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## INTRODUCTION

This administrative matter comes before the undersigned Hearing Officer pursuant to timely request by Urban Peak Denver (“Urban Peak”) for hearing and review of the February 6, 2023 determination by the Labor Division of the Denver Auditor’s Office (“Denver Labor”) that Urban Peak’s Mothership project number 202265966 (“Mothership project” or “Project”) at 1630 S. Acoma St., Denver, CO 80210 was subject to the prevailing wage for the “building” construction classification, rather than that for “residential” construction, under the Denver Prevailing Wage Ordinance, Denver Revised Municipal Code, Sec. 20-76 et al. (City Ex. F, Denver Revised Municipal Code, Sec. 20-76 et al, Denver Prevailing Wage Ordinance; City Ex. B, email notification and discussion of the “building” classification by Denver Labor; and City Ex. C, Urban Peak’s 4/3/23 Request for Review and Hearing of Imposition of Wage Determination.)

The Mothership project is a construction project for Urban Peak that will be both the new “headquarters” for Urban Peak and a comprehensive non-profit facility designed to provide wrap-around treatment and age-appropriate residential services to homeless minors, and homeless youths aging out of the foster care system. The approximately \$37 million Project<sup>1</sup> has been in the making for six and a half years and will be funded by a mix of public monies, grants, and private philanthropy. Public monies include nearly \$17 million from the City and County of Denver.

After Urban Peak filed its request for review, Denver Labor promulgated new Rules, and the undersigned was selected and designated Hearing Officer, Denver Labor filed a motion for decision on the pleadings under Rule 11.3. Urban Peak opposed the motion, desiring an evidentiary hearing, and the Parties were allowed extensive briefing that ultimately revealed ongoing questions of fact favored an evidentiary hearing to avoid the risk and inefficiencies of a remand. (City’s Rule 11.3 Motion dated 9/20/23; Urban Peak’s Rule 11.3 Brief in Opposition dated 10/1/23; City’s Reply dated 10/24/23; Urban Peak’s Surreply dated 11/10/23; and City’s Response to the Surreply dated 11/28/23.)

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<sup>1</sup> As the City notes in its Post Hearing Brief, “[t]his fact has been widely reported on in the media, and is suitable for official notice.” See, e.g., *Urban Peak breaks ground on new campus*, *Colorado Community Media*, dated 2/9/23, available at: <https://coloradocommunitymedia.com/2023/02/09/urban-peak-breaks-ground-on-new-campus/> (last accessed 4/21/24).

On February 13-14, 2024, a hearing was held via Zoom pursuant to agency rules and transcribed by court reporter. In addition to the testimony of five (5) witnesses identified below, the Parties stipulated to the admission (but not relevance, weight, or accuracy) of all documents previously submitted as Exhibits by the other as part of the extended briefing on Denver Labor’s motion for a decision on the pleadings. (City Exs. A-O and Urban Peak Exs. A-B.) Additionally, at the hearing, Urban Peak submitted four more exhibits (Ex. C - F)<sup>2</sup> and Denver Labor submitted three (Exs. P, R and S). This Opinion and Award is timely issued upon full and appropriate consideration of the entire record (whether or not expressly referenced herein).

### **APPEARANCES**

#### **For the Appellant**

Counsel: Patrick Dalin, Esq. and Todd Fredrickson, Fisher & Phillips, LLP

Witnesses:

Christina Carlson, CEO of Urban Peak, Appellant

Thaddeus Christian Pritchett, Director of Development, BlueLine Development, Inc.

#### **For Denver Labor**

Counsel: Paige Arrants, Esq., CAO, Assistant City Attorney

Witnesses:

Kandice McKeon, Labor Compliance Supervisor for Auditor’s Office, Denver Labor

Jeffrey A. Garcia, Esq., County Attorney for Douglas County, former Exec. Dir. of Denver Labor

Matthew Fritz-Mauer, current Executive Director, Denver Labor

### **STATEMENT OF THE ISSUE**

Urban Peak has framed the issue before the undersigned as “whether this is a building where persons will reside” and if it is four (4) stories or less. (E.g., Urban Peak’s Brief in Opposition to Denver Labor’s Rule 11.3 Motion at 15.)

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<sup>2</sup> Urban Peak Exs. D-F, concerning the large shelter facility located at 48th and Colorado, were received over objection that they were untimely under Denver Labor hearing rules, which require exhibits be produced five (5) days before the hearing. The exhibits were ultimately accepted into the record as proper rebuttal evidence, the admission of which was not prejudicial; and as relevant and helpful to the trier of fact. (TR1 300, 305, 309-10.)

Denver Labor frames the issue as whether the Mothership project is “properly classified as ‘building’ or ‘residential’ construction” under the Denver Prevailing Wage Ordinance and related precedent. (E.g., City Rule 11.3 Motion at 2.)

Upon consideration of the full evidentiary record and related authorities submitted by the Parties, the undersigned accepts Denver Labor’s statement of the issue as the most accurate and modifies it as follows:

Whether Denver Labor erred as a matter of fact or law in its determination that the Mothership project was properly classified as “building” construction under Denver’s Prevailing Wage Ordinance and related precedent .

### GOVERNING LAW AND RULES<sup>3</sup>

#### Sec. 20-76 et al, Denver Prevailing Wage Ordinance<sup>4</sup>

(a) Required. Every worker, mechanic or other laborer employed by any contractor or subcontractor in the work of drayage or of construction, alteration, improvement, repair, maintenance or demolition...financed in whole or in part by the city, or any agency of the city... shall be paid not less than the wages and fringe benefits prevailing for the same class and kind of work in the Denver metropolitan area as determined by the career service board under subsection (c). The Denver metropolitan area shall be determined by the **career service board**....

...

(c) Determination of prevailing wages.

(1) The city council hereby declares that it is in the best interests of the city to have a uniform determination of the prevailing wages to be paid to the various classes of laborers, mechanics and workers which will be required in the performance of work covered by this section.

(2) The city council hereby finds and concludes that the federal government, in implementing the Davis-Bacon Act (40 U.S.C. § 276a to 276a-5), possesses and exercises a superior capability with superior resources to ascertain the basic rate of pay, overtime, and other benefits which accurately represent the current prevailing rate of wages for work covered by that federal law. **The career service board shall determine that the prevailing wages applicable to the various classes of**

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<sup>3</sup> By the time of the hearing, the Parties had agreed that the Davis-Bacon Act itself does not apply, so it is not excerpted here. In its Response to the City’s Rule 11.3 motion, Urban Peak also cited to the “Service Contract Act”, which is incorporated by reference into the Denver Prevailing Wage Ordinance. The undersigned does not find the Service Contract Act to be relevant, as explained in the Analysis and Conclusions section, so it is also not excerpted here.

<sup>4</sup> City Ex. F. The Ordinance dates back to the 1970s and was most recently updated in August of 2023 to vest all implementing and enforcement authority with the Denver Labor Division, as will be discussed herein.

**laborers, mechanic, and workers covered by this section and the Davis-Bacon Act correspond to the prevailing wage determinations made pursuant to that federal law** as the same may be amended from time to time. The board shall undertake to keep and maintain copies of prevailing wage determinations made pursuant to the Davis-Bacon Act (40 U.S.C. § 276a to 276a-5) and any amendments to that federal law. The board shall also keep and maintain such other information as shall come to its attention concerning wages paid in the Denver metropolitan area. The provisions of this section shall supersede any differing provisions of that federal law, except when that federal law is applicable independent of this section.

(3) **It shall be the duty of the career service board to determine, after hearing, the prevailing wages for the various classes of laborers, mechanics, and workers which will be required in the performance of work covered by this section but not be covered by the Davis-Bacon Act,** which determinations shall be made at least annually, and as frequently as may be considered necessary by the career service board in order that the determination which is currently in effect shall accurately represent the current prevailing rates of wages. Prior to making such determination, the career service board shall give reasonable public notice of the time and place of the hearing concerning such proposed determination and shall afford to all interested parties the right to appear before it and to present evidence. “Prevailing wages” shall mean, for each class of work covered by this section, but not covered by the Davis-Bacon Act, the rate of pay and the overtime and other benefits granted to such full-time workers in the Denver metropolitan area. The rates shall be determined using the same method as used for those classes which are covered by the Davis-Bacon Act. Should this method cause a reduction in compensation of any class of workers, the career service board will review the appropriateness of using this methodology and may recommend to city council a different method for establishing prevailing wage rates.

**If there is insufficient data available in the Denver metropolitan area to determine the rate of pay and the overtime and other benefits or should comparable classes of work not be performed within the Denver metropolitan area for each class of work covered by this section and not covered by the Davis-Bacon Act, the career service board shall refer to the Service Contract Labor Act of 1965, as amended (41 U.S.C. § 351 et seq.) to determine the rate of pay and the overtime and other benefits.**

...

(d) **Mandatory contract provisions; enforcement. (1) Every contract covered by this section shall contain a provision requiring the contractor and every subcontractor under such contract to pay every worker, mechanic and laborer employed under such contract not less than the scale of wages as provided for under subsections (b) and (c).**

...

(f) **...Any determination by the auditor pursuant to this section is reviewable by the complained-of party, pursuant to subsection (g).**

(g) **Review. Any determination of the auditor related to the imposition of prevailing wage, including determinations of applicable employment classifications and wages, determinations of underpayment or misreporting, and the imposition of penalties shall be reviewable as follows:**

(1) Any person who disputes **any determination made by or on behalf of the city pursuant to the authority of the auditor, which determination adversely affects such person, may petition the auditor for a hearing concerning such determination no later than thirty (30) days after having been notified of any such determination.** Compliance with the provisions of this subsection shall be a

jurisdictional prerequisite to any action brought under the provisions of this section, and failure of compliance shall forever bar any such action.

(2) The auditor shall designate as a hearing officer a person retained by the city for that purpose.

(3) The petition for a hearing shall be in writing, and the facts and figures submitted shall be submitted under oath or affirmation either in writing or orally at a hearing scheduled by the hearing officer. The hearing, if any, shall take place in the city, and notice thereof and the proceedings shall otherwise be in accordance with rules and regulations issued by the auditor. **The petitioner shall bear the burden of proof**, and the standard of proof shall conform with that in civil, nonjury cases in state district court.

(4) Thereupon, the hearing officer shall make a final determination. Such final determination shall be considered a final order and may be reviewed under Rule 106(a)(4) of the state rules of civil procedure by the petitioner or by the city. A request for reconsideration of the determination may be made if filed with the hearing officer within fifteen (15) days of the date of determination, in which case the hearing officer shall review the record of the proceedings, and the determination shall be considered a final order upon the date the hearing officer rules on the request for reconsideration. The nonprevailing party shall be responsible for and shall pay the costs of the hearing, including the costs of the hearing officer and the hearing reporter.

(5) The district court of the second judicial district of the State of Colorado shall have original jurisdiction in proceedings to review all questions of law and fact determined by the hearing officer by order or writ under Rule 106(a)(4) of the state rules of civil procedure.

(6) Failure to pay outstanding penalties that are not pending appeal and are owed to the city pursuant to this section shall be grounds for suspension or revocation of any license issued by the city until fully paid.

## **Denver Auditor's Rules of Procedures for Appeals and Hearings<sup>5</sup>**

### **5.1 Record on appeal**

The record on appeal shall consist of Denver Labor's investigatory file, subject to any limits or exceptions described in these Rules; any newly discovered evidence admissible under Rule 5.3; and other testimony and records admitted as evidence by the hearing officer as described in these Rules.

### **5.2 Scop of review**

Appeals shall be limited to determining whether Denver Labor erred in its determination as a matter of fact or law. Harmless errors shall not be grounds for reversal of Denver Labor's determinations.

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<sup>5</sup> City Ex. E, enacted June 2023, eff. 6/22/23. Appellant "does not concede" that the rules govern because enacted after the filing of the instant appeal. (Email from Patrick Dalin, Esq. Counsel for Urban Peak, dated and timestamped 9/11/23 at 10:38 a.m.).

### 5.3 New evidence

No new evidence may be presented by an appealing party, except for newly discovered evidence that, with reasonable diligence, could not have been discovered before Denver labor made its determination. However, any such evidence must be shared with Denver Labor at least 10 business days before the hearing so that the office may determine whether to amend its determination. If the evidence is not discovered until within 10 business days of the hearing, it must be shared with Denver Labor immediately. If a party fails to follow these requirements, it shall forfeit the right to present the new evidence.

### 5.4 Burden of Proof

The petitioner has the burden of proof to establish by a **preponderance of the evidence** that Denver Labor erred in its determination.

### 6.3 Authority of hearing officers

The hearing officer has all authority necessary to administer an informal, efficient and fair hearing including but not limited to the power to:

...

f. Determine the admissibility of evidence and admit evidence into the record;

...

i. Question witnesses and request additional exhibits.

### 8.1 Denver Labor's disclosures

Denver Labor will share its investigatory file...

The Petitioner must disclose...potential witnesses at least 10 business days before the hearing. If possible, the petitioner must share electronic copies of anticipated and potential exhibits before the hearing with all other parties and the hearing officer. This requirement does not apply to documents that will be used solely for impeachment or rebuttal.

**11.3** Motions for a final decision without a hearing. Any party may, without permission from the hearing officer, submit a pre-hearing motion seeking to have the officer render a final decision without a hearing and based only on review of the record, written briefs, and any stipulation that may be agreed upon by the parties.

### 12.1 General admissibility

All evidence, including hearsay, may be admitted if the hearing officer determines it is relevant, comes from a reasonably reliable source, and has probative value that outweighs its prejudicial effect. The Colorado Rules of Evidence do not strictly apply to hearings governed by these Rules. However, hearing officers will use them as guidance in rendering decisions over objections and admissibility, with the goal of admitting all reasonable credible evidence.

The officer may exclude evidence that is unreliable, irrelevant, immaterial, unduly repetitive, privileged, or otherwise inadmissible under these Rules.

### 16 Sources of Law

In rendering decisions, hearing officers will adhere to binding legal authority. Rules formally promulgated by Denver Labor shall be binding, unless they have been ended or abrogated by a court or other order.

Hearing officers may rely on persuasive authority, including decisions by other officers.

### **18.1 Ordering remand**

Before issuing a final decision, and for good cause shown, the hearing officer may remand a case to Denver Labor for further investigation or analysis if the officer determines additional necessary information or analysis has not been provided...

