

VAL HOYLE
COMMISSIONER



DUKE SHEPARD
DEPUTY COMMISSIONER

BUREAU OF LABOR AND INDUSTRIES

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

In the Matter of:

Case Nos. 29-19

**CITY OF THE DALLES,
COLUMBIA GATEWAY URBAN
RENEWAL AGENCY and
TOKOLA PROPERTIES, INC.,**
Requesters.

FINDINGS OF FACT
CONCLUSIONS OF LAW
OPINION
ORDER

SYNOPSIS

City of The Dalles, Columbia Gateway Urban Renewal Agency and Tokola Properties, Inc. requested a Determination as to whether the proposed urban renewal project to construct a mixed-use development in The Dalles, Oregon 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 correctly determined that the proposed project is a public works project under ORS 279C.800(6)(a)(B) (2017). Therefore, payment of the prevailing rate of wage to workers on the project would be required under ORS 279C.840.

The above-entitled case was assigned for hearing to Jennifer Gaddis, designated as Administrative Law Judge ("ALJ") by Val Hoyle, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by Administrative Prosecutor Adam Jeffries, an employee of the Agency. Requesters City of The Dalles ("The Dalles") and Columbia Gateway Urban Renewal Agency ("URA") were represented by Mr. Gene Parker. Requester Tokola Properties, Inc. ("Tokola Properties") was represented by Mr. Gregory Miner.¹ On

¹ The Dalles, URA and Tokola Properties are referred to collectively as "Requesters."

1 December 3, 2018, a contested case hearing regarding the Agency's Prevailing Wage
2 Rate ("PWR") Determination was held, at the Oregon Employment Department office
3 located at 700 Union St, The Dalles, Oregon.

4 The Agency called BOLI PWR Technical Assistance Coordinator Susan Wooley
5 as a witness. The Dalles and URA called Mr. Matthew Klebs and Mr. Steve Harris as
6 witnesses. Tokola Properties called Mr. Owen Bartels and Mr. Dwight Unti.

7 The forum received into evidence Administrative exhibits X1 through X12. The
8 forum also received the following Agency exhibits:

- 9 1) A1 through A13;
- 10 2) A15;
- 11 3) A17; and
- 12 4) A19 through A22.

13 The forum received the following Requester exhibits:

- 14 1) R12a;
- 15 2) R14; and
- 16 3) R23;

17 Having fully considered the entire record in this matter, I, Val Hoyle, Commissioner
18 of the Bureau of Labor and Industries, hereby make the following Findings of Fact
19 (Procedural, On the Merits, and Ultimate²), Conclusions of Law, Opinion, and Order.

20 **FINDINGS OF FACT – PROCEDURAL**

21 1) On May 8, 2018, The Dalles and URA, through counsel Gene E. Parker,
22 submitted a written request for a determination under ORS 279C.817 ("Coverage
23
24

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 Determination") as to whether their proposed project, "The Tony's Building," was a "public
2 work, subject to the payment of prevailing wages under ORS 279C.840." Tokola
3 Properties, through its counsel Gregory J. Miner, joined in their request. The proposed
4 project ("the Project") involved the demolition of an existing structure and the construction
5 of a "mixed-use redevelopment," which would include housing, parking and retail space.
6 (Ex. A1, A15)

7 2) Relying on information accompanying the request and additional
8 information subsequently provided to BOLI by Requesters, the Agency issued a
9 Coverage Determination on July 17, 2018. The Agency initially determined that the PWR
10 laws would not apply to the Project. (Ex. A11)

11 3) On August 6, 2018, The Dalles and URA filed a request for a contested
12 case hearing on the Agency's July 17, 2018 Coverage Determination. (Ex. A14)

13 4) After the July 17th determination was issued, the Agency subsequently
14 received further information from Requesters, causing the Agency to amend its
15 determination and issue an Amended Coverage Determination on August 9, 2018. The
16 Amended Coverage Determination contained the following "Conclusions of Law" and
17 "Determination:"
18

19 **"CONCLUSIONS OF LAW**

20 "1. The project is not being carried out or contracted for by a public agency and,
21 as such, does not meet the definition of 'public works' under ORS
22 279C.800(6)(a)(A).

23 "2. Under ORS 279C.810(1)(a)(B), 'funds of a public agency' does not include
24 building and development permit fees paid or waived by the public agency.
25 Therefore, the amounts [The Dalles and URA] have paid or will pay for city systems
development charges, city fees and charges, Park and Recreation District Systems
development charges, Building Codes Division fees and charges, and school
district construction excise tax are not considered funds of a public agency used
on the Project.

1 "3. Under ORS 279C.810(1)(a)(D), 'funds of a public agency' does not include
2 land that a public agency sells to a private entity at fair market value. [The Dalles
3 and URA] will sell the Property to the [Tokola Properties] for \$10[.00], which is
4 \$309,990[.00] less than the appraised fair market value. However, under ORS
5 279C.810(1)(a)(E), 'funds of a public agency' does not include the difference
6 between the value of land that a public agency sells to a private entity as
7 determined at the time of the sale after taking into account any plan, requirement,
8 covenant, condition, restriction or other limitation, exclusive of zoning or land use
9 regulations, that the public agency imposes on the development or use of the land,
10 and the fair market value of the land if the land is not subject to those limitations.

11 "According to the appraisal for the Property, the 'estimated land residual
12 value with profit' is -\$2,100,000[.00] due to the restrictions and limitations [The
13 Dalles and URA] have imposed on the Project. While [The Dalles and URA] will
14 convey the Property to the [Tokola Properties] at less than fair market value,
15 because the land has a negative value as a result of the restrictions and limitations
16 the public agencies have imposed on the Project, the difference between the fair
17 market value of the land and the sale price is not considered 'funds of a public
18 agency' used on the Project.

19 "4. The Agency paid \$81,350[.00] for a survey, an environmental assessment,
20 and an archeological study for the Project. [The Dalles and URA] state that these
21 expenditures are not funds of a public agency for multiple reasons.

22 "First, the costs were allocated between the Agency and the [Tokola
23 Properties], and only the costs allocated to the [Tokola Properties] were
24 considered 'funds of a public agency' by [The Dalles and URA]. However,
25 regardless of the proportion of benefit to either party, the fact remains that the total
amount expended by the Agency for those costs is \$81,350[.00]. BOLI will
consider the full costs of the survey, environmental assessment, and archeological
study when determining whether the costs are 'funds of a public agency' under
OAR 839-025-0004(9)(a).

"Second, [The Dalles and URA] state these costs are for 'staff resources'
and not 'funds of a public agency' under ORS 279C.810(1)(a)(F). Under ORS
279C.810(1)(a)(F), 'funds of a public agency' does not include staff resources of
the public agency used to manage a project or to provide a principal source of
supervision, coordination or oversight of a project. Additionally, under OAR 839-
025-0004(27), 'staff resources of a public agency' means employees of the public
agency who may manage, supervise or oversee a project, or employees of a public
agency used to design or inspect one or more components of a project, but not
persons who with whom a public agency contracted to perform such services.' The
costs for the survey, environmental assessment, and archeological study were for
persons with whom the agency contracted to perform those services, not
employees of a public agency, and therefore these costs cannot be considered
'staff resources of the public agency.'

