor's closet containing typical janitorial supplies used primarily by residents. Finally, it would also have a small non-smoking TV lounge with cable and an under-counter fridge, microwave and coffee maker.

21) The Project will have an elevator and stairs connecting the floors. It will also have central heating.

22) Excluding the potential fourth floor, the Project will have a total of 32,485 square feet of floor space. 24,898 square feet, or 77 percent, will be primarily devoted to use by and on behalf of residents.<sup>iv</sup>

23) There was no evidence presented as to the Project's respective costs of construction related to residential and non-residential functions.

24) Residents at the Project will have incomes no greater than 60 percent of the area median income.

25) As at the present Blanchet House, residents at the Project will perform work related to the soup kitchen six to seven hours a day, six days a week in exchange for room and board, and their average length of stay is expected to remain the same.

### **THE AGENCY'S DETERMINATION**

26) Susan Wooley has been the Technical Assistance Coordinator for the Agency's prevailing wage rate ("PWR") unit for the last six and one-half years. In that capacity, she presents seminars to contractors, subcontractors, and public agency personnel on PWR law. She is also a lead worker who reviews the work of rest of the PWR unit staff and writes PWR coverage determinations when they are requested.

27) Wooley was assigned to write a determination of whether the project was covered under prevailing wage laws in response to Requester's request for a determination. After reviewing the records that Requester submitted and the relevant

statutes, Wooley prepared a memorandum on June 17, 2009, regarding Requester's coverage determination request.

28) In her memorandum, Wooley concluded that the Project would not be subject to PWR laws because it was "privately owned new construction of an apartment building that predominately provides affordable housing and that is not more than four stories in height." In conclusion, she noted:

"One issue that I am not entirely sure of, however, is whether the kitchen and dining areas that will be built are really 'incidental' to the residential portion of the building. The residents are required to work there in exchange for room and board, and the meals are not being sold as they would be in a regular commercial establishment. That being the case, I am inclined to say the kitchen and dining areas are in support of the residential portion of the building, and are therefore incidental to the residential construction.

"If you are also inclined to agree with this, then the new Blanchet House project will meet the definition of 'public works' in ORS 279C.800(6)(a)(B), but the exemption for 'projects for residential construction that are privately owned and that predominantly provide affordable housing' in 279C.810(2)(d) will apply to the project. As such, this project will not be subject to the prevailing wage rate laws."

29) On June 18, 2009, Wooley prepared a draft determination in which she concluded that "the proposed project is for residential construction that will be privately owned and that predominantly provides affordable housing. Therefore, the exemption from the prevailing wage rate law provided for in ORS 279C.810(2)(d) will apply to this project." Wooley gave the memorandum and draft determination to Lois Banahene, the Wage and Hour Division's Compliance Manager, and Christie Hammond, the Wage and Hour Division's Administrator, for their review. (Testimony of Wooley; Exhibits R-8, R-9)

30) Banahene manages the Agency's PWR unit and supervises its staff with regard to PWR coverage determinations. She has been working with the PWR unit since before 2000.

31) Wooley met with Banahene and Hammond after they reviewed her memorandum and draft determination. Banahene and Hammond disagreed with her draft determination and explained the reasons for their disagreement. Wooley summarized their meeting in a second memorandum to document why the Agency's determination differed from her initial analysis. In that memorandum, Wooley noted that Hammond and Banahene disagreed with her initial analysis because "it didn't technically fit the residential construction standard, the definition \* \* \* in our statute and rules," and noting they had reminded Wooley that:

"[T]ransient housing is generally not considered to be an 'apartment' building. Also, for a housing unit to be considered an 'apartment,' it must include a bathroom and kitchen. The Blanchet House will be more dormitory-like, in that the rooms contain only one or two beds, desks and closets. Each floor of bedrooms has one shared restroom, a shared laundry room, and a shared kitchenette."

Subsequently, Wooley concluded that the Project would be providing "transient" housing because it was a "homeless shelter." She also reviewed the U.S. 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" (AAM 130), which she had not consulted prior to writing her memo and draft determination, and concluded that the Project was really more like a dormitory, which AAM 130 lists under the category of "BUILDING CONSTRUCTION."