## **FINDINGS OF FACT AND STATEMENT OF THE RECORD**

### **A. Party and Background Information**

#### **1. Urban Peak and an Overview of the Mothership Project**

Appellant Urban Peak is a Denver, Colorado based 501(c)(3) non-profit entity that provides a full range of services to Denver area minors and youths aged 15 to 24 who are experiencing homelessness, including youths who are aging or transitioning out of the foster care system.

It is “a big complicated organization”, with a 32-member board, that began in a Church basement 36 years ago. It is also the only non-profit organization in Denver that provides a full convergence of services for youth experiencing homelessness, and particularly for those aging out of foster care. The organization’s mission is to provide not just housing and food to those experiencing homelessness, but also to provide case management and behavioral health services in order to guide minors and youths from homelessness to stability. It presently serves about 1,000 unduplicated minors and youths a year. For housing purposes, as will be discussed, “youths” are those in the 18-24 year-old range, and “minors” are 12-17 years-old, and they are collectively referred to as “youths” throughout the record. (TR1 21-24, 33, 35, 39-40, 73.)

As Urban Peak CEO Christina Carlson put it, the system for addressing homelessness and especially youth homelessness is “irrevocably broken” (TR1 24.) Homelessness has doubled or even tripled over recent years and the extent of homelessness now “is complete insanity.” The Mayor of Denver has declared homelessness a public emergency. (TR1 72.)

Urban Peak’s work includes street outreach by providing a daytime drop-in center serving three meals a day/seven days a week, and with shower and laundry facilities and case management services. Currently, it has 30 beds at its downtown site; it “owns three apartment buildings with

68 units of supporting housing”; and it “place[s] about another...100-ish youth in community housing”, called “scattered sites”. The Mothership project will add 136 residential beds, consolidate those now in “scattered sites”, and provide wrap-around services to residents as well as house the corporate office(s). By providing residential living with integrated wrap-around services to youths, Urban Peak aims to “create a pathway” for them, out of the downward spiral of low-aspirations nurtured by the present housing voucher system. (TR1 22, 73-74.)

Urban Peak’s wrap-around services include “case management[,]...a medical clinic[,]...licensed clinicians[,] education specialists[,] workforce development, workforce placement, [and] social/emotional support...” (TR1 23.) Its work is trauma informed (TR1 22.) With the Mothership project, Urban Peak seeks to expand its services dramatically. The primary use of the building will be for residential living, and it will increase Urban Peak’s overall bed count from 40 to 136. (TR1 33, 35, 39-40)

The building will include common areas, laundry facilities, dining areas, a medical clinic, a classroom, a visual arts center, and a technology lab to provide needed support services and activities to the building’s residents. Urban Peak forecasts that its Mothership project “will fill a critical need for youth experiencing homelessness in Denver during a time when the city is experiencing a homelessness crisis.” (Id.)

Asked about funding, CEO Carlson stated it was done through “hard work”, “100 percent fundraising”, grants ( federal, state, County of Denver), New Market Tax Credits, and private philanthropy. The Mothership project was first conceived six and a half years ago and Urban Peak has been funding raising for whole time. (TR1 23, 67.) The Project will be funded with a combination of public funding obtained from the proceeds from City of Denver general obligation municipal bonds, New Market Tax Credits, a Colorado Division of Housing grant, a federal appropriation, and financial gifts received from private donors. To date, Urban Peak has obtained the following funding: \$3.4 million from federal sources; \$3.7 million from the State; \$16,764,567 from the City and County of Denver; \$9 million from New Market Tax Credits, and an additional \$12 million in private philanthropy. (TR1 66-67.)

The Mothership project is described in various legal documents as a “shelter”. (City Ex. A, Funding and Assignment Agreement, and attached “Shelter Operating Agreement” and Restrictive Covenant Agreement.) The facility “will include at least twenty (20) congregate shelter beds serving minors, thirty-two (32) congregate shelter beds serving transition-age youth, and

eighty-four (84) non-congregate shelter beds serving minors or transition-age youth (“Shelter Facility”) located at 1630 South Acoma Street, Denver Colorado (the “Property”)...” (City Ex. A at 1, DL0001; Covenant at 1, DL0058.)

## 2. Auditor’s Office, Division of Denver Labor

Denver Labor is a Division of the Auditor’s Office, which is an independent oversight body that is not part of the Mayor’s Office. (TR2 128-29.)

Denver Labor, through “a team of labor compliance analysts, technicians, and interns...audits payroll records for the City and County of Denver on Davis-Bacon as well as prevailing wage projects to ensure compliance with either the Davis-Bacon Act or the Prevailing Wage Ordinance,” CSR Sec. 20-76. As put by former Denver Labor Executive Director Jeffrey Garcia, Esq., it “enforce[s] Denver’s labor and wage laws.”<sup>6</sup>

Enforcement activities include, among other things, publication of federal Davis-Bacon wage determinations; determining what construction classification applies to a given City related project, under federal and state standards and/or area practice; auditing payrolls and uploaded contracts involving the City; reduction of former wage determinations into the outward-facing and internally utilized “Denver Prevailing Wage Clarification Document”; and engaging in an iterative process with constituents when questions or disputes arise as to the correct wage determination and/or wage classification (TR1 170; TR2 5, 172; City Ex. H, Denver Prevailing Wage Clarification Document”, issued in May 2019 (hereinafter “Denver Clarification Document”).)

## 3. Denver Wage-and-Hour Laws, and Other Related Bodies

Denver Labor’s former Executive Director, Jeffrey A. Garcia, held that position from 2014 to March of 2023, and credibly testified to its history, of which he was an integral part, and also to his experience as to how the agency understood the legislative intent, and therefore how it applied the Prevailing Wage Ordinance and related laws, and the interplay between Denver Labor and other related governmental bodies. (TR2 8,10-12, etc.)

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<sup>6</sup> The undersigned notes the transcription error, in stating “loss” instead of “laws”. (TR2 5.)

The City and County of Denver has several wage-and-hour laws, some of which date back over 70 years and some of which are new and/or newly amended. The Denver Prevailing Wage Ordinance (Denver PWO or PWO) has existed since 1950, and was updated in 2016, 2019, and again in 2021 or 2022 in response to passage of the Denver Minimum Wage Ordinance in 2020. (TR2 6-7, 123, 125.) As former-Exec. Dir. Garcia puts it, “the ordinance exists to create a minimum threshold of payment of wages and benefits to employees working under contract for the City and County of Denver (TR2 8.) It does so by adopting the DBA and federal wage determinations, which deals mostly with construction jobs, and supplementing them as needed – such as for service jobs, which are expressly included in the PWO – following the same methods used to determine prevailing wages under the DBA. (TR2 114-16.)

Denver Labor has always been charged with enforcing Denver wage-and-hour laws, but its responsibilities were dramatically increased in recent years, and particularly effective January 9, 2023 when the City Council passed the Denver Wage Theft Act. (TR2 126.) It passed rules in June of 2023 to handle its new responsibilities, under which (among other things) the undersigned independent hearing officer was designated to hear this and/or other matters. (City Ex. E., Rules.)

Several other Denver governmental bodies are involved in either the facts of the instant matter or the enforcement of Denver wage-and-hour laws, so are also briefly described here. First, there is HOST, or the Office of Housing Stability for the City and County of Denver. HOST is a housing support agency and administers the General Obligation or “GO” Bond under which Urban Peak received City funding for its Mothership project. Up to a certain point in the Mothership funding process, Urban Peak was dealing exclusively with HOST, and evidently neither it nor Urban Peak reached out to Denver Labor while finalizing City funding.

Second, two bodies dealing with Denver wage-and-hour matters are also mentioned in the record. There is the Office of Human Resources (OHR), which is a department within the City. According to one City witness, it used to be the Denver agency responsible for publication of federal Davis-Bacon Act prevailing wages, but Denver Labor now does that pursuant to recent amendments to the Denver PWO. There is also the Career Services Board (CSB), which is expressly referenced in the Denver Prevailing Wage Ordinance.

Pursuant to the Denver Prevailing Wage Ordinance, the CSB is responsible for determining the prevailing wages for job classifications not covered by the DBA or the USDOL, as will be discussed more below. Members of the CSB are appointed by the Mayor. The OHR makes

recommendations to the CSB regarding prevailing wages for job classifications not covered by the DBA, and the CSB may accept or reject those recommendations. (TR1 211-13, 253; TR2 76-77, 99, 129; see also City Ex. H, Denver Clarification Document, at 15, 26-27, 33-34, 41-42, 51-58.)

The CSB is not a part of the Auditor’s Office, and the Denver Labor Division does not have any control or authority over the CSB, or proprietary or custodial access to their files. The role of the CSB is to “adopt[] the wages that were referred to as ‘prevailing wage’ and were enforced [by Denver Labor] under the statute.” They do this in one of two ways: through adoption of the USDOL’s publishes wage determinations under DBA, or “through recommendation of...human resources” at twice-monthly public hearings. However they do it, the CSB is the sole body vested with “authority to determine prevailing wages for work not covered by DBA” (e.g., that which is only covered by the Denver PWO, such as services; or positions not listed in DBA wage lists, such as airport freon handlers). When the CSB needs to determine prevailing wages for jobs or work not covered in the federal wage determinations, it still uses the federal methods of survey and analysis. For Denver Labor’s purposes it does not matter how CSB determines prevailing wages, whether by adoption of federal DBA determinations, or through investigation and public hearings – Denver Labor will enforce the wage and hour laws either way. (TR2 9, 12-13, 17-23, 129.)

Outside of the PWO itself, the Denver Clarification Document (City Ex. H) and/or the USDOL All Agency Memo 130/131 (City Ex. I) are typically the first or primary sources looked to by analysts and staff in Denver Labor.

The Denver Clarification Document is a public and outward facing document that has reduced the agency’s prior classification determinations to writing. It can help the constituents and clients “understand what classifications they would need to use and how that work would be identified”. It is also a document relied upon by Denver Labor analysts in making wage determinations under the Denver PWO. At the same time, it is modeled on federal laws and DBA implementation since “the federal government is in the best position to” make wage and classification determinations, as stated in the Denver PWO; and it supplements them in light of differences between the federal DBA and the Denver PWO. (City Ex. F, PWO; TR2 44, 56-57, 64-64, 67-70, 79-80, 95, 133-35, 137.)

In performing its enforcement functions, it largely makes no difference to Denver Labor whether the matter is subject to the Davis-Bacon Act or the Denver Prevailing Wage Ordinance, because the PWO adopts the federal DBA standards and determinations in recognition of the

federal government’s “superior capability” and “superior resources”. Which document, if any, that staff or analysts refer to will depend on the project, circumstance, and their personal predilections. Even as a 46-year-old document, the All Agency Memo (City Ex. I) “is considered a gold standard kind of document” that is still referred to by Denver Labor staff and all over the nation.<sup>7</sup> (TR1 204, 259-60, 271,274-75; TR2 15, 19-22, 25-26, 44, 50, 65.)

## B. General Project History and Procedure

On March 3, 2021, Urban Peak advertised/published the Project for bid. (City Ex. B at 5, emails.)

On November 2, 2021, qualified and registered voters of Denver approved the issuance of GO Bonds in the amount of \$38,600,000 for the purpose of financing the cost of repairs and improvements to the City’s housing and sheltering system. (City Ex. A, Funding and Assignment Agreement between the City and County of Denver and Urban Peak, signed 1/9/23.)

On November 29, 2022, Urban Peak and contractor Deneuve Design, Inc. dba Deneuve Construction Services entered into an agreement, AIA Document A102 – 2017 Standard Form of Agreement Between Owner and Contractor. They attached a residential construction wage determination although it was evidently out of date as discussed below.

On January 9, 2023, the City and County of Denver and the Appellant entered into an agreement under which \$16,764,567 of the previously referenced GO Bond proceeds would be made available to fund costs associated with the construction and/or improvements to the buildings and grounds as part of the Mothership project. (City Ex. A.)

Among other things, the Funding and Assignment Agreement provides for the “payment of prevailing wages as set forth in Section 20-76 through 20-79 DRMC”. Additionally, it subjects the undertaking of the Project to the Shelter Operating Agreement, and also a Restrictive Covenant Agreement, which “requires that the shelter facility be used as a shelter facility” for at least 20 years, before it may be converted to affordable housing for the balance of the 60-year Covenant term. (City Ex. A, Funding and Assignment Agreement, and Exhibits A and B thereto.)

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<sup>7</sup> It is supplemented by a 1986 USDOL guidance, the Davis-Bacon Construction Wage Determinations Manual of Operations (Urban Peak Ex. B), but the Appellant has not highlighted any portion of the lengthy document as being particularly relevant to or dispositive of the instant dispute.

On February 6, 2023, Denver Labor Compliance Supervisor Kandice McKeon advised HOST that Denver Labor was issuing a “Building” prevailing wage determination for the Mothership project. (City Ex. B at 4, emails.)

On February 7, 2023, HOST alerted BlueLine Devel. Dir. Pritchett of the wage classification determination, and also gave notice to Denver Labor that “[w]e have read the memorandum and wish to appeal the determination of building construction for the GO Bond shelters, particularly Urban Peak.” (*Ibid.* at 1.)

On February 9, 2023 Denver Labor Compliance Sup. Kandice McKeon escalated the matter to her supervisor, Denver Labor Manager Rafael Gongon. (City Ex. B at 1.) Before and after this escalation, there were discussions between Urban Peak or its agents and Denver Labor agents, which are described in more detail below.

April 3, 2023, pursuant to an extension of time granted by the City, Urban Peak timely requested review of the February 6, 2023 determination, bringing the matter before the undersigned.

Urban Peak expects to move in the first youths, in July 2024. (TR1 62.)

### C. Additional Details about the Mothership Project

In classifying a project, Denver Labor looks first and foremost to “intent of a project or the description of a project”, as former-Dir. Garcia credibly testified. (TR2 44, 71.) Additionally, prevailing wage case authority directs its attention to use and methods of construction. The following subsections review and detail the record in those regards.

#### 1. A New, Innovative Way of Delivering Residential Services to Homeless Youth

The Project consists of one four-story “residential living [facility] for youth specific and is designed with young people in mind.” (TR1 45-46, 103, 119.) The facility will include a congregate shelter for youth on the first floor and non-congregate shelter housing and office space on floors 2 through 4 for up to 45 people, although only three staff members will be required to be on site at all times. The non-congregate shelter space will be organized into shared “neighborhoods” and “affinity groups”; and will include shared services and common spaces

including classrooms, offices, and other services on the fourth floor. (City Ex. D, Mothership plan or renderings; City Ex B, emails; TR1 70-71, 132, 138-39, 173, 181-82, 210-12; TR2 32, 34, 38-39.)