1 "Third, [The Dalles and URA] state that these costs are 'value added to the
2 land' and not funds of a public agency under ORS 279C.810(1)(a)(I). Under ORS
3 279C.810(1)(a)(I), 'funds of a public agency' does not include value added to the
4 land as a consequence of a public site preparation, demolition of real property or
5 remediation or removal of environmental contamination, except for value added in
6 excess of the expenses the public agency incurred in the site preparation,
7 demolition or remediation or removal when the land is sold for use in a project
8 otherwise subject to ORS 279C.800 to ORS 279C.870. Whether or not a property
9 survey, an environmental assessment, or an archaeological study may be
10 considered 'site preparation,' this provision in statute exempts [sic] 'funds of a
11 public agency' the *value added to the land* as a result of site preparation or
12 demolition paid for by a public agency; it does not exempt the *costs* of the site
13 preparation or demolition paid for by the public agency. It is unlikely the survey,
14 environmental assessment, or archaeological study has or will add value to the
15 land, but whether they do or not, the \$81,350[.00] the Agency paid for these items
16 cannot be considered 'value added to the land as a result of site preparation or
17 demolition paid for by a public agency.'

18 "Finally, [The Dalles and URA] state these costs are not funds of a public
19 agency under ORS 279C.810(1)(a)(E). This statute provides that 'funds of a public
20 agency' does not include the difference between:

21 "(i) The value of land that the public agency sells to a private entity as
22 determined at the time of the sale after taking into account the plan,
23 requirement, covenant, condition, restriction or other limitation, exclusive of
24 zoning or land use regulations, that the public agency imposes on the
25 development or use of the land; and

"(ii) The fair market value of the land if the land is not subject to the
limitations described in sub-subparagraph (i) of this subparagraph.

"This provision relates to the value of the land under certain circumstances.
It does not reference the expenditures a public agency makes to pay for the costs
of such items as surveys, environmental assessments, or archeological studies.
Therefore, it is not appropriate to analyze these costs under ORS
279C.810(1)(a)(E).

"The \$81,350[.00] the agency paid for the survey, environmental
assessment, and archaeological study is therefore 'funds of a public agency' used
on the Project.

"5. The Agency has paid or will pay a total of approximately \$637,551.75 for
demolition and site preparation costs. [The Dalles and URA] state that these
expenditures are not funds of a public agency for two reasons.

"First, [The Dalles and URA] state that these costs are 'value added to the
land' and not funds of a public agency under ORS 279C.810(1)(a)(I). This statute

1 exempts from 'funds of a public agency' the *value added to the land* as a result of
 2 site preparation or demolition paid for by a public agency; it does not exempt the
 3 costs of site preparation or demolition paid for by the public agency. It is not known
 4 whether the demolition or site preparation has or will add value to the land, but
 whether they do or not, the \$637,551.75 the Agency paid for these items cannot
 be considered 'value added to the land as a result of site preparation or demolition
 paid for by a public agency.'

5 "Second, [The Dalles and URA] state these costs are not funds of a public
 6 agency under ORS 279C.810(1)(a)(E). This provision relates to the value of land
 7 under certain circumstances. It does not reference the expenditures a public
 agency makes to pay for demolition or site preparation. Therefore, it is not
 appropriate to analyze these costs under ORS 279C.810(1)(a)(E).

8 "The \$637,551.75 the Agency paid for demolition and site preparation is
 9 therefore 'funds of a public agency' used on the Project.

10 "6. Under ORS 279C.800(6)(a)(B), 'public works' includes a project that uses
 11 \$750,000[.00] or more of funds of a public agency for constructing, reconstructing,
 12 painting or performing a major renovation on a road, highway, building, structure
 or improvement of any type. The Project will use approximately \$1,422,600.75 in
 funds of a public agency, as shown in the table below. Therefore, the Project
 meets the definition of 'public works' under ORS 279C.800(6)(a)(B).

13	Appraisal	\$8,000.00
14	Economic Analysis	\$25,846.00
15	Security Fencing	\$500.00
16	Marketing Consultant	\$1,800.00
17	Survey	\$3,850.00
18	Environmental Assessment	\$2,500.00
19	Archeological Study	\$75,000.00
20	NW Natural Gas	\$80,000.00
21	PUD Relocation	\$118,022.00
22	City water/sewer relocation	\$175,961.50
23	Oil Tank	\$8,920.00
24	Demolition	\$250,000.00
25	Lab and Asbestos testing	\$2,800.00
	Easement survey work	\$1,848.25
	Additional financial assistance	\$667,553.00
	Total Funds of a Public Agency:	\$1,422,600.75

23 "7. No public agency will occupy or use any of the square footage of the Project.
 24 Therefore, the Project does not meet the definition of 'public works' under ORS
 25 279C.800(6)(a)(C).

1 **"DETERMINATION**

2 "Based on the foregoing, the Prevailing Wage Rate laws, ORS 279C.800 to
3 ORS 279C.870, and OAR Chapter 839, Division 025, will apply to The Tony's
4 Building project.

5 "This determination is based on the agency's file as of the date of this
6 determination. The commissioner may make a different determination if any of the
7 project information is incorrect or if the project or project documents are modified
8 or supplemented after the date of this determination."

9 (Emphasis in original) (Ex. A15)

10 5) On August 22, 2018, Requesters collectively filed a request for a contested
11 case hearing on the Amended Coverage Determination, issued August 9, 2018. (Ex.
12 A16)

13 6) On or about September 19, 2018, the Agency filed a Request for Hearing
14 form with the Contested Case Coordinator. (Ex. X1)

15 7) On September 20, 2018, the forum issued a Notice of Hearing to
16 Requesters and the Agency setting the time and place of hearing for 9:30 a.m. on
17 November 8, 2018, at the offices of the Oregon Employment Department in The Dalles,
18 Oregon. The Notice of Hearing also stated that the matter was assigned to ALJ Jennifer
19 Gaddis. Together with the Notice of Hearing, the forum sent a copy of Requesters' request
20 for a contested case, the Agency's August 9, 2018 Amended Coverage Determination, a
21 Multilanguage Form, a document entitled "Summary of Contested Case Rights and
22 Procedures" containing the information required by ORS 183.413, a document entitled
23 "Servicemembers Civil Relief Act (SCRA) Notification, and a copy of the forum's
24 contested case hearings rules, OAR 839-050-000 to 839-050-0445. (Exs. X2, X2A-2G)

25 8) On September 26, 2018, Requesters filed their Unopposed Motion for
 Postponement of Hearing. The forum granted Requester's motion, via interim order, on

1 (Emphasis added). Requesters argued that, under this rule, Requesters are the
2 proponents since they 'have filed their appeal and request for hearing.'
3 (Requesters' motion, p. 3) Requesters stated that the Division 50 contested case
4 rules addressed presentation of evidence only in administrative prosecutions of
5 prevailing wage rate violations.

6 "Although OAR 839-050-0250(3) specifically uses language reflecting the
7 presentation of evidence in cases involving charging documents, the burden of
8 proof remains with the Agency in hearings regarding prevailing wage rate ('PWR')
9 determinations.⁴ As such, the Agency should present its case, followed by the
10 Requesters' case and then the Agency may present any rebuttal evidence. OAR
11 137-003-0040(3) conforms to this model. The Agency is the proponent of its
12 determination, bears the burden of proof as to the determination and should
13 present its case first. Further, attached to the Notice of Hearing in this matter, was
14 a document entitled 'Summary of Contested Case Rights and Procedures,' and
15 subtitled 'Wage and Hour Division – Prevailing Wage Rate Determination.' Section
16 14, entitled 'Hearing Procedure,' lists the presentation of evidence as follows:

- 17 'a) The agency and party may make opening statements.
- 18 b) The agency will present evidence in support of its case.
- 19 c) The party will have an opportunity to present evidence in support of
20 its case and to rebut the Agency's evidence.
- 21 d) The agency may present evidence to rebut evidence presented by
22 the party.
- 23 e) The agency and the party may make closing arguments.
- 24 f) After the Proposed Order is issued, either the agency or the party
25 may file written Exceptions. OAR 839-050-0250.'