32) On June 25, 2009, the Agency issued its coverage determination in which it concluded that Requester's Project was not exempt from the prevailing wage rate laws as provided in ORS 279C.810(2)(d) because:

"The definition of 'residential construction' in ORS 279C.810(2)(d)(D) is based on the U.S. Department of Labor's guidelines for this term. Pursuant to the U.S. 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,' residential construction includes single family houses or apartment buildings of no more than four stories in height. The proposed project is not construction of a

single-family house or an apartment building. As such, the project does not meet the definition of 'residential construction' in ORS 279C.810(2)(d)(D). \* \* \*

33) Joseph Pinzone is a principal at SERA Architects who has had 20 years architectural experience and has been a licensed architect for 13 years. In the past five to seven years, his work has focused on private affordable housing and public subsidized affordable housing projects. He is the principal architect in charge of the Project on SERA's team and is responsible for "all the things that go on with respect to architectural and professional services for the Blanchet House." He is also acting as "the project leader from a project management and technical advisory point of view." From 2002 until 2007, he served on the code committee of the American Institute of Architects ("AIA"), which is a liaison to the state code authorities. His testimony demonstrated his familiarity and expertise with residential structures, local codes and ordinances, and the terminology associated with them. Despite his potential bias because of SERA's financial interest, the form has credited his testimony in its entirety except for his conclusory testimony that the Project is "residential" in a "construction sense" under AAM 130.

34) Joseph Weston was called as an expert witness by Requester. He is a Portland-area real estate developer and investor and has been responsible for the development and construction of thousands of living units in apartments since 1968 in the Portland area. He has also built several thousand condominium living units in the Pearl District in Portland. He was a credible witness, except for his initial testimony concerning the number of persons sleeping in a room in dormitories, which he later clarified as referring to the sleeping porch at a fraternity house, and his conclusory testimony that the Project would have been classified as an "apartment building" under AAM 130 in 1978.

#### **ULTIMATE FINDINGS OF FACT**

1) Requester's project involves the construction of a new three-story building with a basement in Portland Oregon. The project will be privately owned and supported by more than \$750,000 in public funds.

2) The Project will be a soup kitchen that also provides a transitional housing program for men ("the Project's residents") who are recovering from drug or alcohol addictions.

3) The Project's first floor will have a dining room, kitchen, cold storage, a loading zone, a multipurpose room, a counseling office, nurse station, janitor\handyman closet, two public restrooms, and offices for the Project's executive director and manager. The Project's residents and soup kitchen guests will eat all meals in the dining room and all meals will be prepared in the kitchen by the Project's residents and community volunteers. Approximately 600 to 800 meals will be served daily.

4) The Project's second and third floors will each have a number of double and single occupancy units with a large common bathroom. None of the units will have kitchen facilities or locks on the doors and only one will have a private bathroom. The Project will provide toiletries and janitorial supplies for the Project's residents. The units will provide housing for up to 51 residents who will live at the Project for a minimum of three months. It is anticipated that some residents will live at the Project for a year or more.

5) Residents in the Project's transitional housing program will not be allowed to have guests in their rooms. All residents will be tested for alcohol when they return to the building and will be drug tested once a week. There will be a resident curfew of 10 p.m. and residents returning to the building after that time will not be allowed inside.

6) The Project's residents will be men whose incomes are no greater than 60 percent of the area median income.

7) The Project's residents will receive free room and board in exchange for working full time in the Project's soup kitchen that serves three meals a day to its residents, and six days a week, three meals a day, to homeless lower income and working poor of inner northwest Portland.

8) The project will also have a below-ground basement. The basement will have a water storage area for storing collected rain water; storage areas for food and bikes for residents, non-perishables and general building storage; a resident weight\exercise room; and a food storage area for the soup kitchen.

9) The project will have an elevator and stairs connecting all floors. It will also have central heating.

10) Seventy-seven percent of the Project's area will be primarily devoted to use by and on behalf of residents

#### **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 proposed Project is a public works under ORS 279C.800(6)(a)(B).

3) ORS 279C.800 to 279C.870 apply to Requester's Project because it is a not a project for "residential construction." ORS 279C.810(2)(d).

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**

## **INTRODUCTION**

Requester sought a determination from the Commissioner as to whether its proposed Project is a public works on which payment of the prevailing wage rate will be required under ORS 279C.840. The Commissioner, acting through BOLI's Wage and Hour Division, determined that Requester was not entitled to a prevailing wage rate exemption because it did not involve "residential construction." Requester filed a request for reconsideration and a request for hearing, contending that the Project is a project "for residential construction" within the meaning of ORS 279C.810(2)(d). The Agency declined to consider Requester's reconsideration request, and the case was set for hearing.