The Mothership project is the biggest such project in the state of Colorado, which is currently experiencing a crisis of homelessness across the state, with Denver having the largest homeless population and having declared a state of emergency. (TR1 72, 74.) That no doubt explains why Urban Peak received GO Bond proceeds for the Mothership project, and why HOST was advocating for it and similar residential living facilities to Denver Labor, as noted above. Additionally, the percentage of homelessness among marginalized groups, such as black/POC, LGBTQ, nonconforming gender, with mental health issues, or in or coming from foster care, far exceed their representation in the general population. The use of residential neighborhoods and affinity groups will help Urban Peak address the specific needs of various residents. (TR1 77-78.)

Because Urban Peak is focused on residential living for youths who experience unique issues related to homelessness (especially those aging out of the foster care system), it has been very “intentional” about design and service delivery. (TR1 45-46, 103.) As CEO Carlson put it,

[W]e took a huge risk and reimagined this project to really be something outside the box. There is nothing like it in the county. There is no model that looks like this. And we have built it on the backs of 35 years of experience and best practices and have gone to our youth and our staff and said what’s working and what’s not. And so we have come up with this really big, bold,...hairy audacious goal to build something really different.

(TR1 25.)

Simply put, youth homelessness is different. Traditional shelters (such the example of the “48th & Colorado Shelter”, described infra) are usually focused on older, single males or families. Those serving youths are usually just dormitory-style housing with minimal services or support until the youth reaches age18, at which time they age out of the system, and usually without the necessary training, supports, or skills. CEO Carlson gave an example of a youth client who told her he was simply waiting for his housing voucher, “which” he explained to her “is an entitlement that I can have for the rest of my life.” This type of experience was “shock[ing]” to her. In this example, it “was a young man that was working and going to school...And it made [her] really think...” and was “eye opening” for CEO Carlson. (TR1 25-26.) As she put it,

So many youth experiencing homelessness come straight out of foster care and need time to build some independent living skills. And that really opened my eyes to the ideas that young people who are experiencing homelessness need something

different than the chronically homeless adults we see on the street corner. They need community. That need safe residential living spaces. They need support services, and they need adults to help surround them in love and support in the way that I do most days for my children.

And so we had to really reimagine community and residential space and how to provide support services...where it is not about having young people who have experienced really significant trauma being run all over the place to get their needs met, but rather bringing it into their residential space and wrapping those services around them.

(TR1 26-27.)

As CEO Carlson puts it, the organization seeking to meet these youths' needs have to help them "break the cycle" of helplessness and dependence, by creating and providing goals and a real sense of community. (TR1 73.)

Moreover, Urban Peak and similar providers have learned over the course of the Covid-19 pandemic that independent apartments are not in line with best practices for youths or those in recovery or dealing with addiction. Specifically, the provider community learned that individual apartments lead to isolation and loss of access to services; and in cases of addiction and recovery, it was even worse, with deterioration and/or death often resulting. As CEO Carlson said,

to be frank, one of the reasons we're doing the recovery neighborhood for people struggling with substance misuse is locking people and active youth behind doors without support and community is how we are seeing so many people die.

Instead, the neighborhood design creates community while also evoking the design of walking through community spaces to get to your private quarters. (TR1 81-82.) Additionally, as will be described more below, neighborhoods are further divided into "affinity groups", to meet the specialized needs of certain resident groups such as pregnant, LGBTQ, or developmental delayed youth residents, or youth residents in addiction recovery. (TR1 33, 39-41, 46-48.)

Urban Peak is deeply invested (and the CEO emotionally invested) in their vision and understanding of the Mothership project as precisely "residential" in nature, use, and purpose, because Mothership is striving to provide age- and condition-appropriate community and supported residential-living to otherwise homeless youth, who may reside there between 30 days and two years.

## 2. Project's Architectural Plans

The shelter facility shall consist of “a minimum of 41,020 square feet of the structure on the property.” (City Ex. A, att. Covenant.)

The architectural floor plans were attached to the original Funding Agreement with the City (City Ex. A, DL0660-0665.) The plans were a significant factor considered by the Denver Labor analyst, Compliance Sup. Kandice McKeon, so are reviewed in detail here.

As noted, this is a four-story structure; also, there are no underground components. (TR1 30, 119.) Urban Peak CEO Carlson emphasizes that approximately 90% of the floor space in the building will be for the exclusive use by or on behalf of residents. (TR1 130-31.)

### a. First floor

On the first floor, the Mothership project will house up to 20 minors, and there will be up to 36 beds on the youth side. There will be no more than 8 beds in the largest dorm. (TR1 27-39, 94, 124-27.)

The green-colored areas are generally community and “all youth centric spaces”. These include: lobby, pantry, community room, gendered multi-stall restrooms, non-gendered private restrooms. (TR1 30-31.) It also includes a youth lounge, youth courtyard, private dining (TR1 35-36.) Green is what BlueLine Development Director Christian Pritchett (they are assisting Urban Peak and he is also the Mothership Project Manager) “would classify as service delivery space”, and he notes that it is still exclusively for residents. (TR1 127.)

The purple-colored areas are specific to “minors”, ages 12-18. (TR1 31, 33, 38.) The rules around minors are different and the needs of a 17-year-old and a 23-year-old are very different. As such, creating separate residential segregated space was a very important component of the Mothership project's design. CEO Carlson credibly testified that it was “really going to be critical to how we operate it.” (TR1 33.) As designed, the minor residents will have their own and separate full kitchen, courtyard, dorms, laundry, and community dining. (TR1 33, 35-36.) Development Dir. Pritchett “would call those community or congregation spaces rather than specifically service delivery areas”, and he notes they are also exclusively for residents. (TR1 127-28.)

The yellow-colored areas in the northwest and southwest corners (R-1, etc.) include shared bedrooms with beds or bunk beds, dressers, one or more wardrobes, and no bathroom. These rooms can sleep four to eight residents. Development Dir. Pritchett “would call those residential living or sleeping space for the residents that Urban Peak will serve in this building, particularly in the first floor, which would be a combination here of both youth and minors...” (TR1 31-34, 125.)

The blue-colored areas (Dorm R-1, etc.) include two banks of dormitories to the far left and three dorm banks to the far right. They take up about 40-50% of top edge of the first-floor plan. (TR1 34-35, 125.) The blue-colored area also includes tuck-under parking, some storage, and trash and recycling areas. The parking area is not underground or of poured concrete, as in Type 1 or 2 construction. (TR1 39, 131.)

The first floor also has an area marked “Respite” and a “light court.” The respite rooms “are for...someone who is sick or...intellectual and development delays need a different space. That’s more designed for the escalation and meeting the needs of what [Urban Peak] call[s] IDB, or intellectual and developmental delayed youth. (TR1 34.) The “light court” is a “very cool architectural feature” that “brings light down through the whole building as a component of the trauma-informed designed”, and it “is in the area for dining and where they eat.” (TR1 35-36.)

#### b. Second and Third Floors

The second and third floors have basically the same plans as each other. (TR1 41-61.)

These two floors have a lot more yellow than the first floor. The yellow areas are marked as dorms, and they are youth rooms that will also have four to eight beds. (TR1 41-42, 125.) These rooms will also have a couch, wardrobe, and dressers. (TR1 42.)

These floors also have purple color-coded areas for minors. They include community living spaces in Neighborhood 1 and Neighborhood 2, with a full kitchen, dining, and laundry facilities in each community. (TR1 43-44.)

As noted above, the “neighborhoods” are an essential component of the Mothership’s intentional and trauma informed design. As CEO Carlson testified,

...[they] had so many meetings before [they] broke ground, so, so many. And Neighborhoods...really became what [they] think about as a trauma-informed designed aspect. Because neighborhood is where we find community and where

we find connection and it is where we live, and so taking that name is actually a really important piece of the sort of how we welcome people into it.

The neighborhoods themselves were really about again not just only creating the space for people to be in community and have the support systems, but also about land and hard access. So [Urban Peak] knew [they] wanted to create some density, much like creating apartments or those types of things. So [they] wanted to be able to create the community while leveraging the density of economy and scale.

Each neighborhood will have support services in it. You can see something called an office. That's not an office. It's a space for case managers to work with youth who are in their space.

...[T]hat was really about how are [they] bringing adults to youths and how are [they] making living and residential space really welcoming and teaching some of those skills...[to] young people staying here for three months, six months, two years. You know, people need time to grow up.

(TR1 44-45.)<sup>8</sup>

Similarly important and intentional are the “affinity groups” used in the plans. “...[E]ach neighborhood will service a specific affinity group”, including

- (1) “pregnant and parenting youth”;
- (2) “youth coming out of the foster care system” (about 40% of Urban Peak’s client population);
- (3) “intellectual and developmental delayed youth”;
- (4) migrant and/or ESL youth;
- (5) “independent living...for youth who are working or going to school”; and
- (6) “youth who are in recovery and working through their substance misuse...”

(TR1 46-47.)

Like the first floor, these floors also show green-colored spaces. They include storage for maintenance, resident bikes etc. (TR1 48.) They also include staff offices that are integrated into the communities, community spaces, community restrooms (again, gendered multi-stall, non-gendered private bathrooms), study spaces/library, pantry, “cooking kitchen”. (TR1 49-51.)

#### c. Fourth Floor

The fourth floor – which is predominantly color-coded green – includes an outdoor well-being center, with tables and chairs; and also many skills-, community-, and therapy-focused common spaces.

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<sup>8</sup> Several transcription errors in this passage, as well as other quotations, have also been corrected.

About the well-being center with outdoor community terrace, CEO Carlson testified that, “...it’s the most beautiful place in the world. When [she] went up there the first time [she] cried. It is an outdoor terrace that [Urban Peak] will use for programs[,]. . .yoga[,]. [m]indfulness[,]. . .art, outdoor art-type work.” (TR1 52-53). As such, she adds, “it’s [a] space that is very specific to programs, not just a place to hang out.” (TR1 58.)

Other fourth floor spaces for residents include: a gathering room/community room, two classrooms, a “group therapy” room, a “visual arts center”, a music studio that “will have one side for recording and one side for. . .performing”, a “tech lab” with computers, storage, restrooms, and case management space. (TR1 54-58.)

Notably, the fourth floor also includes the “Mothership office”, which is an open workspace area for Urban Peak staff, to provide quiet, private places to enter confidential data. These areas are limited to staff but still for benefit of residents. (TR1 69-60, 130-31.) The plans indicate it could house up to 45 staff members, and it has been described as the headquarters or “flagship” offices of Urban Peak. (City Ex. D.)

Lastly, the fourth floor also includes a medical clinic and therapy rooms. The Mothership project will provide the services of two volunteer medical doctors, and a full-time licensed mental health clinician. Urban Peak also partners with community providers such as WellPower (f.k.a. Mental Health Center of Denver), and it hopes to hire two more full-time mental health clinicians eventually. Volunteer providers do not accept payment for their work and do not run private practices out of the Mothership offices. Paid staff clinicians do not charge residents, and do not use space to generate independent income. (TR1 61-64.)

In determining that the building classification applied, Denver Labor staff weighed heavily the sheer amount of square footage devoted to staff use or offices; the labeling of rooms as “dorms”; the lack of private bathrooms, kitchens, or water sources; that this is the corporate “flagship” or headquarters and the presence of what it termed an “in-patient” medical clinic.

### 3. Nature of the Use: Non-Profit Versus Commercial, with Public Versus Private Facilities

Denver Labor staff view the Mothership project as a commercial one, fitting its corporate mission, and Denver Labor emphasizes the lack of private amenities for residents; while Urban

Peak continues to emphasize its non-profit purpose and mission to provide residential living to homeless youth, and youths aging out of the foster care system.

As noted, the Mothership space and facilities will be only for used by, and/or for the benefit of, the youth residents; and neighborhood spaces are further restricted to the use of residents assigned to those neighborhoods. Green and purple spaces are only for the use of the residents. All the public and “staff” spaces will be used solely by or for the benefit of residents (although use of about 10% of the fourth floor is limited to staff to maintain confidentiality and provide a quiet place to work). Urban Peak does not accept payment from residents; many providers (such as chefs/cooking teachers and medical doctors) are volunteers; and none of the staff or volunteer providers are using the space to generate revenue and/or run private practices or pay rent to Urban Peak for those spaces. (TR1 48, 52, 64, 81, 127-31.)

There are no private bathrooms or kitchens in the sleeping quarters. As such, they lack essential features “to be autonomous, separate and independent living spaces”. (TR1 86-90; TR2 155.) Although this was a significant factor for Denver Labor staff, which it viewed as weighing against a residential classification, this was an intentional design choice of Urban Peak, to further create community within neighborhoods and affinity groups, and avoid isolation.

A “commercial kitchen” is referenced in planning documents, which was also significant for Denver Labor staff. (TR1 90; City Ex. D.) However, the kitchen is not necessarily “commercial” in terms of its function or purpose. It will be used for teaching residents kitchen-related life-skills, and also for feeding them. All “commercial” likely means in this context is that it has a certain “level of grease interceptor traps”, which is how the term “commercial kitchen” is defined under construction codes. The Mothership project will not use the kitchen for making food for resale; Urban Peak or others will not be operating any sort of business out of the kitchen(s); Urban Peak will not “earn any revenue from the kitchens in the Mothership project”; and the CEO does not see “the kitchens in the Mothership project further[ing] Urban Peak’s business interests in any way”, other than feeding and educating the youth residents. (TR1 51, 105-10, 159.)

In contrast to Denver Labor staff, BlueLine Development Dir. Pritchett did not place significant emphasis on “business function” or “end use”. He prefers to look at the construction methods, which he asserts is more consistent with the test laid out by USDOL All Agency Memo 130/131 for determining the appropriate construction classification. (TR1 143-44.)

Another factor that weighed heavily in Denver Labor’s building classification determination was what it perceived as the “Shelter” nature of the Mothership project. As noted above, the project is described throughout the relevant contracting documents by use of the word “shelter”. (City Ex. A; TR1 89-95.) The Funding Agreement between the City and Urban Peak also included a 60-year Covenant, which provides for two-phased restrictions including a 20-year Shelter Phase, and thereafter an Affordable Housing phase; and explicitly references “congregant shelter” and “non-congregant shelter”. (TR1 96-97, 110-12; City Ex. A, Attachment “A”, DL0037, DL0058-59; TR 2 119-20.)