(Emphasis in original). Requesters' Motion to Present Evidence First is DENIED.

"Evidence and Witnesses at Hearing"

18 "Hearings conducted pursuant to OAR 839-050-0445 are unique in that,
19 unlike contested cases involving the administrative prosecution of violations within
20 the Agency's jurisdiction, PWR determination hearings are very narrow in scope.
21 As such, the hearing process is intended to only address the determination of the
22 PWR Unit and the materials that the PWR Unit considered in order to reach its
23 determination. The rules regarding admissible evidence in such a hearing
24 demonstrate this limited scope. Pursuant to OAR 839-050-0445(5), 'within ten
25 days after the Notice of Hearing is issued, the administrative law judge will issue
an order requiring:

⁴ "PWR determination hearings are governed by the procedures set forth in OAR 839-050-0000 to OAR 839-050-0430, except to the extent those procedures are modified by OAR 839-050-0445. OAR 839-050-0445(2).

- 1 (a) The party to file a written statement identifying all of the party's
2 reasons for contesting the determination; and
3 (b) The agency to file copies of all materials provided by the requester
4 under OAR 839-025-0005(1)-(4), a copy of the agency's
5 determination, and a copy of any other materials the agency relied
6 on to reach its determination. The agency will mark these materials
7 and the agency's determination for identification in the manner set
8 forth in 839-050-0270.'

9 The rule does not allow for the admission of exhibits outside of what was provided
10 to and considered by the PWR Unit for the determination. OAR 839-050-0445(5)-
11 (6). To do so would render the hearing process of analyzing the determination and
12 materials meaningless, as it would involve new evidence that was not originally
13 considered.

14 'The forum may also narrow the scope of testimony. Pursuant to OAR 839-
15 050-0445(8), 'after reviewing the materials and statements filed pursuant to
16 sections (5) and (7) of this rule, the administrative law judge may issue an interim
17 order finding that the testimony of any proposed witness is irrelevant to the issues
18 at hearing and disallowing the proposed testimony. The administrative law judge
19 may also request that the party or agency bring additional witnesses to the
20 hearing.' The case participants are advised that unless a witness's testimony
21 pertains to the materials provided by Requesters under OAR 839-025-0005(1)-(4)
22 or the reasons for the Agency's determination, their testimony will not be
23 considered by the forum. OAR 839-050-0445(8). **Evidence presented at
24 hearing is limited to the exhibits filed pursuant to OAR 839-050-0445(5)(b)
25 and witness testimony explaining the exhibits and their significance.** OAR
839-050-0445(9).

"IT IS SO ORDERED."

(Emphasis in original) (Ex. X11)

14) On November 21, 2018, the Agency filed its Stipulated Facts, on behalf of
all case participants. (Ex. X12)

15) On December 3, 2018, the hearing began. At the start of the hearing, the
ALJ orally advised the Agency and Requesters of the issues to be addressed, the matters
to be proved, and the procedures governing the conduct of the hearing. (Hearing Record)

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1 16) During the hearing, Requesters offered Ex. R12a. The Agency had no
2 objection. Requester Ex. R12a was identical to Agency Ex. A1, p. 128 and p. 133, except
3 that the pictures in R12a were in color. Ex. 12a was admitted.⁵

4 17) During the hearing, Requesters offered Ex. R14. The Agency had no
5 objection. Ex. R14 was identical to Ex. A13, p. 6. Witnesses, for both the Agency and
6 Requesters, referred to a demonstrative aid of an enlarged version of Ex. R14 and
7 referred to it as "R14," during their testimony. In the interest of clarity of the record, Ex.
8 R14 was admitted.

9 18) During the hearing, Requesters also offered Exs. R23 through R27.
10 Requesters did not previously provide the exhibits to the Agency as part of the Agency's
11 Coverage Determination or Amended Coverage Determination. Requesters offered Ex.
12 R23 as impeachment evidence, during their cross-examination of BOLI PWR Technical
13 Assistance Coordinator Susan Wooley. Ms. Wooley testified on direct that the only
14 pertinent legislative history that BOLI could find was compiled within Ex. A18, and that
15 BOLI could not find anything specific to the statutory exemptions argued in this case.
16 Requesters then offered Ex. R23 as impeachment evidence, since the exhibit consisted
17 of legislative history regarding the statutory exemptions.
18

19 Although not admissible for substantive purposes, impeachment evidence can be
20 used to attack the credibility of the witness. *State v. Gill*, 3 Or. App. 488, 494 (1970).
21 Pursuant to ORS 40.345, "the credibility of a witness may be attacked by any party,
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23
24

25 ⁵ In this particular case, the fact that the photos were in color did not make a substantive difference to the
issues before the forum. Since the Agency did not object, the exhibit was admitted.

1 including the party calling the witness.”⁶ After reviewing the record in this matter, it is
2 clear Ms. Wooley limited her testimony to what *BOLI* found, when it performed its
3 legislative history search. There was no evidence that Ms. Wooley had, in fact, found the
4 legislative history compiled in Ex. R23 and then testified falsely about it. Although the
5 Agency did not object to the admission of Ex. R23, and the exhibit was admitted, it was
6 not proper impeachment evidence and was given no weight. Had the exhibit been
7 provided as part of Requesters’ request for a Coverage Determination, the forum could
8 have evaluated the exhibit substantively, pursuant to OAR 839-050-0445(5)(b) and (9).

9 19) On cross-examination, Requesters also offered a Request for Coverage
10 Determination, made by Metro and the City of Hillsboro, and the resulting Coverage
11 Determination issued by the Agency on March 7, 2012. These documents were marked
12 as Exs. R24 and R25 and Requesters offered them for the purposes of impeachment.
13 Ms. Wooley testified, however, that she was not involved with the determination nor did
14 she have any personal knowledge of the determination. The exhibits were not proper
15 impeachment evidence of Ms. Wooley’s testimony and were not admitted into the record.
16

17 20) During Requesters’ direct examination of Dwight Unti, the Agency objected
18 to the use of Exs. R26 and R27, which were documents prepared by Mr. Unti. The forum
19 did not admit the exhibits, since they were not provided as part of the Request for
20 Coverage Determination. Pursuant to OAR 839-050-0445(5)(b) and (9), exhibits in PWR
21 Determination Hearings are limited to “* * * all materials provided by the requester under
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25 ⁶ “While the forum may draw on the Oregon Evidence Code for guidance in a matter not addressed in this
forum’s contested case hearing rules, these proceedings are not governed by the Oregon Evidence
Code.” *In the Matter of Gordy’s Truck Stop, LLC*, 28 BOLI 200, 215 (2007).

1 OAR 839-025-0005(1)–(4), a copy of the agency’s determination, and a copy of any other
2 materials the agency relied on to reach its determination.”