## **PAYMENT OF PREVAILING WAGE RATE REQUIRED ON ALL PUBLIC WORKS UNLESS AN EXEMPTION APPLIES**

ORS 279C.840(1) requires that the prevailing wage rate must be paid to workers "upon all public works" by all contractors and subcontractors unless a statutory exemption applies. Requester contends that it is entitled to an exemption under ORS 279C.810(d) and OAR 839-025-0100(e) because it is a project for "residential construction" that is privately owned and predominantly provides "affordable" housing.

## **REQUESTER'S PROJECT IS A "PUBLIC WORKS"**

Under ORS 279C.800(6)(a)(B), a term "public works" includes "[a] project for the construction \* \* \* of a privately owned building \* \* \* that uses funds of a private entity and \$750,000 or more of funds of a public agency \* \* \*." The participants stipulated that the Project will be privately owned and that it will use more than \$750,000 in funds from the Portland Development Commission, a public agency. Accordingly, the forum concludes that the Project is a "public works."

## **REQUESTER’S PROJECT WILL BE PRIVATELY OWNED AND WILL PROVIDE “AFFORDABLE HOUSING”**

The participants stipulated that the Project will be privately owned and that the upper two floors will provide “affordable housing,” meaning that the Project’s residents will have incomes no greater than 60 percent of the area median income. ORS 279C.810(1)(d)(A).

## **REQUESTER’S PROJECT IS NOT “RESIDENTIAL CONSTRUCTION” UNDER ORS 279C.810**

“Residential construction” is defined in ORS 279C.810(1)(d) as follows:

“(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[.]”

The statute identifies two specific structures as “residential construction” – single-family houses and apartment buildings less than five stories in height – and refers the Commissioner to AAM 130 for guidance. It also gives the Commissioner the discretion to consider different definitions contained in local ordinances or codes. However, since Requester did not identify any definition of “residential construction” in a local ordinance or code, this Order relies exclusively on the definition of “residential construction” contained in the first sentence of ORS 279C.810(1)(d)(D) to resolve this case and does not consider Requester’s argument that the Project, under the City of Portland’s building code, is a “residential structure” containing single room occupancy (“SRO”) housing, thereby meeting the residential construction requirement in ORS 279C.810(2)(d)(D)(i).<sup>v</sup>

**A. AAM 130.**

AAM 130 was adopted by the U.S. Department of Labor (“DOL”) in 1978 to assist contracting agencies in determining the appropriate wage rate schedule for public works, not as a guide to be used in determining whether a project is in fact a public works. It contains general definitions of four categories of construction -- building, residential, heavy, and highway – and lists, but does not define, examples of projects included in each category. Only the residential and building categories are relevant to this case.

AAM 130 defines “BUILDING CONSTRUCTION” as follows:

“Building construction generally is 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.”

AAM 130 defines “RESIDENTIAL CONSTRUCTION” as:

“those [projects] involving the construction, reconstruction, alteration, or repair of single-family houses or apartment buildings not more than four (4) stories in height. This includes all incidental items such as site work, parking areas, utilities, streets and sidewalks.”

“BUILDING CONSTRUCTION” is followed by a long list of examples, including dormitories, hospitals, hotels, and nursing and convalescent facilities. “RESIDENTIAL CONSTRUCTION” has a shorter list, including apartment buildings of four stories or less, multi--family houses, and married student housing. These are all private, self-contained autonomous residential units with incidental conveniences in common, not critical things like bathrooms and kitchens.

**B. The Project Is Not An “Apartment Building”**

Requester contends that the Project is “residential construction” under ORS 279C.810(2)(d)(D) because it meets the definition of an “apartment building” of four stories or less. It is undisputed that the Project is four stories or less in height.

The term “apartment building,” as used in ORS 279C.810(2)(d)(D), is not defined by statute or administrative rule. In the case of *In the Matter of Central City Concern*, 30 BOLI 94 (2008), the first prevailing wage rate determination case to come before the forum, the Commissioner determined that “apartment building” was an inexact term and that it should be given its “plain, natural, and ordinary meaning,” using the methodology set out by the Oregon Supreme Court in *PGE v. Bureau of Labor and Industries*, 317 Or 606 (1993). *Id* at 104. Relying on *Webster’s Third New Int’l Dictionary* (unabridged ed 2002), the Commissioner defined “apartment building” as a “building containing a number of separate residential units and usually having conveniences (as heat and elevators) in common.” *Id*. However, because the facts were undisputed that the project involved a building that was five stories in height and involved the purchase and remodel of a former hotel, the Commissioner did not find it necessary to parse that definition.