However, Urban Peak CEO Carlson distinguishes the Mothership project from traditional shelters, such as that at 48th Avenue and Colorado Boulevard (the “48th & Colorado Shelter”), with “hundreds of people in one space” without assigned beds or private storage. The 48th & Colorado Shelter – which Compliance Sup. McKeon would have been familiar with – houses 500 single males overnight on cots on one side, and 300-350 single females overnight on cots on the other side. In contrast, at the Mothership project, residents will have assigned rooms, assigned beds, assigned storage, and there will be a maximum of eight (8) residents to the biggest room, who will reside there somewhere between 30 days and 2 years, and usually a minimum of three months. (TR1 111-12, 293-88; City Ex. D, Mothership project plans; Urban Peak Exs. D-F, pictures from the 48th & Colorado Shelter.)

#### 4. Nature of the Construction

As put by BlueLine Development Dir. Pritchett, “[f]rom a construction site standpoint”, “the Mothership project is “very, very similar” to apartments and condos in being four-stories or less and using Type 5 construction, which is a wood frame construction type” and is “the least intensive type of construction, as defined by the International Building Code” (IBC).

Devel. Dir. Pritchett has 10 years with BlueLine, which specializes in developing affordable housing projects, “and more specifically focusing on at-risk populations like [they are] serving here”, across the Mountain West (both financing, and construction phases); and before that he spent about five years working on the financing of about 17 Davis Bacon Act (DBA) affordable housing projects in Wyoming. (TR1 115-18, 121.) He has been involved with 55 residential projects (including but not limited to prevailing wage projects) through BlueLine; and involved

with 60-70 projects in his prior role (although only directly involved if a DBA project); and they have ranged from eight units up to 202 units, or square footage ranging from 6,000 up to 240,000. (TR1 116, 119.) The City declined to cross-examine Development Dir Pritchett, presumably on grounds that IBC or other criteria regarding the nature of construction were not relevant and/or Urban Peak had never provided the relevant IBC documentation to add to Denver Labor's investigatory file. (TR1 165, 284, 310; Rule 5.1, record on appeal.)

Devel. Dir. Pritchett testified that he and his general contractor (Deneuve), and even some of the subcontractors, were “flabbergasted” and “shocked” by Denver Labor's determination that the four-story Mothership Project, which does not have a poured concrete garage or any steel structure, was subject to the building construction classification for purposes of the Denver Prevailing Wage Ordinance. As with his company, about 90% of the contractors and subcontractors he works with also work predominantly (e.g., about 90%) with residential construction for at-risk populations. (TR1 121, 131-32, 149-50.) However, he pointed to only one comparator from his body of work: Arroyo Village.

In Arroyo Village, BlueLine and the same general contractor (Deneuve) constructed what Devel. Dir. Pritchett asserts is a similar 130-unit “residential community” over the course of 2017-2019. The Arroyo Village project was for low-income residents including those exiting homelessness, and also provided wrap-around services and relied on State and federal monies. The USDOL determined Arroyo Village was “residential” construction, despite including some Type 1 or 2 construction elements, including concrete parking built into a slope, and 2x4 construction for the “shelter” or congregant sleeping portion.

Denver Labor admits that it did not consider the example of Arroyo Village in issuing its wage determination. (TR1 156-64, 256.) It distinguishes the Arroyo Village project, however, based upon it clearly being apartments unlike the “dorms” of the Mothership project. It contains 130 apartment units which cover more than 90,000 square feet, and the shelter facility comprises only a small percentage of the total project. (TR2 155; City Post Hearing Brief at 25.)

Nonetheless, Devel. Dir. Pritchett explained that the Mothership project and the Arroyo Village project are similar in being “residential” construction projects “from a construction site standpoint” or in terms of “building science” because of its “Type 5” wood frame construction. (TR1 120.) Type 5 construction will be framed with wood, not concrete or structural steel, and will not include any fire-resistant materials, or underground parking. Type 5 Construction is the

least complex and least stringent type of construction as compared to construction Types 1 through 4. A building of four stories or less that is built with Type 5 construction also does not use the materials, equipment, or skilled labor that is found on a “Building” construction project. “From a floor plan layout, from a gross building area, from a schedule and from the labor market that’s being utilized for this project, it’s the exact same subs, trades, divisions that go into any other residential construction project.”

For instance, as a wood frame facility, the Mothership uses the “exact same skills and divisions that are going into” other Type 5 construction, “[e]ven down to the tools that the subcontractors are using.....utilizing tools like skill saws, hammer and nails, nail guns. You....might use a miter saw here and there. But for the most part, kind of the most basic tools of the trade.” Moreover, “that flows through to the rest of the trades and divisions as well. The drywall hangers and finishers, very, very different. The flooring installers are different because they have to be used to working under that more intensive construction type.” Type 5 will use “framers, general day laborers, ...rough carpenters” and “[y]ou might have some finish carpenters, drywallers, very standard, typical subcontractor base”. In contrast, Type 1 or 2 will use “workers that specialize in concrete work, whether it’s tilt form or slip form...You’d have to have welders...It’s completely different structural engineering”, and the subcontractors are referred to as “commercial subcontractors”. (TR1 120-22, 131-32, 144-45.)<sup>9</sup>

Devel. Dir. Pritchett also notes that common spaces are common features of apartments and condominiums, and generally occur in them 100% of the time. Similarly, elevators are also

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<sup>9</sup> The undersigned generally found Devel. Dir. Pritchett to be very credible based on common cues and measures and he was not impeached given the lack of cross-examination. See, e.g., Hillen v. Dept. of the Army, 35 MSPR 453 (1987) (factors include (1) the opportunity and capacity to observe the event or act; (2) character; (3) prior inconsistent statements; (4) bias; (5) contradiction by or consistency with other evidence; (6) inherent improbability; and (7) demeanor if relevant or reliable). His conclusory statements were less persuasive, however, as were his concerns that paying building construction wages could require him to rebid the contract or obtain new subcontractors or even a new general contractor. There is nothing in the record to support that latter speculation. Instead, the Denver Clarification document indicates that all of the jobs under the residential classification have a counterpart in the building classification or the OHR Supplemental Building, except for Drywall Hangers/Framers and Formbuilders/Formsetters. (City Ex. H at 3-5; TR1 139-40, 154-55.) The Denver Clarification Document advises the public that “Building classification will be used for residential construction and maintenance were a residential wage classification is not provided for the type of work performed.” (City Ex. H at 44.) As such, absent other record evidence, it appears that if Denver Labor’s wage classification determination is upheld, Urban Peak would only need to pay the general contractor, subcontractors, and their staff at the higher applicable building rates, and not restart the bidding process.

not an uncommon feature in apartments or other construction of two to four stories that are classified as “residential”. (TR1 128-29, 304.)

In his view, the Mothership project, as a four-story, wood-frame Type 5 construction, meets USDOL’s stated “test” for residential construction under the Davis Bacon Act, based upon the building materials, tools and skills required. (City Ex. I, USDOL All Agency memo.) Additionally, based on his experience, the residential wage determination “is a fair wage within the market, within the Denver market”, and he notes there was “plenty of sub demand for all components of this building” at the residential wage rate. (TR1 143-45, 162-63.)

Devel. Dir. Pritchett likens the Mothership project to the Arroyo Village construction project of 2017-219, which the USDOL deemed “residential” construction. Arroyo Village is two-story. It has 35 supportive housing units stacked over a large shelter space with two rooms for 55-bed total congregant capacity (about 27-28 per room). This required 2x6 rather than the usual 2x4 used in residential wood framing, and also steel ground-to-floor support beams. It also has case management offices on the first floor for providing wrap-around services. It also has a “commercial kitchen”, which relates to the “level of grease interceptor traps” as noted. It also has a partially underground garage because built on a slope, which required more intense construction and fire-barrier walls, unlike the Mothership with its tuck-under parking. (TR1 156-64.)

In contrast, Devel. Dir. Pritchett distinguishes the Mothership project from the construction of the large shelter at 48th Avenue and Colorado Boulevard that Denver Labor deemed “building” under the Davis-Bacon Act a few years ago. The 48th & Colorado Shelter, aside from being different in “programmatic intent” described by CEO Carlson, is also “very different” “from a...construction intensity standpoint and the building science methodology”. For instance, it has “a raised concrete foundation with almost entirely brick construction on top of that”, which involves “different types of trades and divisions and...skill”, and “would be extremely atypical for an apartment building or residential building”. Additionally, there is tilt-up construction for the interior walls, which “requires much more heavy equipment to accomplish...along with fasteners that are...very different from...your typical nail gun and screws for residential framing.” There is also more complicated interchanger and mechanical systems, structural scale joins for the roof, and structural steel and steel joints, which are “much, much different than what you would see in a residential setting...”, with its primarily wood materials. (UP Ex. D; TR1 306-309.)

D. Intentions, Discussions, and Understandings About the Applicable Prevailing Wage Classification

Under Section 3(G)(c) of the Funding Agreement between the City and Urban Peak, Urban Peak agreed to pay project workers “prevailing wages as set forth in Section 20-76 through 20-79”. They also agreed that their performance “shall also be in conformance with the Shelter Operating Agreement...and Declaration of Restrictive Covenant Agreement...” (TR1 91-92, 182, 202; City Ex. A, Funding Agreement DL008.)

Urban Peak is willing to pay prevailing wages. (TR1 68.) It has paid and is presently paying wages at the residential classification rate. They always intended to pay prevailing wages, but its agents (CEO Carlson and BlueLine Devel. Dir. Pritchett) were under the belief that the project was subject to residential construction classification. (TR1 79.) As such, Urban Peak only budgeted for residential construction classification based upon “the direction...and advice [they] got from the City and the State and their...architects, and [their] developers, and elected officials...And then [their] understanding of it being a residential building, as well as being four stories or less.” (TR1 68.)

Long before the project was published for bid or ground was broken, Urban Peak with or through BlueLine had conversations with its contract administrator, HOST. In discussions with HOST, Urban Peak’s “ask”– in relation to use of GO Bond funding for the Mothership project – “was based on the direction of it being residential wage”, and that the project was fully funded based upon the assumption of a residential classification. (TR1 69-70, 252.) It is also clear from the documentary record that HOST, too, believed the Mothership project (and other GO Bond affordable housing projects) should or would be classified as residential construction, since it advocated as much to Denver Labor in February 2023. (City Ex. B, emails.)

As Devel. Dir. Pritchett credibly testified, other subsequent discussions with the various actors also confirmed his and Urban Peak’s belief and understanding that this was a residential construction project. The general contractor, architect, and subcontractors all spoke in terms of residential construction, and the tools and trades, and it was “universally agreed” that “residential prevailing wage is appropriate based on the type of construction, the building science, the size of the building, and the comparability of other projects that we have collectively developed in Denver and outside of Denver across the Rocky Mountain west”. He also notes that it was a Davis-Bacon

Act residential wage determination that was attached to the contract with the contractor, and he maintains that early talks with the City presumed application of the Davis-Bacon Act, not the Denver Prevailing Wage Ordinance. (Denver Labor in turn observes that it was Urban Peak or its agent BlueLine that led the Division to believe it was a Davis-Bacon Act project.) (TR1 132-33, 138, 150-53, 207; TR2 140.)

Urban Peak also obviously views the Denver Labor building determination as having come somewhat late in the process. As noted, the project was advertised for bid in March of 2021<sup>10</sup>; the contract was executed with the general contractor in November 2022; and they broke ground late November or early December 2022. Then, on February 7, 2023, the capital project manager for the City of Denver (Megan Yonke, with HOST), forwarded to BlueLine an email from prevailing wage Compliance Supervisor Kandice L. McKeon of Denver Labor, notifying BlueLine/Urban Peak of the new building classification determination. Pritchett emailed Yonke expressing confusion, and she replied that “[a]pparently only single-family homes and apartment buildings qualify as residential. Shelters do not...This is certainly news to me...” (TR1 70-71, 132, 138-39, 173, 203- ; City Ex B, DL000821-827, \*-824.)

The notification of a building construction classification under the Denver Prevailing Wage Ordinance made CEO Carlson cry, then throw up, knowing the project was no longer fully funded. (TR1 70-72.)

In response to Ms. Yonke’s email, Devel. Dir. Pritchett wrote back referencing a “memo sent over”<sup>11</sup>, and asserting that non-congregant shelters were not addressed therein. He noted, referencing that document, that “[t]he test of whether a project is of a character similar to another project refers to the nature of the project itself in a construction sense, not to whether union or nonunion workers are employed.” As he later testified, “first and foremost[,]...there wasn’t a specific classification for the type of building that we’re constructing within the memo that was

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<sup>10</sup> The attached USDOL prevailing wage determination, however, was not the most recent, or correct/accurate at the time, and/or was not valid by the time the project was published for bid.) Compliance Sup. McKeon observes that the USDOL wage determinations are only valid for 180 days, and that in this case the contract was not awarded within 180 days of the wage determination that Denver Labor would have attached had they been involved in the matter sooner. (TR1 205-207, 211, 214, 249-50; City Ex. B, emails, DL0824-825; City Ex. S, USDOL Building Mod 5 wage rates dated 5/13/22, circulated by Denver Labor 5/13/22; see also Urban Peak Ex. C, USDOL prevailing wages document dated 7/8/22.)

<sup>11</sup> This evidently refers to the USDOL All Agency Memo 130/131 that then-Dir. Garcia shared with an Urban Peak board member at some point, as discussed below.

sent over. But also...maybe more important, is that the memo does define how to apply a test for buildings of a character similar to those that are defined within the memo.” (City Ex. B at 2; TR1 143.)

#### E. Cost Impacts of Applying the Building Classification

If Urban Peak is ordered to pay the building construction prevailing wages, that would apply to the whole project retroactively. Urban Peak can make the retroactive payments if they lose their appeal, but it will come at a cost to implementing and operating the flagship Mothership project. (TR 80.)

BlueLine Devel. Dir. Pritchett initially suggested to the City it could make a \$2 million to nearly \$4 million difference in labor costs for the whole project, but at the hearing he testified more credibly that it would be about \$2 million in added costs. (TR1 80; TR2 162.) CEO Carlson testified that absent,

giving up other pieces that we had initially planned from some of the furniture,...[Urban Peak] will have to be able to think about how to raise more money and stretch our resources more and try to figure out where to find the money to be compliant with the operating reserve required by the City; and, honestly, to build enough that [they] can manage through a crisis, through any kind of operating issues that [they] might have in the building. And [they] are looking at staffing and how [they] are going to cut staffing to absorb this extra cost, if [they] can't raise the additional 2 million [dollars].