3 21) After the conclusion of Requesters’ case, the Agency called Ms. Wooley as
4 a rebuttal witness. During her rebuttal testimony, the Agency asked Ms. Wooley to
5 address Mr. Unti’s testimony regarding unrelated Coverage Determinations, that arrived
6 at a different result than that which was the subject of the hearing. Ms. Wooley testified
7 that she would need to review the specific files to address the determinations accurately.
8 She also speculated that one of the determinations could have been a file she was familiar
9 with and explained why the outcome was different in that case. During her testimony
10 about that determination, she referenced factors listed in ORS 279C.827. Pursuant to
11 ORS 279C.827(1)(c), in determining if a project has been improperly divided, the
12 commissioner “shall consider:

- 13
- 14 (A) The physical separation of the project structures;
 - 15 (B) The timing of the work on project phases or structures;
 - 16 (C) The continuity of project contractors and subcontractors working on
project parts or phases;
 - 17 (D) The manner in which the public agency and the contractors
administer and implement the project;
 - 18 (E) Whether a single public works project includes several types of
improvements or structures; and
 - 19 (F) Whether the combined improvements or structures have an overall
purpose or function.”

20 Ms. Wooley went on to testify that ORS 279C.827 is regularly considered during the
21 deliberation of all Coverage Determinations.

22 Requesters moved to strike her testimony regarding ORS 279C.827, arguing that
23 the Agency had not given notice of its application to the matter before the forum. The
24 forum denied the Motion to Strike because ORS 279C.827(2)(a) sets forth a statutory
25 right of the commissioner to consider particular factors, at the commissioner’s sole

1 discretion. ORS 279C.827(2)(a) states “[t]he commissioner may apply the considerations
2 set forth in subsection (1)(c) of this section to determine whether to divide a public works
3 project into more than one contract, *regardless* of whether the commissioner believes that
4 a person or public agency divided the public works project for the purpose of avoiding
5 compliance with ORS 279C.800 to 279C.870.” Thus, the commissioner need not suspect
6 a requester is attempting to avoid compliance with PWR laws, nor must the commissioner
7 wait for a requester to raise the issue of a divided project; she has the discretion to
8 examine the issue when she feels it is appropriate to do so. Ms. Wooley’s testimony
9 regarding ORS 279C.827(1)(c) was initially offered to rebut the evidence elicited by
10 Requesters during the direct examination of Mr. Unti, regarding coverage determinations
11 *not* before the forum. Pursuant to OAR 839-050-0250(7), the Agency is entitled to offer
12 rebuttal evidence. Ms. Wooley testified that ORS 279C.827 lists factors that are always
13 considered by the commissioner because the commissioner has the discretion to do so.
14 However, as Requesters noted in their cross-examination, neither Requesters nor the
15 Agency ever argued or alleged that a divided project was involved in this matter. Pursuant
16 to ORS 183.415(3)(c), a contested case hearing notice “must include * * * [a] reference
17 to the particular sections of the statutes and rules involved * * *.” The Notice and
18 accompanying documents for this contested case hearing met the requirements of ORS
19 183.415(3). Requesters’ Motion to Strike is denied.
20

21 22) The hearing concluded and the record closed on December 4, 2018.
22 (Hearing Record)

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- 1 c. "On January 5, 2016, [The Dalles and URA] and [Tokola Properties]
2 entered into an Exclusive Negotiating Agreement ('ENA') for joint
3 development of the Property. Although this ENA expired, [The Dalles
4 and URA] and [Tokola Properties] entered into a new ENA for
5 redevelopment of the Property, effective August 2, 2016.
- 6 d. "On February 26, 2016, [URA] acquired the Property for the purpose
7 of a mixed-use redevelopment, to include market rate housing,
8 parking, and retail space. The proposed redevelopment is referred
9 to as The Tony's Building (the 'Project').
- 10 e. "On February 28, 2018, [URA] and [Tokola Properties] entered into
11 an Agreement for Disposition and Development of Real Property (the
12 'Agreement'). The Agreement governs the sale and redevelopment
13 of the Property.
- 14 f. "Under the Agreement, [Tokola Properties] will purchase the
15 Property from [The Dalles and URA] for ten dollars (\$10[.00]).
- 16 g. "The Agreement requires development of the Project within certain
17 timelines, and requires the Project contain numerous elements,
18 including:
- 19 i. "A mixed-use development constructed in a single building of
20 approximately 47,000 square feet in size and comprised of
21 four stories on approximately 0.59 acres of land.
 - 22 ii. "49 market rate apartments with a mix of studio, one-bedroom,
23 two-bedroom, and three-bedroom floor plans.
 - 24 iii. "Approximately 1,500 square feet of ground-level retail space)
 - 25 iv. "44 tuck-under, off-street parking spaces and five offsite
parking spaces.
 - v. "A bicycle wash and repair area.
 - vi. "A fitness center.
 - vii. "Controlled building access.
 - viii. "Elevator access to all floors.
 - ix. "A community room.
- h. "There are no plans for any public agencies to use or occupy any of
the square footage of the Project.

- 1 i. "The Agreement states in Section 3.1 that [The Dalles and URA] will
 2 have and exercise no control over the construction of the Project.
 3 j. "The Agreement stipulates under Section 9.4 that [The Dalles and
 4 URA] have the following remedies if [Tokola Properties] fails to obtain
 5 a certificate of completion within 36 months of the closing date:
 6 i. "Re-enter and take possession of the Property;
 7 ii. "Terminate (and revert in [The Dalles and URA]) the estate
 8 conveyed by the Deed for the Property;
 9 iii. "Terminate [Tokola Properties]'s right to develop the Property;
 10 iv. "Provide [The Dalles and URA] with the right to resell the
 11 Property.
 12 k. "Under Section 6.3 of the Agreement, [The Dalles and URA] agree
 13 to pay [Tokola Properties] \$750,000[.00] in financial assistance for
 14 the Project. Under an amendment to the Agreement, dated June 20,
 15 2018, the [p]arties have agreed to limit this amount to \$749,900[.00].
 16 l. "[URA] has paid or will pay for \$388,508.25 in building and
 17 development permit fees, including city systems development
 18 charges, city fees and charges, Parks and Recreation District
 19 systems development charges, Building Codes Division fees and
 20 charges, and school district construction excise tax. The [p]arties
 21 agree the following are not funds of a public agency used on the
 22 Project:

City Systems Development Charges (SDCs)	\$116,511.50
City Fees and Charges	\$440.00
Parks and Recreation SDCs	\$56,938.00
Building Codes Division Fees/Charges	\$123,898.75
School District Construction Excise Tax	\$90,720.00

- 23 m. "An appraisal of the Property was done by Integra Realty Resources,
 24 effective January 16, 2018, The appraisal states that the estimated
 25 land value (i.e., the as-is fair market value) is \$310,000[.00]. The fair
 market value of the Property less the sale price is \$309,990[.00]. The
 [p]arties agree that the fair market value of the property less sale
 price in the amount of \$309,990.00, are not funds of a public agency
 used on the Project.
 n. "[URA] paid \$8,000[.00] for the appraisal for the Property. The
 [p]arties agree that the \$8,000[.00] paid for the appraisal for the
 Property are funds of a public agency used on the Project.