To define “apartment building,” one must first ascertain the meaning of the word “separate” before applying that definition to the Project.

The relevant definition of “separate” follows:

“**2a** : not shared with another : INDIVIDUAL, SINGLE <group consciousness ...makes the individual think lightly of his own *separate* interests— M.R.Cohen> <the world's largest city deserves *separate* consideration— L.D.Stamp> **b** *often capitalized* : estranged from a parent body <there were 90 *Separate* churches, with 6,490 members— F.S.Mead>

“**3 a** : existing by itself : AUTONOMOUS, INDEPENDENT <the partitioning of India created two *separate* jute economies— F.F.George> <reorganization of schools into *separate* primary and postprimary units— H.C.Dent> **b** : dissimilar in nature or identity : DISTINCT, DIFFERENT <my most recent works, in their *separate* ways, embody this tendency— Aaron Copland> <the full bibliography ... lists 2204 *separate* publications— *Geographical Journal*> <built-in facilities ... permit cooking in seven *separate* ways without the use of additional utensils— *Report of General Motors Corp.*>”

*Webster's* at 2069. In this case, the units are residential, in that they are used as a transitional dwelling place for the Project's residents. *Webster's* at 1931. However, to be separate, they must be "autonomous and independent." Without kitchens and bathrooms, the units cannot be "autonomous and independent" and are therefore not "separate." Because they are not "separate," the Project does not fall within the definition of "apartment building" and is not "residential construction" under ORS 279C.810(2)(d)(D).

**C. The Project Is a "Dormitory"**

Among the multitude of structures listed under the categories of "BUILDING CONSTRUCTION" and "RESIDENTIAL CONSTRUCTION" in AAM 130, none exactly describes the Project. In terms of similarity, the label "dormitory," listed as an example under "BUILDING CONSTRUCTION," comes closest. Like "apartment building," the word "dormitory" is not defined by statute or administrative rule and is an inexact term, and the forum once more relies on *Webster's*. *Webster's* defines "dormitory" as "a residence hall providing separate rooms or suites for individuals or for groups of two, three, or four with common toilet and bathroom facilities but usually without housekeeping facilities." *Webster's* at 675. Although not an exact fit, it is a fairly good match for the transitional housing part of the Project and is the closest match to any of the structures listed in AAM 130 under the categories of "BUILDING CONSTRUCTION" and "RESIDENTIAL CONSTRUCTION."

**CONCLUSION**

Requester's Project is a dormitory that is not residential construction" under ORS 279C.810(1)(d)(D) and is subject to Oregon's prevailing wage rate laws.

**ORDER**

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

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<sup>i</sup> “Soup kitchen” is the term that Rich Ulring, president of Requester’s board of directors, used in referring to the Blanchet House’s public meal program.

<sup>ii</sup> Ferschweiler testified that residents work six to seven hours per day, six days per week.

<sup>iii</sup> Ferschweiler, Requester’s Executive Director, testified as follows in response to questioning by Requester’s counsel and the Agency’s case presenter:

(Haglund) Q: “How would you describe the scope of operations at the Blanchet House at 4<sup>th</sup> and NW Glisan?”

A: “First and foremost we are a soup kitchen providing free meals three times a day, six days a week, to anyone who comes through that door. We also provide a transitional housing program for recovering addicts in the other two floors of the Blanchet House.”

(Burgess) “Q: So how do you determine who’s eligible to live there? Is it just first come, first serve?”

“A: We require that each man volunteer 16 hours of work before he’s allowed to move into the Blanchet. Patrick Daley makes that decision, along with some of his staff, but mainly Patrick makes that decision who comes into the program.”

<sup>iv</sup> In this calculation, square footage devoted to non-resident or mixed use includes basement storage (1,835 square feet), first floor dining area and queuing (3,980 square feet), first floor kitchen (1,260 square feet), and first floor loading (512 square feet).

<sup>v</sup> The Portland city code defines “residential structure,” but not “residential construction.” The Commissioner has previously held that the Agency’s discretion to consider different definitions of “residential construction” is limited to definitions of “residential construction.” *In the Matter of Central City Concern*, 30 BOLI 94, 108 (2009).