(TR1 79-80.)

Exec. Dir. Matthew Fritz-Mauer of Denver Labor testified that, while the Division has no discretion to decline to enforce the Prevailing Wage Ordinance or other wage-and-hour laws within its jurisdiction, it often negotiates with parties to reduce or eliminate penalties or set up re-payment plans. (TR2 162-63.) The record suggests it may also be possible for Urban Peak to go back to the City to seek additional public monies.

#### F. Denver Labor's Entry into the Case and Its Decision-Making Process in Assigning a Building Classification, and in Considering Urban Peak's Request for Review

Kandice McKeon is a labor compliance supervisor in the Denver Labor Div. of the Auditor's Office. She was the lead for the Mothership project and made the essential

determination<sup>12</sup> that the Mothership project was appropriately subject to the “building” construction classification. Compliance Sup. McKeon has 35+ years of experience applying the Davis-Bacon Act and/or the Denver Prevailing Wage Ordinance, including ten (10) years with Denver Labor and 27 years with the Colorado Building and Trades Council. She was credibly described by her former Executive Director as being “an exceptional analyst”, although also described by others as being “inflexible.” Although obviously very knowledgeable, she had questionable recall and appeared defensive and equivocated on cross examination. For instance, she claimed she could not recall having ever worked on a “shelter” project or “homeless” project, even if there had been one, five, or ten, which was rather incredible to the undersigned, although she surely would have heard of the 48th & Colorado Shelter project. (TR1 169-72, 219-21, 258, 284, 289; TR2 42, 50, 72, 78.)

Compliance Sup. McKeon and/or Denver Labor became aware of the Mothership project sometime in late January 2023, although the record was unclear exactly when or how. Witnesses Urban Peak CEO Carlson, BlueLine Devel. Dir. Pritchett, Denver Labor Compliance Sup. McKeon, then-Exec. Dir. Garcia, and current Exec. Dir. Fritz-Mauer all offer somewhat different descriptions and chronologies of their communications about the Mothership project’s wage determination. This is not terribly surprising given the number of actors and agents involved, and it also illustrates Exec. Dir. Fritz-Mauer’s explanation of Denver Labor’s enforcement/compliance review being an “iterative process.”

In any event, it appears that Denver Labor’s involvement did not begin with the February 6, 2023 building classification determination, or on January 31, 2023 when Megan Yonke from HOST forwarded an email from BlueLine Devel. Dir. Pritchett to Denver Labor Compliance Sup. McKeon, asking “who the city should contact to coordinate with on the Davis-Bacon compliance”. (City Ex. B, emails.) Instead, it appears that Denver Labor became involved when an Urban Peak Board Member (Gretchen Hollrah, who did not testify) reached out to then-Exec. Dir. Garcia about the issue. (TR2 29-30, 47.)

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<sup>12</sup> Compliance Sup. McKeon was quite clear and firm in first stating she made the determination, and then in saying that then-Exec. Dir. Garcia and Rafael Gongon were the “ultimate decision-maker[s]”. Then-Dir Garcia affirmatively denied that he made the determination and said it was Sup. McKeon’s decision, about which she was reportedly “very firm”. He added that it would be “inappropriate” for him or Gongon to change it unless it was “inaccurate”, and that he would have come to the same conclusion. (TR1 173, 257-58; TR2 42, 50, 70, 72.)

Ordinarily, Denver Labor is made aware of contracts with DBA and/or PWO requirements earlier in the process, and before the matter is put out to bid. However, there is no set or single way by which Denver Labor is apprised of contracts within its jurisdiction. Another City Agency may contact them (such as HOST, etc.), or they may be alerted when prevailing wage related contracts are uploaded to the City’s contract management system called “Jaggaer”. Denver Labor makes a “standing invitation” through its public outreach for constituents/clients to “Please contact us as early as possible so we can get involved as early as possible, so we can educate everyone on their obligations, rights and responsibilities’. When Denver Labor is made timely aware of a prevailing wage contract, it “attaches a wage determination prior to it being sent out for a request for proposal or request for bid. That way the contractors who are bidding a project are aware of the wage determination that’s attached to the project.” (TR1 173, 202-09, 214, 224-25, 252, 283, 290-91; TR2 29, 39, 47-48, 90,-91, 105, 172, 180-83; City Ex. H, inside contact page.)

In this case, Compliance Sup. McKeon testified that she determined the construction classification for the Mothership project as being “building” in late January 2023. This was about a week or so before BlueLine and Urban Peak were notified on February 7, 2023 by Megan Yonke at HOST. Compliance Sup. McKeon testified that she made this determination based upon consideration of “the scope of work”; the plans (City Ex. D); the Funding and Assignment Agreement (City Ex. A); the USDOL All Agency Memo 130/131 from 1987 (Urban Peak Ex. B); and her extensive knowledge and experience as a prevailing wage analyst. (TR 173-74.)

She notes that the Funding Agreement specifies the project shall be subject to the Denver Prevailing Wage Ordinance (PWO). Moreover, it is the same standards, analysis and result whether applying the DBA or the PWO, since the PWO adopts the DBA, and mandates application of federal wage determinations and standards. She did not refer to the more recent USDOL document, “Davis-Bacon Act Construction Wage Determination Manual of Operations”, dated 1986. (TR1 173-74, 204, 226, 229, 235-57, 282; City Ex. I, USDOL All Agency Memo 130/131; Urban Peak Ex. B, USDOL 1986 MOP.) Compliance Sup. McKeon also did not formally consult or review the Denver Clarification Document (City Ex. H), and Denver Labor did not produce it as part of the record relied upon. However, she has used the City Clarification Document regularly over the decades and as a distillation or summary of prior wage determinations it necessarily reflects and influences her analysis. (TR1 230, 277; TR2 79-80.)

As to scope, the Funding and Assignment Agreement explicitly references “shelter” 134 times, and in her extensive experience, shelters are normally within the “building”, not “residential”, construction classification for purposes of determining either DBA or PWO prevailing wages. Additionally, the floor plans attached to the Funding Agreement reference “commercial building” (actually “one-story metal commercial building”, at DL0662/DL0040); and a majority of certain floors in the plans are green (up to 80-90% depending on the floor), and the “IBC occupancy classification”<sup>13</sup> color code on the Funding Agreement states that green represents “business”. Another factor was the lack of private bathrooms or kitchens and/or the presence of public bathrooms and communal kitchens. Typically, “residential” construction classification is limited to apartments and single-family homes, which are not commercial or business in nature outside of home offices; and you do not see public restrooms or restrooms with multiple toilets in apartments or single-family dwellings. (TR cites after the following para.)

Also significant for Compliance Sup. McKeon were the yellow portions labeled “Dorm”. Although the purple common gathering areas did not have a significance for her, the USDOL All Agency Memo 130/131 lists “dormitories” under “building”. She also noted the presence of an elevator, which single-family residences normally lack. She further testified that she and Denver Labor did not typically consider IBC codes and/or construction materials or methods. She also did not consider the Arroyo Village project. Finally, she concluded that residential construction did not apply because the Mothership project did “not meet any of the[] examples or definition[s]” under the USDOL All Agency Memo; or the examples of “residential” class of construction in the Denver Clarification Document. (TR1 170, 173-74, 179, 181-82, 185, 187-200, 230-34, 244, 246, 248, 256; City Ex. A, Funding Agreement; City Ex. I, USDOL All Agency Memo 130/131; City Ex. H, Denver PWO Clarification Document.)

The Denver Clarification Document is somewhat distinct from the USDOL All Agency Memo 130/131 in several respects. This is in part due to the statutory difference of Denver PWO protecting service jobs or other classifications of work not covered under the Davis-Bacon Act, and in part due to the Denver Clarification Document filling in gaps left by the All Agency Memo

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<sup>13</sup> The undersigned notes the Witness and/or Denver Labor are happy to rely upon IBC information or indicators for this purpose but not regarding the nature of construction.

130/131. Here are the two documents' respective definitions and illustration of the two terms (building and residential):<sup>14</sup>

Denver Clarification Document

- “Building wage classifications include: the construction, rehabilitation, and repair of sheltered enclosures with walk-in access for the purpose of housing persons, machinery, equipment, or supplies. Building construction typically includes all construction of such structures, installation of utilities and equipment (both above and below grade level), as well as incidental grading, utilities and paving, unless there is an established area practice to the contrary.”
- “Residential wage classifications include[] those projects involving the construction, alteration, or repair of single family houses or apartment buildings of no more than four floors in height (e.g. town homes or row houses, single family houses, mobile homes, multi-family houses, apartment buildings of four floors or less, and student housing of four floors or less).” (City Ex. H at 13-14, emphases added.)

USDOL All Agency Memo 130/131

- “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.”

...

Examples

...

Dormitories

...

Office buildings

Out-patient clinics

...”

- “Residential projects for Davis-Bacon purposes are those involving the construction, alteration, or repair of single family houses or apartment buildings of no more than four (4) stories in height. This includes all incidental items such as site work, parking areas, utilities, streets and sidewalks.

Examples

Town or row houses

Apartment buildings (4 stories or less)

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<sup>14</sup> As former Dir. Garcia testified, the Denver Clarification Document goes into much greater and more granular detail about the trades under each rate. (City Ex. H; TR2 88.)

Single family houses  
Mobile home developments  
Multi-family houses  
Married student housing". (City Ex. I at 2-4, emphases added.)<sup>15</sup>

As former-Denver Labor Dir. Garcia noted at the hearing, the Denver Clarification document adds "area practice" to the definition of "building" and deletes "married" from "married student housing" under the definition of "residential". Additionally, the USDOL All Agency Memo 130/131 includes examples under "building", unlike the Denver Clarification Document (TR2 87-89.)

Neither guidance mentions shelters, shared or communal restrooms or kitchens, or the presence of office space, all of which may exist in apartment buildings of four stories or less. Also, color coding on architectural plans were shown to be inaccurate or misleading for purposes of prevailing wage analysis. (Cf. City Exs. H and I; TR1 234, 236-41, 235-244, 286.)

Compliance Sup. McKeon, on cross-examination, repeatedly distinguished "bona fide" apartment buildings or single-family residences. (TR1 243-44, 259.) She also pointed out that although the green spaces are used for the benefit of the residents, that is still "the business of Urban Peak", in which "[t]hey are providing services" in or from these areas "to support...their mission." (TR1 240.) Compliance Sup. McKeon further testified that in all her 35 years, this was the first time in her experience that "an applied applicable wage determination has been challenged." (TR1 262 268-69.)

At the hearing before the undersigned, BlueLine Devel. Dir. Pritchett credibly challenged several points of Compliance Sup. McKeon's analysis. First, the reference on DL00662 (City Ex. D, plans) to "commercial building" was from the pre-construction survey, and it was about a "one-story metal commercial building" that was "previously located on the site and was demolished as part of the development of the Mothership." It was a building with structural steel. Additionally, the "commercial kitchen" designation is not particularly accurate or relevant in this case. (TR1

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<sup>15</sup> Urban Peak introduced a 1990 USDOL document titled "Davis Bacon Construction Wage Determinations Manual of Operations. (Urban Peak Ex. B.) Denver Labor evidently did not consult this document in the initial determination by Compliance Sup. McKeon or its subsequent review of that initial determination. (TR1 146.) It appears that the few differences between the PWO and the DBA derive from or relate to the 1986 Manual of Operations. *Id.* at 23 and 26 (stating that "the guidelines contained in All Agency Memoranda No. 130 and 131 concerning classifications are not binding" and "[w]hen the nature of a project is not clear, it is necessary to look at other considerations as well, with foremost consideration given to area practice"; and that deleting "married" from "student housing".)

301-303.) Devel. Dir. Pritchett also points out that Arroyo Village had two elevators, notwithstanding its USDOL residential wage determination. (TR1 304.)

At some point, Urban Peak Board Member Gretchen Hollrah reached out to then-Dir. Garcia, to advocate for a residential classification. Then-Dir. Garcia shared the USDOL All Agency Memo 130/131 (City Ex. I) with the Urban Peak Board Member. He inquired about the Mothership project's "purpose", appearance, and Urban Peak's "goals". They discussed that there would be multiple individuals sleeping in a single room, there would be outpatient treatment facilities, Urban Peak offices, and "if they would have their business operations there...And they said yes, they would have office space there." Garcia pointed out that out-patient medical treatment and business offices fell under "building" under City Ex. I, and that the Mothership project "did not fall under the definition of a single-family home or an apartment building". (TR2 50-54, 80-81.)

Then-Denver Labor Dir. Garcia did not recall discussing the Denver Clarification Document, and he did not recall having a specific idea at the time of whether the Mothership project was covered by the DBA or the Denver PWO. However, the Denver Clarification Document (City Ex. H) is very similar and supports the same determination in Garcia's view; and he showed the USDOL All Agency Memo 130/131 because it contained "building" examples, unlike the Denver Clarification document. (TR2 61-62, 80-81, 87-90.) Former-Dir. Garcia admitted that the PWO and rules he is aware of do not expressly authorize reliance on DBA determinations or case law, but he believes it is implied in the PWO favorably citing the superior resources and abilities of the federal government and given that the four basic construction categories come from the DBA originally. The undersigned agrees. (TR 2 97-99, 101, 103, 198.)

Then-Dir. Garcia agreed at the time and still agrees with Compliance Sup. McKeon's determination that the Mothership project is properly classified as "building" construction, not "residential" construction. In fact, he testified, "at no point did [he] ever believe this to be residential." While it is true that he initially thought of the Mothership project in terms of being a traditional "shelter", like the 48th & Colorado Shelter project, learning that it was "a very complex structure" serving "multiple functions" did not change his assessment. Referring to it differently, such as a "group home" instead of a shelter, also would not change his assessment given the narrowness of the definition of "residential" under both the DBA and the PWO, and the business or commercial purpose implicated in the project. Furthermore, the Mothership project did not fall

within any of the examples of residential construction under the Denver PWO Clarification Document, while its component parts did meet several examples of “complex” structures under the USDOL All Agency Memo 130/131. Then-Dir. Garcia further testified (as did the current Director, Matthew Fritz-Mauer) that Denver Labor does not have “discretion” to apply a different classification than what is required under the Denver PWO. (TR2 54-55, 72-74, 90, 92-94, 100, 106, 109-10.)