- 1 o. "[URA] paid \$25,846[.00] for an economic analysis for the Project. The [p]arties agree that the \$25,846[.00] paid for an economic analysis for the Project are funds of a public agency used on the Project.
- 2
- 3 p. "[The Dalles] will be providing security fencing around the excavation site for the City-owned parcels which make up the parking lot. The estimated cost for providing the security fencing is \$500.00. The [p]arties agree that the \$500.00 paid for security fencing are funds of a public agency used on the Project.
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- 6 q. "[URA] paid for a marketing consultant at a cost of \$1,800.00. The [p]arties agree that the \$1,800.00 paid for a marketing consultant are funds of a public agency used on the Project.
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- 9 r. "The [p]arties agree that the \$667,553.00 in financial assistance [URA] will pay [Tokola Properties] are funds of a public agency used on the Project.
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- 11 s. " * * * the [p]arties agree that the following are funds of a public agency used on the Project (BOLI contends additional funds of a public agency are being used on the Project):
- 12

13	Appraisal	\$8,000.00
14	Economic Analysis	\$25,846.00
15	Security Fencing	\$500.00
16	Marketing Consultant	\$1,800.00
17	Additional Financial Assistance Paid to Developer	\$667,553.00
18	Total	\$703,699.00

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- 20 t. "[URA] paid \$3,850[.00] for a survey of the Property. [URA] required a boundary survey, at a cost of \$1,925[.00], [Tokola Properties] requested and [URA] agreed to upgrade the survey to a full ALTA survey for [Tokola Properties]'s use, which increased the cost to \$3,850[.00]. The [p]arties agree that the additional cost of \$1,925[.00] for the ALTA survey to be funds of a public agency used on the Project. Parties do not agree on whether the remaining \$1,925 for the boundary survey should be considered funds of a public agency used on the Project or 'exempt' under ORS 297C.810(1)(a)(l).
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1 u. "[URA] paid \$2,500[.00] for an environmental assessment of the
 2 Property. [URA] and [Tokola Properties] agreed that the assessment
 3 was of equal value to both [p]arties, and as a result, [The Dalles and
 4 URA] considered half of the cost allocated to [Tokola Properties], or
 5 \$1,250[.00], to be funds of a public agency and will be deducted from
 6 the financial assistance to be paid to [Tokola Properties]. The
 [p]arties agree that \$1,250[.00] of the environmental assessment are
 funds of a public agency used on the Project. The [p]arties disagree
 on whether the remaining \$1,250[.00] should be considered funds of
 a public agency used on the Project or exempt under ORS
 297C.810(1)(a)(I).

7 v. "According to the Determination Request Letter dated May 8, 2018,
 8 pages 8-9, [The Dalles and URA] contracted for an archeological
 9 study covering the Property, the adjacent alley, and the [c]ity parking
 10 lot parcels. The cost was \$75,000[.00]. [The Dalles] 'must deal with
 11 archeological issues throughout its downtown to allow broad-based
 12 development to occur. [Tokola Properties] only requires an
 13 archeological survey to guide it in its excavation activities after
 [URA]'s site preparation work.' [URA] and [Tokola Properties] agreed
 on an allocation of the cost of the study 'based on the breadth of the
 archeological study and the relevant benefit to [The Dalles and URA]
 for their broader development work and to [Tokola Properties] for its
 site-specific excavation work.' The cost allocated to [Tokola
 Properties] was \$43,026.00. The [p]arties agree that \$43,026.00 are
 funds of a public agency used on the Project. The [p]arties disagree
 on whether the remaining \$31,974.00 for the archeological study
 should be considered funds of a public agency used on the Project
 or 'exempt' under ORS 297C.810(1)(a)(I).

17 w. " * * * the [p]arties agree that some amount of the following costs are
 18 funds of a public agency used on the Project. The [p]arties disagree
 19 on the amount that should be considered funds of a public agency
 used on the Project as shown below:

Cost	[The Dalles and URA] and [Tokola Properties] consider to be funds of a public agency	BOLI considers to be funds of a public agency
Survey	\$1,925.00	\$3,850.00
Environmental Assessment	\$1,250.00	\$2,500.00
Archeological Study	\$43,026.00	\$75,000.00
Total	\$46,201.00	\$81,350.00

- 1 x. *** the [p]arties agree that the following amounts are funds of a
 2 public agency used on the Project (BOLI contends additional funds
 3 of a public agency are being used on the Project):

4 Appraisal	\$8,000.00
5 Economic Analysis	\$25,846.00
6 Security Fencing	\$500.00
7 Marketing Consultant	\$1,800.00
8 Survey (1/2 of total cost)	\$1,925.00
9 Environmental Assessment (1/2 of total 10 cost)	\$1,250.00
11 Archeological Study (Allocated cost)	\$43,026.00
12 Additional financial assistance	\$667,553.00
13 Total:	\$749,900,000[.00]

- 14 y. "[URA] has paid or will pay for certain demolition and site preparation
 15 costs, including demolition of a building, moving utilities, moving an
 16 oil tank, asbestos testing, and an easement survey. The estimated
 17 total cost for this will be \$637,551.75. [The Dalles and URA] consider
 18 these costs to be 'Value added to the Property as consequence site
 19 preparation' and therefore 'exempt' under ORS 297C.810(1)(a)(I).
 20 BOLI determined the following \$637,551.75 for certain demolition
 21 and site preparation costs to be funds of a public agency used on the
 22 Project. [The Dalles and URA] and [Tokola Properties] disagree with
 23 BOLI's determination that the following costs are funds of public
 24 agency used on the Project:

25 Demolition of Building	\$250,000.00
NW Natural Gas	\$80,000.00
PUD Relocation	\$118,022.00
City Water/Sewer Relocation	\$175,961.50
Oil Tank Removal	\$8,920.00
Lab and Asbestos Testing	\$2,800.00
Easement Survey Work	\$1,848.25
Total	\$637,551.75

- 26 z. *** [The Dalles and URA] and [Tokola Properties] disagree with
 27 BOLI's determination that the following costs are funds of a public
 28 agency to be used on the Project:

29 Demolition of Building	\$250,000.00
30 NW Natural Gas	\$80,000.00
31 PUD Relocation	\$118,022.00
32 City Water/Sewer Relocation	\$175,961.50
33 Oil Tank Removal	\$8,920.00

Lab and Asbestos Testing	\$2,800.00
Easement Survey Work	\$1,848.25
Survey (1/2 of total cost)	\$1,925.00
Environmental Assessment (1/2 of total cost)	\$1,250.00
Archeological Study (Non-Allocated cost)	\$31,974.00
Total	\$672,700.75

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5 aa. "The appraisal of Integra Realty Resources ('IRR') included as
6 Attachment 2 to [The Dalles and URA]'s Coverage Determination
7 Request dated May 8, 2018, listed the 'Estimated Cost of the
8 Proposed Development before Land' as \$10,800,000[.00] (IRR
9 appraisal, p. 123; Exhibit A-1, p. 214).

10 bb. "The IRR appraisal * * * listed the 'Hypothetical Value As Stabilized
11 through the Income Approach' as \$8,700,000[.00] (IRR, p. 123;
12 Exhibit A-1, p. 214).

13 cc. "The IRR appraisal * * * listed the 'Estimated Land Residual Value
14 with Profit' as a negative value, -\$2,100,000[.00]. The 'Estimated
15 Land Residual Value with Profit' of -\$2,100,000 is shown as the
16 difference between the \$10,800,000 'Estimated Cost of Proposed
17 Development before Land' and the \$8,700,000 "Hypothetical Value
18 As Stabilized through the Income Approach' (IRR, p. 123; Exhibit A-
19 1, p. 214)."