Then-Dir. Garcia testified that he was “really surprised that we’re at this situation” because, [w]hen [he] left, the understanding was that Urban Peak was fairly in agreement with [his] explanation of what the situation was

They did say that they were going to file an appeal and look for a hearing, but that they would do that on paper and that there would be no testimony. That there would be no hearing because they just really wanted the determination by the hearing officer so they could go back to the city and ask for a change order for additional funds.

(TR2 74-75.)

On April 3, 2023 Urban Peak filed a formal request for review of Denver Labor’s determination that the Mothership fell within the “building” classification, not “residential”. At that time, Denver Labor was undergoing the transitions described above, and it had not yet even promulgated rules for the handling of such requests for review, or the designation of independent hearing officers. (TR2; City Ex. C, Urban Peak appeal.)

In April 2023, Exec. Dir. Fritz-Mauer (a JD and PhD labor practitioner who succeeded Mr. Garcia) and Urban Peak’s counsel here (Patrick Dalin of Fisher Phillips) entered into months of additional “iterative” discussions, during which course the entire matter was reviewed again. (TR2 172-73)

In these discussions, Urban Peak again analogized the Mothership project to apartment buildings, dormitories, or student housing based upon its use or purpose of providing “residential living” with wrap-around services to homeless youth. Upon review of the Funding Agreement and Plans, and the All Agency Memo 130/131 and the Denver Clarification document, Dir. Fritz-Mauer concluded that it was more like the building examples relied on by former-Dir. Garcia. He too pointed to the lack of private bathrooms, kitchens or independent sources of water (as well as the lack of any student requirement for residents) as rendering the Mothership project unlike an apartment building or “student dorms”. He too pointed out that dorms and shelters “typically fall into the building construction category” in any event, unless they are devoted to actual students.

Dir. Fritz-Mauer also conducted independent research and shared the comparator of the 48th & Colorado Shelter. (City Ex. R; TR cites after the following para.)

Dir. Fritz-Mauer also considered Urban Peak’s arguments about the construction intensity/complexity, and the International Building Code (IBC). However, Urban Peak never provided any additional evidence or information establishing the IBC standard or their use or relevance for purposes of construction classification under prevailing wage laws. Fritz-Mauer also “searched Wage Appeal Board determination for any reference to the IBC” and “could not find any.” Later, Urban Peak raised Arroyo Village as a comparator but Dir. Fritz-Mauer was not persuaded because Arroyo Village, unlike the Mothership project, was “overwhelmingly” residential. Lastly, the Director also considered Urban Peak’s arguments about increased costs. Although he agreed it is facially plausible that costs will increase under the higher “building” classification, he maintains that Urban Peak has failed to provide evidence or information, since the estimates have ranged from \$1.9 million to \$4 million, and no information was provided to support the current estimate of a \$2 million cost increase. (TR2 146-48, 150-57, 161-62, 174-75, 177-88.)

Although much of these discussions were not part of the “investigatory file” as defined under Denver Labor rules (see City Ex. E, Rule 5.1), this process was entirely consistent with the Division’s standard “iterative process” in seeking to resolve objections or requests for review pre-hearing. Ultimately, Urban Peak did not persuade Denver Labor to change their classification determination. As Dir. Fritz-Mauer put it, he “thought it was completely correct throughout this process, and as [he] had each new conversation or evaluated each new piece of information or evidence.” (TR2 167.)

## **PARTY POSITIONS**

### ***Appellant Urban Peak states, swears and avers as follows:***

“The touchstone principle of prevailing wages is that workers be paid the wages and benefits that prevail “for similar work in the same locality. (Urban Peak Post Hearing Brief at 11, quoting Phoenix-Griffin II, Ltd. v. Chao, 376 F. Supp. 2d 234, 236 (D.R.I. 2005). For the reasons

that will follow, Denver Labor’s determination of a building wage classification must be dismissed in its entirety, because the Career Services Board failed to gather wage data and hold a hearing as required under the Denver Prevailing Wage Ordinance. In the alternative, the Hearing Officer should determine that the residential construction classification applies. (Ibid. at 20.)

The burden of proof in ruling on Urban Peak’s request for review of Denver Labor’s determination is one of a simple preponderance of the evidence, and no special deference should be afforded by the Hearing Officer to Denver Labor’s determination. (Ibid. at 9-11, citing City. Ex. F, PWO, § 20-76(g)(4); CO C.R.P. 106(a)(4); Cash Advance and Preferred Cash Loans v. State, 242 P.3d 1099, 1113 (Colo. 2010), US v. Gehrman, 731 F. App’x 792, 802 n. 9 (10th Cir. 2018) (citing cases establishing that the standard of proof in Colorado civil matters is “preponderance of the evidence”); Sinclair Wyo. Ref. Co. v. U.S. Env’tl. Prot. Agency, 887 F.3d 986, 991 (10th Cir. 2017) (that in cases of “informal adjudication”, Chevron-style deference does not apply, and the Court must evaluate “the persuasiveness of agency action with no thumb on the scale of judicial deference”).

“Contrary to the Denver Auditor’s contention, preponderance of the evidence can be both the burden of proof and the standard of proof (or standard of review on appeal).” (Ibid. at 10, citing Dantran Inc. v. U.S. Dep’t of Labor, 171 F.3d 58, 69 (1st Cir. 1999) (the Service Contract Act adopts a preponderance of the evidence standard of review); Meyer v. Dep’t. of Health and Human Servs., 666 F.2d 540 (Fed. Cir. 1981) (weighing, in a “KeyCite red flagged” case, whether an MSPB ALJ should have applied a “preponderance of the evidence” or a “substantial evidence” standard of review); Deeds v. People, 747 P.2d 1266, 1269 (Colo. 1987) (“the appropriate standard of review for voluntariness was by a preponderance of the evidence”).

When the record is considered without impermissibly weighing the scale in Denver Labor’s favor, it is clear that Urban Peak has met its burden to prove by a preponderance of the evidence that Denver Labor erred as a matter of fact and law in determining the Mothership project was building construction rather than residential construction.

In the first instance, Denver Labor violated the Prevailing Wage Ordinance by issuing a federal Davis-Bacon prevailing wage determination at all, since the Mothership project is only covered by the Denver PWO, not Davis-Bacon. The PWO directs the City’s Career Service Board (‘CSB’) to adopt and/or defer to the federal wage determinations only for projects covered by the Davis-Bacon Act in whole or part. In cases where Davis-Bacon does not apply and the project is

covered only by the PWO, the PWO requires the CSB to instead conduct wage benefit surveys, collect data, and hold hearings to determine the prevailing wage using “the same method” that USDOL uses. (Urban Peak Brief at 12, citing PWO §20-76(c)(3), and In re Mistick Constr., ARB No. 04-51, 11 WH Cases 2d 952 (ARB Mar. 31, 2006) (that to set prevailing wages under the Davis Bacon Act, the U.S. Department of Labor conducts surveys of wages and fringe benefits, as well as reviews statements of wage rates paid on projects and rates listed in signed collective bargaining agreements”).

Because “there was no prevailing wage rates that were properly adopted to be applied” in the first instance, the Service Contract Act, §§ 41 U.S.C. 351, et seq. applies instead, pursuant to the express terms of Section (c)(3) of the PWO. (Ibid. at 12-13.)

In the alternative, if any construction prevailing wage does apply, it is clear under the record – even assuming using an abuse of discretion does apply – that it would be the residential construction rates that apply. (Urban Peak Brief at 13, 19.)

The Mothership is a four-story “residential building to house homeless youths and young adults in the City and County of Denver”, and it is not a traditional shelter or a commercial or outpatient medical facility. Instead, it is a new concept, designed to “create an environment in which the youth and young residents have the resources at their residences that they need to thrive and succeed.” (Urban Peak Brief at 1.) Its residential purpose is tailored to unique youth/young adult needs and is matched by the use of relatively simple building materials, tools and skill required in comparable construction classified as “residential”. Moreover, Urban Peak had no duty to contact Denver Labor regarding the prevailing wages to be paid on the project – rather, that was HOST’s responsibility as the contract administrator. This failure of City components to communicate between themselves resulted in Urban Peak only being notified of the building classification after it had already broken ground on the project. (Ibid. at 4. )

Moreover, in making her determination, Compliance Sup. McKeon relied upon spurious, irrelevant, and erroneous factors that are not supported by the evidence, the relevant USDOL and/or Denver guidances, or prevailing wage case law. These irrelevant or spurious factors included:

- mere use of the word “shelter” several times in the Funding Agreement;
- appearance of the word “commercial’ on one page of the building plans, which in fact referred to the building that previously existed on the site and was demolished;

- that in some places the plans referred to spaces as having a “business” IBC occupancy classification;
- communal restrooms and kitchen, although not all multi-person residences have private kitchens or baths and neither feature is cited in either the federal or the Denver guidances;
- the assignment of more than one person to a sleeping area, although shared bedrooms in residences and apartment buildings are not uncommon;
- that the plans include many “office” spaces, although many apartment buildings of four-stories or less have office spaces; and
- the existence of a variety of other shared spaces, such as reading rooms, gym, and laundry, which many multi-person residences of four-stories or less often have.

Instead, Compliance Sup. McKeon and Denver Labor should have made the determination based upon “the nature of the project in a construction sense”, meaning its the simple construction methods and tools used. (Ibid. at 4-7, and 13-14 citing City Ex. I, USDOL All Agency Memo 130/131.)

Additionally, Compliance Sup. McKeon’s analysis was marred by her reliance on the USDOL All Agency Memo 130/131, rather than the Denver Clarification Document; and her failure to consider the types of materials, tools and skills used, which probably arises from her lack of experience working in construction. (Ibid. at 7, 13-14.) Notably, the comparator of the 48<sup>th</sup> & Colorado Shelter was presented late so not relied upon by Sup. McKeon, but it is clearly distinguishable in any event, and was “constructed in a fundamentally different fashion.” (Ibid. at 7-8.)

Similar error exists in then-Exec. Dir. Garcia’s reliance upon or referral to the USDOL All Agency Memo 130/131, “despite the fact that the Denver guidance document departs from the federal document in some respects.” At the same time, then-Dir. Garcia rebuffed Urban Peak’s attempts to consider relevant Davis-Bacon Act case authority that supported Urban Peak’s position. (Urban Peak Brief at 8-9, citing TR1 72-73.)

While the Davis-Bacon Act is not applicable, cases decided under it “are instructive regarding core prevailing wage concepts and principles”, and that case law “states that in dispute over which prevailing wage rates apply, we are to look at ‘wages being paid on projects of a character similar,’ and ‘the construction, techniques, the materials and equipment being used on the project, and the types of skills called for in the project and other similar factors which would indicate the proper category of construction.’” (Ibid. at 13, citing Texas Highway – Heavy Branch & Texas Heavy, Municipal, WAB No. 77-23 (12/30/77, City Ex. L).) Because the nature of construction is so critical, the USDOL All Agency Memo 130/131 cautions that “a literal application

of the guidelines may be inappropriate.” (Ibid. at 14, citing City Ex. I, USDOL Memo at DL0761-DL0767.)

In fact, use of “e.g.” shows that the residential examples listed in the Denver Clarification Document are merely illustrative, not exhaustive. (Ibid. at 16, citing City Ex. H, Denver PWO Clarification Document.) Additionally, the broad descriptions of the building category must “give way” to the residential illustrations, to avoid making them superfluous. (Id., citing EEOC v. Cont’l Oil Co., 548 F.2d 884, 889 (10th Cir. 1977) (“statutes are to be given such effect that no clause, sentence, or word is rendered superfluous, contradictory, or insignificant”).) However, Denver Labor’s

argument in this matter relies in large part upon calling the project a ‘shelter,’ or a ‘dormitory,’ or ‘commercial,’ and then leaping from those designations to the conclusion that Building Construction wages are applicable. Denver’s guidance, however, does not identify any type of building that categorically falls into the ‘Building Construction’ category.

(Ibid. at 16-17.)

In fact, the Denver Clarification document does not mention shelters or dormitories at all, and it only mentions “commercial” in a single instance “to acknowledge that” a residential building can contain “commercial-use” space. (Ibid. at 17, citing City Ex. H at DL0716.) The USDOL’s 1986 Davis-Bacon Guidance (Urban Peak Ex. B) does list “dormitories” as an example of building construction, but it was not cited or relied upon by any of the Denver Labor staff. (Ibid. at 17-18) In any event, the Mothership project is obviously not a dormitory, even if the architect marked some sleeping spaces as such. Indeed, “Dorm” may have been used solely because it fit in the small boxes. (Ibid. at 18, citing TR 46:6-19.) Overall, the Mothership project is far more similar to the Arroyo Village project than it is to the 48th & Colorado Shelter project, in a construction sense.

Notably, the same conclusion – that the residential classification applies – is equally supported under either the Denver Clarification Document or the USDOL All Agency Memo 130/131. This is based upon the Type 5 nature of the construction, as well as its essentially residential use or purpose. The Arroyo Village project that was deemed residential is, in fact, a “more complex building” with both apartment units and an 11,300 square foot congregate shelter space containing 55 beds, and a 75-space covered parking garage that was built with Type 1 construction (BlueLine worked on it as well). (Ibid. at 3-4, 14-18.)

Lastly, the residential classification would apply even if the Hearing Officer uses an abuse of discretion standard in reviewing Denver Labor’s wage determination, since Denver Labor has misconstrued or misapplied the law, and its position is not “reasonably supported by competent evidence in the record.” (Urban Peak Brief at 19, citing Freedom Colo. Info., Inc. v. El Paso Cnty. Sheriff’s Dep’t, 196 P.3d 892, 899-900 (Colo. 2008). In particular, Denver Labor failed to establish the 45-year precedent it purportedly relied upon; erroneously relied upon USDOL All Agency Memo 130/131 instead of the Denver Clarification Guidance; and it misapplied the law by ignoring the nature of the construction and instead relying on “egregious mistakes of fact” such as a supposed commercial building that has been demolished, or that it contains commercial operations such as an “outpatient clinic.” (Ibid., 7-9, 19.)

For all these reasons, Urban Peak’s appeal should be sustained and Denver Labor’s wage determination dismissed or modified. If Urban Peak is ordered to pay the building wage rate, it will cost an additional \$2 million, which it does not have as a non-profit. This will necessitate raising additional money, staff cuts, or foregoing some furniture or other elements. (Ibid. at 9.)