20 (Ex. X12)

21 2) At the time of the Amended Coverage Determination, URA had paid or
22 anticipated to pay \$3,850.00 for a boundary survey, \$2,500.00 for an environmental
23 assessment and \$75,000.00 for an archeological study of the Property, for a combined
24 total of \$81,350.00.⁷ (Testimony of Wooley; Exs. A9, A15, A21)

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26 ⁷ In its preparation of the July 17, 2018 Coverage Determination, the Agency understood Requesters had
27 "split costs" of the boundary survey, the environmental assessment and the archeological study, with
28 Tokola Properties. In acknowledgment of these split costs, the Agency considered just \$1,925.00 for the
29 boundary survey, \$1,250.00 for the environmental assessment and \$43,026.00 for the archeological
30 study (a total of \$46,201.00), as paid for or anticipated to be paid for by URA and, therefore, "funds of a
31 public agency."

32 In regard to the August 9, 2018 Amended Coverage Determination, however, Ms. Wooley testified that
33 "there is no provision for [splitting costs]" in PWR law, despite the Agency's prior acknowledgment of the
34 split costs. She clarified that, for purposes of the Amended Coverage Determination, the Agency did not
35 consider the costs split between URA and Tokola Properties because the Agency learned that URA
36 actually paid the costs *in their entirety* (a total of \$81,350.00). Tokola Properties did not then reimburse

1 3) At the time of the Amended Coverage Determination, URA had paid or
 2 anticipated to pay \$637,551.75 in demolition and site preparation costs. These costs
 3 included demolition of a building, moving utilities, moving an oil tank, asbestos testing
 4 and an easement survey. (Testimony of Wooley; Exs. A15, A21)

5 4) A list of expenditures made or anticipated to be made by URA on the Project
 6 that are funds of a public agency, under ORS 279C.800(6)(a)(B), follows:

7	Appraisal	\$8,000.00
8	Economic Analysis	\$25,846.00
9	Security Fencing	\$500.00
10	Marketing Consultant	\$1,800.00
11	Boundary Survey	\$3,850.00
12	Environmental Assessment	\$2,500.00
13	Archeological Study	\$75,000.00
14	Financial Assistance	\$667,553.00 ⁸
15	Demolition of Building	\$250,000.00
16	NW Natural Gas	\$80,000.00
17	PUD Relocation	\$118,022.00
18	City Water/Sewer Relocation	\$175,961.50
19	Oil Tank Removal	\$8,920.00
20	Lab and Asbestos Testing	\$2,800.00
21	Easement Survey Work	\$1,848.25
22	TOTAL	\$1,422,600.75

22 URA for Tokola Properties' portion of the split costs; rather, the amount was deducted from the additional
 23 financial assistance that URA had agreed to provide Tokola Properties. The additional financial
 assistance totaled \$749,900.00 and the Agency accounted for URA's deductions in its Amended
 Coverage Determination.

24 ⁸ This amount reflects the deduction of the appraisal, economic analysis, security fencing, marketing
 25 consultant, and the "split cost" amounts for the boundary survey, environmental assessment and
 archeological study, from the total financial assistance contemplated ($\$749,900.00 - (\$8,000.00 +$
 $\$25,846.00 + \$500.00 + \$1,800.00 + \$1,925.00 + \$1,250.00 + \$43,026.00) = \$667,553.00$)

1 5) An appraisal was completed on the property in January of 2018. Mr. Bartels,
2 an appraiser for the Project, was asked to perform a real estate appraisal that determined
3 the "as-is value" of the land, as well as the "residual value" of the land.

4 a. The "as-is value" of the land was the value of the land, under the
5 existing Tony's Building, unencumbered by the Disposition and
6 Development Agreement. Mr. Bartels estimated the as-is value of
7 the land at \$310,000.00.

8 b. The "residual value" of the land was the value of the completed and
9 stabilized Project, less the costs incurred for completing the Project
10 and an allocation of anticipated profit.⁹ Mr. Bartels estimated the
11 residual value of the land at -\$2,100,000.00.

12 (Testimony of Bartels; Ex. A1)

13 6) While Mr. Bartels estimated some demolition costs, in order to arrive at the
14 as-is value of the land, he did not calculate the amount of value added to the land as a
15 result of the boundary survey, environmental assessment, archeological study and
16 demolitions and site preparation costs, which totaled \$718,901.75 ("the disputed
17 funds").¹⁰ Thus, the amount of value added to the land by those costs was unknown at
18 the time of the Amended Coverage Determination and at hearing. (Testimony of Bartels,
19 Wooley; Ex. A1)

20 7) Per agreement of the Requesters, Tokola Properties will purchase the
21 property for \$10.00. (Testimony of Wooley; Ex. A15)

22 CONCLUSIONS OF LAW

23 1) The Commissioner has jurisdiction over this matter, pursuant to ORS
24 279C.817(4).

25 ⁹ Mr. Bartels testified that the price to acquire the land was not considered for purposes of the appraisal.

¹⁰ \$718,901.75 = \$3,850.00 + \$2,500.00 + \$75,000.00 + \$637,551.75.

1 2) Requesters each have an interest in whether the Project is a public works,
2 on which payment of the prevailing rate of wage is or would be required under ORS
3 279C.840, and they requested a determination of that question by the Commissioner of
4 the Bureau of Labor and Industries, in the manner required by, and in compliance with
5 OAR 839-025-0005.

6 3) A Coverage Determination was issued by the Agency, followed by an
7 Amended Coverage Determination. Requesters properly sought, pursuant to ORS
8 279C.817(4) and OAR 839-025-0005(7), a hearing under ORS 183.415 to challenge the
9 Agency's Amended Coverage Determination.

10 4) "Value added to the land," for purposes of ORS 279C.810, is the value
11 added to or created in the land by the development process, exclusive of the costs of
12 those developments.

13 5) Costs expended to add value to the land are not exempt under ORS
14 279C.810(1)(a)(E).

15 6) Costs expended to add value to the land are not exempt under ORS
16 279C.810(1)(a)(I).

17 7) Based on the entirety of the record, the Project is a public works project
18 under ORS 279C.800(6)(a)(B).

19 8) Payment of the prevailing rate of wage to workers on the Project is required
20 under ORS 279C.840.

21 9) Pursuant to ORS 279C.817(1), the Commissioner of the Bureau of Labor
22 and Industries has the authority under the facts and circumstances of this case to make
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25

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

3 **OPINION**

4 Pursuant to ORS 279C.817(1), the Agency "shall, upon request of a public agency
5 or other interested persons, make a determination about whether a project or proposed
6 project is or would be a public works on which payment of the prevailing rate of wage is
7 or would be required under ORS 279C.840." Requesters sought a determination as to
8 whether the Project would be subject to the prevailing wage rate under ORS 279C.840.
9 In its July 17, 2018 Coverage Determination, the Agency determined that the Project was
10 not subject to the prevailing wage rate. (Finding of Fact – Procedural #2) After receiving
11 more information from Requesters, however, the Agency issued its Amended Coverage
12 Determination on August 9, 2018. (Finding of Fact – Procedural #3, #4) In its Amended
13 Coverage Determination, the Agency determined that the Project would be subjected to
14 the prevailing wage rate, under ORS 279C.840. (Finding of Fact – Procedural #4) On
15 August 22, 2018, Requesters requested a contested case hearing, pursuant to ORS
16 279C.817(4). (Finding of Fact – Procedural #5)