***Respondent Denver Labor states, swears, and avers as follows:<sup>16</sup>***

On January 9, 2023, the City and County of Denver (“Denver” or the “City”) agreed to loan Urban Peak \$16,764,567, to fund the construction of Urban Peak’s new headquarters and homeless shelter (the “Mothership”). (DL’s Ex. A, DL0001.) In return for this enormous sum of money, Urban Peak promised to follow Denver’s Prevailing Wage Ordinance (the “Ordinance”), and to operate the Mothership as a homeless shelter providing short-term housing for at least 20 years. (Ex. A, DL 0008, DL0058-59.)

This case is about Urban Peak’s desire to repudiate both its promise to pay prevailing wages and nearly 50 years of legal precedent.

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<sup>16</sup> The first six of following eight paragraphs are copied verbatim from Denver Labor’s Post Hearing Brief pp. 3-4, with only minor additions or changes. This is not the undersigned’s practice, but in this case it is a clean distillation of Denver Labor’s arguments and doing so contributes to efficiency and economy. Denver Labor’s arguments and authorities, being very helpful and on point, are relied upon in the Analysis section so not listed here.

The heart of this dispute lies in how the Denver Labor division (“Denver Labor” or “the Division”) of the Auditor’s Office classified the Mothership project. For decades, the Auditor’s Office has been the only entity under the Ordinance with the authority and expertise to classify construction projects and assign prevailing wages. As under the federal Davis-Bacon Act, projects may fall into four categories: Residential, Building, Heavy, and Highway. Since 1978, the United States Department of Labor has stated that dormitories, office buildings, and commercial buildings belong in the Building category. Denver has long embraced these same standards, and the Division determined that the Mothership—as a dormitory with significant office and commercial space [or as a mix-use/commercial space]—was Building construction.

Urban Peak wants to pay much-lower Residential wages, however. To escape its obligations, it filed a wide-ranging appeal. It now claims that the Ordinance does not apply to it at all, notwithstanding its agreement with the City. It also uses this process to attack the Career Service Board (CSB), a separate government body that is not even a party to this dispute and has had no opportunity to defend itself.

Finally, Urban Peak argues the Mothership belongs in the Residential category, even though it bears no resemblance to single-family homes, townhouses, duplexes, small apartment buildings, or any other construction in that classification. It makes this argument while conceding that the Mothership will contain 2-8 person dormitories without bathrooms, kitchens, or even water hookups, and will have office space for more than 45 people, a commercial kitchen, a medical clinic, group therapy rooms, conference rooms, classrooms, and a technology lab; and “will double as an organization’s headquarters.” (City Ex. D, DL0663-665; see also Brief at 26). And it claims residential status notwithstanding a restrictive covenant that requires Urban Peak to operate the Mothership as a dormitory-style shelter, and not a residential building. (City Ex. A, DL0058-59.)

The Ordinance is based around a simple and straightforward idea: When the public funds are used, “the people who build Denver should earn a dignified wage.” And this case requires a simple and straightforward application of nearly half a century of precedent. Office buildings and dormitories, like the Mothership, are Building construction. Denver Labor’s wage determination must be upheld. (City Post Hearing Brief at 3-4.)

All of the various arguments asserted by Urban Peak related to student housing, apartment buildings, IBC codes/Type 5 construction, and the impact of a building wage classification on project costs “are improper, unsupported by evidence, and irrelevant.” (*Id.* at pp. 22-24.)

Moreover, “there is no established area practice that supports classifying the Mothership as Residential. On one hand, it can only point to Arroyo Village, which hardly establishes an area practice<sup>17</sup>; and Arroyo is clearly distinguishable, anyway, as an actual apartment building of four-stories or less. The shelter portion was not entitled to a separate classification because it was only a small portion of the overall project” and “[g]enerally,...[w]hen one aspect of a project would justify a different determination, it only receives one [a separate classification] where the work in question is not ‘incidental’.” Even assuming Urban Peak had made sufficient showing to get to that step, it failed to demonstrate area practice. (*Id.* at 26, citing City Ex. J, DL0762 n. 1).

Lastly, although the abuse of discretion standard of review applies at this stage as it does in Davis-Bacon matters, the same conclusions would result if an abuse of discretion standard were not applied. (*Ibid.* at 13-15, 17.)

## ANALYSIS AND CONCLUSIONS

### I. Relevant Legal Standards

#### A. Review of the Overall Legal Framework and Setting

Every contract involving the City or City funds is subject to prevailing wages under either the Davis-Bacon Act or the Denver Prevailing Wage Ordinance, unless the State or Denver minimum wage is higher, in which case the highest rate will apply. (City Ex. F, PWO; see also TR1 155, 213, 218.) As the City succinctly puts it, the PWO “both adopts and builds” or “expands upon” the DBA. It “expressly incorporates and is modeled after the Davis-Bacon Act.” (City Post Hearing Brief at 5-6, 15, citing PWO(c)(1) - (3).)

Whether either law is governing, the Career Services Board (CSB) is charged, among other things, with adopting the Davis-Bacon wage rates or using means similar to the USDOL to identify prevailing wages for jobs covered by the PWO but not the DBA. These are usually but not always

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<sup>17</sup> When it first filed its request for review, it also pointed the Warren Village project as a comparator, but Urban Peak has agreed between that filing and the hearing that Warren Village was not subject to either the Davis-Bacon Act or the Denver Prevailing Wage Ordinance.

service jobs. Service jobs, the Service Contract Act, and the CSB are irrelevant in this case, which concerns only ordinary, traditional construction work.

Under either law, Denver Labor is charged, among other things, with the responsibility of making wage determinations as to the proper construction classification. In this case, the ultimate issue is whether Denver Labor erred as a matter of fact or law in classifying Mothership as “building” or whether it should instead have been classified as “residential” construction. The Parties agree that the Davis-Bacon Act itself does not apply, and that the Denver Prevailing Wage Ordinance covers projects like the Mothership project that are funded in whole or part by City and taxpayer monies and not covered by the DBA. Nonetheless, their respective post hearing arguments also make clear that they each recognize that Davis-Bacon standards and principles are highly relevant in applying the Denver Prevailing Wage Ordinance, which is modelled on the DBA.

#### B. Standards or Tests for Determining Prevailing Wage Construction Classifications

“The touchstone principle of prevailing wages is that workers be paid the wages and benefits that prevail “for similar work in the same locality. Phoenix-Griffin II, Ltd. v. Chao, 376 F. Supp. 2d 234, 236 (D.R.I. 2005). Notably, prevailing wages by definition are not intended to have an inflationary impact. See, e.g., Building & Const. Trades’ Dept., 712 F.2d at 616-617 and 47 Fed. Reg. 23,644-23, 645 (cited in In re Mistick Constr., supra.).

To determine a project’s classification, decision makers are typically directed to examine “the character of the project itself in a construction sense”, See, e.g., Construction General, Inc., ITMO 2900 Van Ness St., WAB No. 76-11 (1/27/77) (City Ex. J). As put in Texas Highway, supra, where “there is a legitimate dispute as to the category of construction”, it is “necessary to look at other characteristics of the project” than just wages,

including the construction techniques, the material and equipment being used on the project, the type of skills called for on the project work and other similar factors which would indicate the proper category of construction.

Id. at DL00776 (City Ex. L).

Failure to look to the characteristics of the project is “not proper” and may warrant reversal. However,

when it is clear from the nature of the project itself in a construction sense that it is to be categorized as either building, heavy or highway construction, it is not necessary to resort to an area practice survey to determine the appropriate categorization...Area practice...could not convert what is clearly one category of construction into another.

Lower Potomac Pollution Control Plant, WAB No. 77-20 at DL0772 (9/30/77) (City Ex. K). On the basis of this authority, Denver Labor argues that “analyzing extraneous factors” is only appropriate where there is a “legitimate dispute as to the category of construction.” (City Ex. L, Texas Highway-Heavy Branch, DL0776.)

The undersigned agrees with Denver Labor and its authorities that the Denver Prevailing Wage Ordinance is intended to be construed consistently with the Davis-Bacon Act; and that requirements and standards under the two laws are largely co-extensive as to any job positions already covered and/or measured under the Davis-Bacon Act. As such, the foregoing DBA authorities are entitled great persuasive weight where on point. See, e.g., Stoorman v. Greenwood Trust Co., 908 P.2d 133, 135 (Colo. 1995) (that “[g]enerally, similar language should be interpreted in the same manner”); Lorillard v. Pons, 434 U.S. 575, 580 (1978) (this is so because decisionmakers are presumed to be aware of existing language and interpretations); and Winter v. Indus. Claims Office, 321 P.3d 609, 612 (Colo. Ct. App. 2013) (these principles also apply when interpreting administrative rules and guidance).

Moreover, the undersigned concludes that any differences between the two laws do not impact the analysis in this case.

However, the undersigned is not persuaded by Denver Labor’s arguments to the extent it suggests the nature of the project in a construction sense is irrelevant, when applying DBA authority to the instant case. The refrain is repeated too often in the prevailing wage case law to be completely irrelevant, even if its exact weight and relevance was not made clear under the instant record.

### C. Standards Related to Burden of Proof and Standard of Review

Urban Peak bears the burden of proof in this matter. As such, it must demonstrate by a preponderance of the evidence that Denver Labor’s determination of “building” classification was in error. See Denver PWO, Sec. 20-76(g)(3) (“[t]he petitioner shall bear the burden of proof and the standard of proof shall conform with that in civil, nonjury cases in state district court”; and

Denver Labor Rules for Procedure for Appeals and Hearings (hearing after “Hearing Rules”), Rule 5.4 (that the burden is “to establish by a preponderance of the evidence that Denver Labor erred in its determination”); Cash Advance and Preferred Cash Loans v. State, 242 P.3d 1099, 1113 (Colo. 2010) (“Preponderance of the evidence is the applicable burden of proof in civil cases”); and US v. Gehrman, 731 F. App’x 792, 802 n. 9 (10th Cir. 2018) (citing cases establishing that the standard of proof in Colorado civil matters is “preponderance of the evidence”).

As seen above, the Parties disagree as to the nature or standard of review as distinct from the Appellant’s burden of proof. See, e.g., Black’s Law Dictionary (11th ed. 2019) (emphasis added) (that the “standard of review” is the “criterion by which an appellate court exercising appellate jurisdiction measures the constitutionality of a statute or the propriety of an order, finding, or judgment entered by a lower court”, while a “standard of proof” is the “degree or level of proof demanded in a specific case” at the trial level); see also Chenega Mgmt., LLC v. US, 96 Fed. Cl. 556, 580 (Ct. Fed. Cl. 2010), Prairie State Generating Co. v. Sec’y of Labor, 792 F.3d 82, 92 (D.C. Cir. 2015), and Dantran, Inc. v. US Dep’t of Labor, 171 F.3d 58, 69-70 (1st Cir. 1999) (all also distinguishing the standard of review from the burden of proof).

Under the abuse of discretion standard, decision-makers “defer to an agency’s determinations of fact[,] . . . give considerable weight to an agency’s interpretation of its own enabling statute,” and only “set aside interpretations that are clearly erroneous, arbitrary, or otherwise not in accordance with law.” Davison v. Indus. Claims Appeal Office, 84 P.3d 1023, 1029 (Colo. 2004).

Under the plain language of the PWO and the Auditor’s Rules of Procedure, the undersigned is charged with reviewing Denver Labor’s (and only Denver Labor’s or the Auditor’s) decisions for factual or legal error, with the Appellant bearing the burden of proof to establish error by a preponderance of the evidence. It is also clear from the plain language of the PWO that the undersigned’s final decision will be subject to review for abuse of discretion. See PWO Sec. 20-76(g)(3) (that appeal of the instant decision will be governed by Colorado Rules of Civil Procedure Rule 106(a)(4); CRCP Rule 106(a)(4) (providing process for relief where a quasi-judicial body allegedly exceeds its jurisdiction or abuses its discretion)).<sup>18</sup>

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<sup>18</sup> Rule 106. Forms of Writs Abolished.

(a) ...Special forms of pleadings and writs...are hereby abolished in the district court. Any relief provided hereunder shall not be available in county courts. In the following cases relief may be obtained in the district court by appropriate action under the practice prescribed in the Colorado Rules of Civil Procedure:

Nonetheless, the PWO is silent as to the actual standard of review before the undersigned. Urban Peak argues that only the undersigned’s determination is subject to abuse of discretion. Denver Labor argues that an abuse of discretion standard for its determinations can be inferred from the Denver Labor’s broad discretion to administer Denver’s various wage and hour laws, and the PWO’s similarity to the DBA. Specifically, it asserts, “a) Denver Labor and the Administrator of the Department of Labor’s (DOL) Wage and Hour Division have similar authority, and b) the DOL’s internal review board applies an abuse of discretion standard to wage classification decisions.” (City Post Hearing Brief at 15, citing ITMO The Residences at Boland Place, Richmond Heights, Missouri, ARB Case No. 2020-0031 at DL0699 (City Ex. G, decision and order dated 4/30/21). See also In re Mistick Constr., supra (att. to Urban Peak’s Post Hearing Brief) (that “the Board’s review of the Administrator’s rulings is in the nature of an appellate proceeding”; and “the Board generally defers to the Administrator as being ‘in the best position to interpret the DBA’s implementing regulations in the first instance..., and absent an interpretation that is unreasonable in some sense or that exhibits an unexplained departure from past determinations, the Board is reluctant to set the Administrator’s interpretation aside”).

The Parties present an interesting but, in this case, largely academic question. Under either standard, the undersigned would ultimately find and conclude as she does herein.

At the very least, however, the undersigned finds Denver Labor’s experience, expertise and insight to be extraordinarily persuasive where supported by the factual record, ordinance language, published guidelines, Davis-Bacon related authority, and area practices, and not otherwise impeached. See, e.g., Chenega Mgmt., supra (noting – irrespective of the specific burden of proof or standard of review – that agency decisions are “reviewed for rationality”); and Freedom Colo. Info., Inc. v. El Paso Cnty. Sheriff’s Dep’t, 196 P.3d 892, 899-900 (Colo. 2008) (that a reviewing

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...

(4) Where, in any civil matter, any governmental body or officer or any lower judicial body exercising judicial or quasi-judicial functions has exceeded its jurisdiction or abused its discretion, and there is no plain, speedy and adequate remedy otherwise provided by law:

(I) Review shall be limited to a determination of whether the body or officer has exceeded its jurisdiction or abused its discretion, based on the evidence in the record before the defendant body or officer.

...

(IX) In the event the court determines that the governmental body, officer or judicial body has failed to make findings of fact or conclusions of law necessary for a review of its action, the court may remand for the making of such findings of fact or conclusions of law.

authority “should not substitute its judgment for that of the agency when the [legislative branch] by statute has consigned the matter to the exercise of the agency’s sound discretion”).

## II. Application

### A. Threshold Matters

As threshold matters, based upon the evidentiary record and foregoing findings, the undersigned rejects Appellant Urban Peak’s arguments related to the Career Services Board and the Service Contract Act.

The Prevailing Wage Ordinance is clear on its face that the undersigned only has jurisdiction to review PWO related actions of the Denver Labor Division of the Auditor’s Office Arguments. Under Section (3)(g), titled “Review”, “[a]ny determination of the auditor related to the imposition of prevailing wage, including determinations of applicable employment classifications and wages, determinations of underpayment or misreporting, and the imposition of penalties shall be reviewable” as provided therein. This language does not grant the undersigned jurisdiction to review determinations by the CSB, and the Appellant points to no other relevant language that arguably grants such jurisdiction.

The undersigned agrees with Denver Labor that the construction proposed by Urban Peak is contrary to its express grant of jurisdiction and would also render the statute unworkable. (Denver Labor Post Hearing Brief at 27-31.) Accordingly, any claims directed at action or inaction by the CSB are hereby summarily dismissed for lack of jurisdiction under the PWO.

Additionally, any arguments related to the Service Contract Act are facially irrelevant and are summarily rejected since the instant dispute does not concern service contracts. Such arguments or claims are patently frivolous and require no more discussion than that. (See, e.g., Denver Labor Post Hearing Brief at 12.)

Lastly, the undersigned finds and concludes that the construction jobs at issue here are of types covered under the USDOL Davis-Bacon wage determination, so do not require an independent hearing by the Career Services Board; and that Denver Labor had jurisdiction to issue a construction classification under the Denver Prevailing Wage Ordinance.

B. Urban Peak Fails to Establish by Preponderance of Evidence that the Mothership Project Was Improperly Classified as Building Construction

The Urban Peak post hearing brief argues that Denver Labor has misconstrued or misapplied the law, and its position is not “reasonably supported by competent evidence in the record.”

Urban Peak cites to Freedom Colo. Info., Inc. v. El Paso Cnty. Sheriff's Dep't for the proposition that this constitutes abuse of discretion. Id., 196 P.3d 892, 899-900 (Colo. 2008) (“‘abuse of discretion’ occurs when the trial court’s decision is manifestly arbitrary, unreasonable, or unfair” and a “misapplication of the law constitutes an abuse of discretion”; it is also an abuse of discretion to fail to balance interests as required or to articulate the rationale for the decision); see also Mistick, supra at 8 (abuse of discretion includes “offer[ing] no convincing explanation or legal authority for” a construction at apparent variance from the text and purpose of a wage and hour rule “eliminating the ‘thirty percent rule’ to avoid giving undue weight to CBA wage rates and, thereby, artificially inflating what actually is the prevailing wage rate”).

Whether simple preponderance of evidence or an abuse of discretion standard applies, the undersigned finds and concludes that Urban Peak has failed to meet its burden in this case because it fails to meet even the lower burden.

Devel. Dir. Pritchett points out that “you could...make the case that the use of that space by staff is directly related to the service delivery component for the residents because the staff...working in those spaces will be planning their engagement strategy with the youth...the residents.” (TR1 131-32.) Against this, Denver Labor staff reason that “if a space is dedicated to further the business purposes of Urban Peak, it’s commercial.” (TR1 109.) However, much of this quibbling on both sides sounds like the type of “logomachy”<sup>19</sup> rejected by the Wage Appeals Board in reviewing Davis-Bacon classification determinations. Cf. Wisconsin Avenue Nursing Home, WAB Case No. 724091972 WL 20567 (1972) (att. to City’s Post Hearing Brief).

“As a general rule, [the USDOL Wage and Hour Div.] identifies projects by end use type and classifies them into [the] four major categories” based on that use alone. (Urban Peak Ex. B, USDOL 1986 Manual of Oprs. at 23.) Merely having people reside therein for some period of

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<sup>19</sup> Meriam-Webster’s Online: “1: a dispute over or about words”. Id., located at <https://www.merriam-webster.com/dictionary/logomachy> (last accessed 4/21/24).

time is not sufficient. (Cf. City Post Hearing Brief at 19, noting that if that were sufficient “many types of Building construction would be Residential...includ[ing] nursing homes, hospitals, hotels, motels, detention facilities, and barracks, all of which may have people ‘reside’ in them and none of which are Residential”, as recognized at p. 26 of Urban Peak Ex. B, USDOL’s 1986 Manual of Operations.)

Nonetheless, federal and state Wage and Hour Agencies recognize that some cases require scratching below the surface. In those cases, wage determinations should “give consideration to many factors” and “[a]ny serious contention that will be of assistance...will be weighed”. However, “to be helpful, the inquiry must be primarily directed to those factual considerations [of]...planning and development and to architectural, engineering and construction factors which will assist” the trier of fact or decision-maker. Wisconsin Ave. Nursing Home.

Devel. Dir. Pritchett has extensive experience with residential construction, including that for affordable housing projects. He testified credibly and without rebuttal that Urban Peak’s Mothership project constitutes “residential” construction, not “building construction”, in the “construction sense”, meaning in terms of materials, techniques, tools, and skill. He testified credibly enough but without any independent corroboration that other mix-used affordable housing projects he and his usual contractors and subcontractors work on also involve residential construction in terms of materials, techniques, tools, and skill. Similarly, he further testified that the Mothership project relied on residential construction labor pools and subcontractors; and there was ample demand for the work at that rate.

This evidence and the totality of the record raised a legitimate question in the undersigned’s mind as to the appropriate construction classification. Initially, the investigative file raised concerns for the undersigned about the clarity or lack of articulation of Denver Labor’s reasoning or explanation to Urban Peak for its determination. Cf. Freedom Colo. Info., *supra* (that it is an abuse of discretion to fail to articulate the reason for decision-making). The Parties’ briefing on Denver Labor’s Rule 11.3 motion for a decision on the pleadings seemed to confirm that impression and Urban Peak was therefore provided a full and fair hearing despite extensive briefing.

At the hearing on the merits, both parties pressed the same basic arguments but also significantly augmented the factual basis for most of their assertions or concerns. Nonetheless, the record as significantly augmented still failed to produce sufficient evidence to meet Urban

Peak's burden. Although much was illuminating as to why the Parties took the positions they have, little was dispositive on the issue of proper classification. Additionally, Urban Peak still failed to provide concrete objective evidence of some of its verifiable claims, such as the exact increase in cost and what other mixed-use affordable housing prevailing wage projects it has worked on that were classified as residential.

At the same time, the residential classification appears from relevant authorities provided to be a narrow one, notwithstanding the frequent references to considering the “nature of construction” or the “construction sense”. Notably, none actually applied factors related to the “construction sense”, and none cited to the IBC codes or effects on the available subcontractor pools. While some of the nursing home cases had helpful language about “nature of construction”, the Mothership project clearly is not a nursing home, so the utility of those cases was limited. However, in the one case provided that involved an affordable housing project, the Oregon Bureau of Labor and Industries upheld the Agency's determination that the project was not residential construction. See ITMO Blanchet House of Hospitality, 31 Boli 73 (2010); see also City Post Hearing Brief at 20-21.)

Blanchet House, like the Mothership project, involved supported “housing in a structured setting” where residents would stay between 90 days and two years, and for which 77% of the project would be “primarily devoted to use by and on behalf of residents.” Id. It housed up to 28 homeless gentlemen, but it considered its primary purpose to be a soup kitchen that provided room and board in exchange for kitchen service. Blanchet House was the most analogous case presented and it does not help Urban Peak establish that it was error to classify the Mothership project as building construction. To the contrary, it is quite devastating and there is no countervailing authority in the record.

Blanchet House noted “transient housing is generally not considered to be an ‘apartment’ building” because “for a housing unit to be considered an ‘apartment,’ it must include a bathroom and kitchen.” Blanchet House lacked such facilities and it had “dormitory-like” rooms “with only one or two beds”. Applying the plain dictionary definitions of “apartment”, and “separate” residential units, the Oregon Board concluded the Blanchet House facilities were dormitories not apartments because they lacked kitchens and bathrooms so were not “autonomous and independent” or “self-contained” Id. at DL0786-787; see also Merriam-Webster and City Post Hearing Brief at 18-19.).

Although based on Oregon prevailing wage law, the Blanchet House decision appears consistent with DBA and other prevailing wage related case law entered into the record, and it does not appear to be an outlier. In the face of the narrowness of the “residential” classification, it was incumbent upon Urban Peak to produce reliable and persuasive evidence adequate to establish its claims concerning wage patterns, and/or to produce more or better comparators. Failing to do so, it has not made the necessary “showing of a practice that excludes [the project at issue] from the general wage pattern of the locality for general building construction.” Wisconsin. All we have are essentially uncorroborated self-serving and/or hearsay claims. Cf. Blanchet House at DL0783 (crediting testimony of a similar consultant “in its entirety except for his conclusory testimony that the Project is ‘residential’ in a ‘construction sense’ under AAM 130”).

Nor do the Arroyo Village or 48th & Colorado Shelter projects shed particular light on this case. Both are similar in some critical respects and clearly distinguishable in others.

As observed in Wisconsin Avenue Nursing Home, “[w]here local practice clearly establishes that a well-defined and identifiable type of construction is recognized in the locality as carrying rates different than those that generally prevail, this fact normally should be recognized.” Id., WAB Case No. 724091972 WL 20567 (1972) (att. to City’s Post Hearing Brief). “Here, however” – as in Wisconsin Ave. Nursing – “the work is no more clearly identified with apartments than with hotels, office buildings and other types of buildings”. In fact, the undersigned agrees with CEO Carlson that this is an entirely new type of project that is neither student dormitory nor apartment, nor shelter, nor medical clinic, nor commercial office, nor restaurant.

However, Urban Peak has still not shown it was error to classify the Mothership project as building construction. Both sides called witnesses who have high levels of experience within their particular domains, such as Denver Labor Compliance Sup. McKeon and BlueLine Devel. Dir. Christian Pritchett. Additionally, both sides called witnesses who are passionately committed to their organization’s respective missions, such as Urban Peak CEO Carlson and Denver Labor Dir. Fritz-Mauer. (See, e.g., TR1 20-21, 72, TR2 163-66.) None were more credible than the other on any significant issue, but their testimony and points of view largely bypassed that of each other. At the same time, as noted, Devel. Dir. Pritchett failed to produce any comparators from his own experience, upon which he based his testimony.

Against the rather weak evidence of a “residential” nature or character, there are implied policy arguments such as that application of the building construction rate would impede or

interfere with the City’s separate goals and intentions to address youth homelessness. However, policy argument related to homelessness are beyond the undersigned’s jurisdiction to consider; and are not relevant to review of a PWO determination as matters of fact or law. Nor may cost impacts play into the undersigned’s consideration, evidently, although it no doubt affected Urban Peak’s perspective and position. See, e.g., Blanchet House (noting project costs, along with funding sources and amounts, but not noting the cost impact of a different wage classification).

The one factor that does give the undersigned serious pause is the concern of inflationary wage pressures cautioned against in some Davis-Bacon Act cases. See, e.g., Mistick. Specifically, if it is true that this is residential work from a “construction sense”<sup>20</sup> in Devel. Dir. Pritchett’s and his subs’ experience, paying building rates will likely be inflationary. However, as noted, that was mostly uncorroborated hearsay evidence even if unrebutted, and Dir. Pritchett failed to prove up even his personal experience.

Ultimately, the undersigned cannot conclude from this record that Denver Labor erred as a matter of fact or law in classifying the Mothership project as “building” construction rather than residential construction. That determination is supported by the facts even as augmented, the Denver Clarification Document, and the USDOL All Agency Memo 130/131; and is not inconsistent with case law. As in Blanchet House, none of the “building” examples of the USDOL All Agency Memo 130/131 “exactly describes the Project.” Nonetheless, “dormitory...is a fairly good match for the transitional housing part of the Project and is the closest match to any of the [other] structures listed”. Id. at DL0787. Additionally, other components do fit within building examples provided in the USDOL All Agency Memo, as Denver Labor aptly observes.

Although Denver Labor did not establish a 40+ year history of classifying projects like the Mothership project as “building” construction, given that this is a new type of construction, it did establish that the residential classification is a narrow one. It also accurately describes the overall project as a mix-use one comprised of multiple components that standing alone would constitute building construction. Given the lack of corroborating evidence for Devel. Dir. Pritchett’s and Urban Peak’s claims about other similar mixed-use properties being classified as residential, the

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<sup>20</sup> While the wage cases speak of “construction sense”, the weight of the cases reviewed do not suggest they mean the term in the way Urban Peak and/or BlueLine interpret it. Rather, they still seem to be focused on the use and purpose, such as nursing home construction, or apartment construction, or shelter construction.

commercial and transient shelter characters or components predominate as a matter of fact and law, for purposes of the Prevailing Wage Ordinance.

It is also evident, upon receipt of testimony, that Denver Labor did fully articulate its rationale for the classification determination to Urban Peak and/or BlueLine, over the course of several meetings. The undersigned also finds and concludes that the various errors or inconsistencies Urban Peak points to (such as different people citing to different guidances, or Compliance Sup. McKeon’s initial focus on such minor and even incorrect factors such as color coding or the presence of a “commercial” kitchen) were not ultimately shown to be harmful.

### **ORDER**

For the reasons stated herein, the Appellant’s request for dismissal of any prevailing wage determination – or, in the alternative, for an Order determining that “residential construction prevailing wages be issued” to the Mothership project – is hereby dismissed for lack of merit, and the Denver Labor wage determination of building classification is affirmed.

Urban Peak may seek review of the Decision and Order pursuant to the Prevailing Wage Ordinance, Sec. 20-76(g)(4), Rule 106(a)(4) of the Colorado Rules of Civil Procedure, and according to the time limits or other criteria stated therein.



\_\_\_\_\_  
Pilar Vaile, JD  
Hearing Officer

Signed this 30<sup>th</sup> day  
of April, 2024