17
18 Contractors and subcontractors must pay the prevailing wage rate on all public
19 works projects, unless a statutory exemption applies. ORS 279C.840(1). Pursuant to
20 ORS 279C.800(6)(a)(B), a "public works" project is a "project that uses \$750,000[.00] or
21 more of funds of a public agency for constructing, reconstructing, painting or performing
22 a major renovation on a road, highway, building, structure or improvement of any type."
23 The Project at issue is aimed at redeveloping a property in downtown The Dalles.
24 (Finding of Fact – The Merits #1a, #1b) The Project is a mixed-use development,
25

1 including housing, a fitness center, a community room, "tuck-under" parking and retail
2 space. (Finding of Fact – The Merits #1d, #1g)

3 URA's mission is "to eliminate blight and depreciating property values within
4 [URA]'s jurisdiction and in the process, [attract] aesthetically pleasing, job producing
5 private investments that will stabilize or increase property values and [protect] the area's
6 historic places and values." (Finding of Fact – The Merits #1a) URA's involvement in the
7 Project is a key component in Requesters' desire that the Project succeed. Requesters
8 anticipate that URA will spend at least \$1,422,600.75 on the Project in their joint effort to
9 revitalize The Dalles downtown area. (Finding of Fact – The Merits #4) The issue in this
10 case, is whether a statutory exemption applies to some of URA's expenditures and
11 anticipated expenditures, taking the Project out of the "public works" definition under ORS
12 279C.800(6)(a)(B), and eliminating the requirement to pay the prevailing wage rate.

13
14 Requesters argued that the \$637,551.75 for site preparation and demolition, as
15 well as \$3,850.00 for the boundary survey, \$2,500.00 for the environmental assessment
16 and \$75,000.00 for the archeological study, are not "funds of a public agency."
17 Requesters argued that only portions of these costs should be considered funds of a
18 public agency, bringing the amount of public funds used on the Project under the
19 \$750,000.00 benchmark and taking the Project out of the definition of "public works" under
20 ORS 279C.800(6)(a)(B). Requesters' argument was two-part.

21 Requesters first argued that the disputed funds fell under the exemption in ORS
22 279C.810(1)(a)(I). Pursuant to ORS 279C.810(1)(a)(I), "funds of a public agency" do not
23 include:

24 "Value added to land as a consequence of a public agency's site
25 preparation, demolition of real property or remediation or removal of

1 environmental contamination, except for value added in excess of the
2 expenses the public agency incurred in the site preparation, demolition or
remediation or removal when the land is sold for use in a project otherwise
subject to ORS 279C.800 to 279C.870[.]”

3 Second, they argued that the disputed funds fell under the exemption in ORS
4 279C.810(1)(a)(E). Pursuant to ORS 279C.810(1)(a)(E), “funds of a public agency” do
5 not include:

6 “The difference between:

7
8 “(i) The value of land that a public agency sells to a private entity as
9 determined at the time of the sale after taking into account any plan,
10 requirement, covenant, condition, restriction or other limitation, exclusive of
zoning or land use regulations, that the public agency imposes on the
development or use of the land; and

11 “(ii) The fair market value of the land if the land is not subject to the
12 limitations described in sub-subparagraph (i) of this subparagraph[.]”

Both exemptions deal specifically with the “value added to the land.”

13 Requesters argued that the disputed funds constituted value added to the land
14 because the disputed funds *directly determined* the amount of value added to the land.

15 Requesters urged the forum to determine that the disputed funds, or the costs of adding
16 value to the land, were equivalent to the resulting value added. In considering

17 Requesters’ argument, it is helpful to consider the definition of “value added.” It is an
18 inexact term, undefined in ORS chapter 279C, and requires the forum’s interpretation.

19
20 When interpreting a statute:

21 “* * * the forum follows the analytical framework set out by the Oregon Supreme
22 Court in *PGE v. Bureau of Labor and Industries*, 317 Or 606, 859 P2d 1143 (1993)
23 and modified by *State v. Gaines*, 346 Or 160, 206 P3d 1042 (2009). Within that
24 framework, the forum first examines the text and context of the statutes and also
25 considers any pertinent legislative history proffered by the participants. The text of
the statutory provision itself is the starting point for interpretation and the best
evidence of the legislature’s intent. Also relevant is the context of the statutory
provision, which includes other provisions of the same statute and other related

1 statutes. If the legislature's intent is clear from the text and context of the statutory
2 provision, further inquiry is unnecessary."

3 *In the Matter of Dr. Andrew Engel, DMD, PC*, 32 BOLI 94, 128 (2012). When considering
4 the text and context of the statute, the forum gives words of common usage their plain
5 natural and ordinary meaning. *PGE v. Bureau of Labor and Industries*, 317 Or at 610-
6 611; *State v. Gaines*, 346 Or 160 (2009).

7 "Value added" is defined as "the value added to or created in a product or
8 commodity by the manufacturing or marketing process *exclusive of* the cost of materials,
9 supplies, packaging, or overhead." (Emphasis added) *Webster's Third New Int'l*
10 *Dictionary* 2,531 (unabridged ed 2002) Notably, the definition specifically *excludes* the
11 costs expended to achieve the value. Such an exclusion implies that the value added to
12 something and the costs necessary to achieve that value are not necessarily equal and,
13 therefore, that the costs do not always determine the amount of value added.

14 This difference is also highlighted by the context of the term "value added," as well.
15 The statutes specifically governing the PWR are found in ORS 279C.800 through ORS
16 279C.875. Within those statutes, the terms "cost" and "costs" appear 13 times. This
17 context demonstrates that when the legislature intended to use the term "cost" or "costs,"
18 it did so. Had the legislature intended for the costs of adding value to the land to be within
19 the ORS 279C.810(1)(a)(i) exemption, it would have included specific language. The
20 forum will not insert a term, where the legislature has omitted it. ORS 174.010.

21 The costs expended to add value to the land are separate and distinct from the
22 amount of value actually added to the land. In consideration of the definition of "value
23 added," it is reasonable to conclude that "value added to the land" for purposes of ORS
24 279C.810 is the value added to or created in the land by the development process,
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1 exclusive of the costs of those developments. Individuals or entities expending the costs
 2 to add value, quite understandably, may hope that the amount expended directly
 3 determines the value added to the land but that, of course, is not always the case.
 4 Sometimes a relatively low cost returns a big amount of value added; other times, the
 5 costs expended outweigh the value added, and result in a poor investment. ORS
 6 279C.810(1)(a)(I) specifically exempts only the value added to the land. As applied to
 7 this case, the calculation of the amount of money excluded from the definition of "funds
 8 of a public agency," under ORS 279C.810(1)(a)(I), would be as follows:

\$ unknown ¹¹	Amount of value added to the land as a consequence of URA's costs or anticipated costs for site preparation, demolition of real property or remediation or removal of environmental contamination.
- \$ unknown	The costs URA expended, or anticipated it would expend, in the site preparation, demolition or remediation or removal when the land is sold for a public works project.
<hr/>	
\$ unknown	Amount exempt from consideration of "funds of a public agency," as defined in ORS 279C.800(6)(a)(B).

16 As with the exemption under ORS 279C.810(1)(a)(I), the value that was added to
 17 the land, as a result of the expenditure of the disputed funds, is unknown for purposes of
 18 ORS 279C.810(1)(a)(E). Pursuant to ORS 279C.810(1)(a)(E), the amounts necessary to
 19 determine the exemption from "funds of a public agency" are:

\$ unknown ¹²	The value of land that a public agency sells to a private entity as determined at the time of the sale after taking into account any plan, requirement, covenant, condition, restriction or other limitation, exclusive of
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23 ¹¹ The appraisal on the Project did not calculate the amount of value added to the land, as a result of URA's
 24 costs or anticipated costs (aka the disputed funds). (Finding of Fact – The Merits #5)

25 ¹² Although the appraisal did calculate the residual value of the land, the lack of evidence as to the amount
 of value added to the land as a result of expending the disputed funds, made this amount indeterminate,
 as well. (Finding of Fact – The Merits #5)

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zoning or land use regulations, that the public agency imposes on the development or use of the land.

- \$310,000.00 The fair market value of the land if the land, unencumbered.

\$ unknown Amount exempt from consideration of "funds of a public agency," as defined in ORS 279C.800(6)(a)(B).

Requesters also argued that, in a negative land value case, to determine that "value added to the land" does not include the costs that it took to add the value, there is no benefit to the exemption because many cities would be unable to participate in urban renewal projects. The forum agrees that considering the costs expended to add value to the land as "funds of a public agency," in negative land value cases, may make it extremely difficult for certain cities, especially smaller cities, to participate in urban renewal projects. Unfortunately, the statute is clear as to what funds may be exempt from the definition of "funds of a public agency." Under ORS 279C.810(1)(a), Exemptions (E) and (I) consider the "value added to the land." The definition of that term does not include the costs expended to add that value.

AGENCY'S EXCEPTIONS

The Agency submitted 12 exceptions to the Proposed Order. The first five exceptions addressed scrivener's errors made by the Agency in its filed Stipulations and scrivener's errors made by the forum when it incorporated the Stipulations into the Proposed Order. The Agency's Exceptions #1-5 are GRANTED.

In its sixth and ninth exception, the Agency noted that the forum had referenced expenditures made or anticipated to be made by URA but had failed to specifically identify the listed expenditures as only those considered "funds of a public agency;" the referenced expenditures were not *all* of the expenditures made or anticipated to be made

1 by URA on the Project. The Agency's exceptions on this issue are well taken and
2 consistent with the forum's intent to discuss the expenditures that were considered to be
3 funds of a public agency by the forum. The Agency's Exceptions #6 and #9 are
4 GRANTED.

5 In its seventh exception, the Agency requested that the forum consolidate fn. 10
6 into the body of Proposed Findings of Fact – The Merits #6. For purposes of clarity, the
7 Agency's Exception #7 is GRANTED.

8 In its eighth exception, the Agency excepted to the forum's use of the term
9 "disputed funds" to refer to the costs of the boundary survey, environmental assessment,
10 archeological study and demolitions and site preparation costs referenced in Proposed
11 Finding of Fact – The Merits #6. The Agency argued that Requesters disputed only *part*
12 *of* the monetary amounts associated with the costs of the boundary survey, environmental
13 assessment and archeological study and, therefore, the forum should not term these
14 amounts as "disputed." The Agency is correct that Requesters did not dispute part of the
15 whole amounts, however, the *whole* amount of the boundary survey, environmental
16 assessment and archeological study were disputed, as funds of a public agency, by
17 Requesters. Since these costs were not actually "split," the forum refers to the whole
18 costs as "disputed funds." The fact that the case participants agreed that \$672,700.75 of
19 the total amount were funds of a public agency was not particularly helpful, and their use
20 of the split cost amounts as a basis for their joint Stipulations created confusion, muddling
21 the record. The whole amounts of the costs were in dispute and the whole amounts were
22 funds of a public agency, pursuant to ORS 279C.800(6)(a)(B). The Agency's Exception
23 #8 is OVERRULED.
24
25

1 In Exception #10, the Agency noted that the forum inaccurately represented
2 Requesters' argument about the amount of money that should be considered funds of a
3 public agency. The Agency's exception is well taken. While the forum accurately
4 represented that Requesters disputed that \$637,551.75 for site preparation and
5 demolition, as well as \$3,850.00 for the boundary survey, \$2,500.00 for the environmental
6 assessment and \$75,000.00 for the archeological study were "funds of a public agency,"
7 Requesters did not argue that the entire amounts of some of those costs were outside
8 that definition. The Agency's Exception #10 is GRANTED.

9 In Exception #11, the Agency requested that an additional finding of fact be added,
10 stating the following:

11 "No determination was made regarding what specific activities constitute site
12 preparation, demolition or remediation or removal as those terms are used in ORS
13 279C.810(1)(a)(I)."

14 (Agency's Exceptions, p. 13) The Agency stated "[t]he requesters asserted that certain
15 costs, including but not limited to, the costs of PUD relocation in the amount of
16 \$118,022.00 and Survey Work in the amount of \$1,848.25 constitute site preparation,
17 demolition or remediation or removal and should not be considered funds of a public
18 agency pursuant to ORS 279C.810(1)(a)(I)." *Id.* Pursuant to ORS 183.470(2), a final
19 order's "findings of fact shall consist of a concise statement of the underlying facts
20 supporting the findings as to each contested issue of fact and as to each ultimate fact
21 required to support the agency's order." Since a determination as to what specific
22 activities constituted "site preparation, demolition or remediation or removal" was not
23 before the forum, the Agency's suggested Finding of Fact is not necessary to support the
24 conclusions in the Final Order. The Agency's Exception #11 is OVERRULED.
25

1 In Exception #12, the Agency asked the forum to remove the monetary value it
2 assigned to the costs expended or anticipated to be expended on site preparation,
3 demolition or remediation or removal, for purposes of ORS 279C.810(1)(a)(I). The forum
4 assigned this value at \$718,901.75, however, this amount erroneously included costs that
5 may or may not have been specifically for site preparation, demolition or remediation or
6 removal, for purposes of ORS 279C.810(1)(a)(I). As stated in its ruling on Agency's
7 Exception #11, the issue of what specific activities constituted "site preparation,
8 demolition or remediation or removal" was not before the forum. The Agency's Exception
9 #12 is GRANTED.

10 **REQUESTERS' EXCEPTIONS**

11 Pursuant to OAR 839-050-0380(1), "[e]xceptions *must be specific* and must be in
12 writing." (Emphasis added) Requesters did not make specific exceptions. Instead,
13 Requesters listed Proposed Conclusions of Law Nos. 4-8 and made a general argument
14 that the Proposed Order's conclusions were inconsistent with an unrelated Agency
15 Coverage Determination, issued on March 7, 2012. The March 7, 2012 Coverage
16 Determination was not provided to the Agency for consideration, as part of Requesters'
17 Request for Determination, and was not evidence in this case. Requesters offered the
18 document as impeachment evidence, during their cross-examination of Ms. Wooley. For
19 the reasons set forth in Finding of Fact – Procedural #19, the evidence was inadmissible.
20 Requesters' general Exception to the Proposed Final Order is OVERRULED.
21

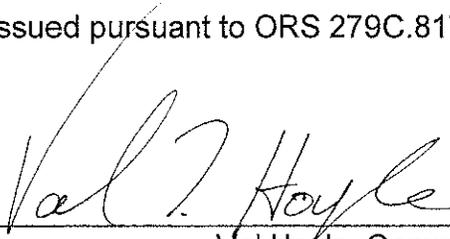
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ORDER

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



Val Hoyle, Commissioner
Bureau of Labor and Industries

Issued ON: April 8, 2019

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