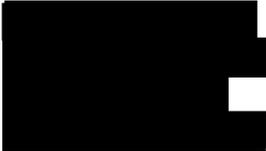




New York State Department of Labor
David A. Paterson, Governor
Colleen C. Gardner, Commissioner

December 22, 2010



Re: Request for Opinion
Article 8 Applicability
Privately Owned Property
RO-10-0182

Dear [REDACTED]:

This letter is written in response to your letter dated December 2, 2010, in which you request an opinion as to the applicability of Article 8 of the Labor Law to a proposed real estate development project. The project described in your letter involves the construction of a two story 22,168 square foot building on a parcel of land in the Town of Gates. This new building will be integrated into an existing retail center commonly referred to as the "Elmgrove Crossing Retail Center". The developer, a private company specializing in commercial and industrial real estate development, has entered into a lease agreement with the Town of Gates for the use of this new building to house the Gates Public Library. The developer will retain ownership of the building, and the Town will make no contribution toward the construction project. The initial term for the lease is 15 years, commencing shortly after the completion of the project, and the Town will be responsible for monthly lease payments as well as for the payment of the building's utilities, janitor/rubbish service, maintenance, and its proportional share of taxes based on the size of the structure being occupied by the Town. Your letter requests the Department's opinion as to whether the construction project constitutes "public work" and is, therefore, within the coverage of Article 8 of the Labor Law.

The test for determining whether Article 8 of the Labor Law applies to a particular public contract "focuses on the nature, or the direct or primary objective, purpose and function, of the work product of the contract," (*Erie Town Industrial Dev. Agency v. Roberts*, 94 AD2d 532 (4th Dep't 1983), aff'd 63 NY2d 810.) With that in mind, a two-pronged test is generally used to determine whether a construction project is subject to Article 8 of the Labor Law: "(1) the public agency must be a party to a contract involving the employment of laborers, workmen or mechanics, and (2) the contract must concern a public works project." (*See, Sarkisian Brothers, Inc. v. Hartnett*, 172 A.D. 2d 895, (3d Dept., 1991); *New York Charter School Association v. Smith*, 61 A.D.3d 1091 (3d Dep't 2009).) [emphasis added] "Later, it was stated that contemporary definitions focus upon

Tel: (518) 457-4380, Fax: (518) 485-1819
W. Averell Harriman State Office Campus, Bldg. 12, Room 509, Albany, NY 12240

the public purpose or function of a particular project***. To be public work, the project's primary objective must be to benefit the public." (citations omitted) (*Sarkisian Brothers, Inc. v. Hartnett*, 172 A.D. 2d 895, (3rd Dept., 1991).)

As to the first prong, whether a public agency has entered into a contract involving the employment of laborers, workers and mechanics, the identity of the parties and the terms of the agreement to the present project are dispositive on that issue. Effective October 27, 2007, Section 220 (3) of the Labor Law reads as follows:

"Contract" now also includes "reconstruction and repair of any such public work, and any public work performed under a lease, permit, or other agreement pursuant to which the department of jurisdiction grants the responsibility of contracting for such public work to any third party proposing to perform such work to which the provisions of this article would apply had the department of jurisdiction contracted directly for its performance..." Labor Law §220 (3).

The lease agreement in the present case certainly meets the first prong of the public work test enunciated by the courts and now established by the statute. It matters not that the Town is not directly contracting to have such work performed since the lease agreement requires that the developer contract for such work to be performed, and the Town will utilize the facility after such work is completed. Where a public agency contracts with third parties with the ultimate object of constructing facilities to be used by the public, that work meets the first test of the *Erie* standard in the same manner as if the public agency had contracted directly with a private contractor. The Town, through its third party contracts, is engaging contractors who will hire laborers, workers, and mechanics to perform the work. Therefore, the first prong in the test for determining whether Article 8 applies has been satisfied.

As to the second prong of the test, i.e. whether the contract concerns a public work project, the primary consideration, as stated above, is whether the project's primary objective is to benefit the public. There are several cases that are helpful and relevant to the present situation in that regard, and the specific factual circumstances surrounding the holdings in those cases are helpful in rendering a determination.

In *Sarkisian Brothers*, a building on the grounds of SUNY Oswego was rehabilitated and turned into a hotel and convention center. (172 A.D. 2d 895.) The lease of that property provided that the lessee would be responsible for all costs associated with the rehabilitation and conversion of the building to the specified use. The State retained ownership of the property, with lessee having an option to purchase at the conclusion of the lease only upon the State's determination to sell to a non-governmental purchaser. The State retained the right to approve all renovations and design drawings through the Office of General Services and SUNY. Certain usages of the facilities were guaranteed to SUNY. The Court held that all of the above circumstances were sufficient indices of public use, ownership, and public enjoyment so as to support the Labor Department's determination

that the project was one of public purpose sufficient to satisfy the second prong of the test for determining whether a particular project is subject to Article 8 of the Labor Law.

In *National R.R. Corp. v Hartnett*, 169 A.D.2d 127 ((Third Dept., 1991), the Third Department stated that the inquiry must focus “on the nature, or the direct or primary objective, purpose and function of the work product of the contract.” In *National*, the question was whether the construction of a \$50 million rail line by Amtrak needed to transfer all Empire Corridor rail service to Pennsylvania Station from Grand Central Station was a public work project. The Court determined it was not, based upon the primary purpose and function of the project itself. While the Court conceded the overall public purpose of improving rail service as an overall benefit to the public, it noted that Amtrak was created to fulfill a function that was not historically that of government, but rather of private common railroad carriers. Following that line of logic, the Court determined that Amtrak’s purpose in entering into the contract with the State was to enhance its non-governmental function of providing efficient and, eventually, profitable rail service. Specifically the Court determined that Amtrak “retains ownership of the lines to be installed in the project, bears the risk of future financial losses or physical destruction, is entitled to all profits from its operations over the lines, and retains the authority to condition the public’s use and enjoyment of its facilities upon the purchase of a passenger ticket. These are factors that have repeatedly been held sufficient to preclude any determination that a given project constitutes a public works for purposes of applying Labor Law §220 (citing cases).”

Conversely to the above two cases, the court in *60 Market Street v. Hartnett*, (153 A.D. 2d 205) held that a project for the construction of properties to be leased to a public entity was not a public work project. Rather, the Court noted that to characterize the lease arrangement as a “public work” contract distorts the very essence of the term. The lessor retained all the risks and benefits of ownership. The building was constructed on privately owned property and, once completed, it was privately, not publicly, owned. The project was financed entirely by private funds; no public money was used. In the event that the building was damaged by fire, catastrophe or casualty, the lessor retained the risk of loss. The Court concluded that the lease arrangement, even though it contemplated construction of a new building, did not come within the parameters of Labor Law, Section 220. The present project is being undertaken by a private developer whose (presumed) primary purpose for building the structure is to reap the financial benefits of leasing it to tenants. The building will be held in ownership by the private developer, it is being built on private property, with private funds. There is no interest – present or reversionary – in the building retained by the Town. The Town is making a one-time lump sum payment to the private developer in the amount of \$1,215,278.00 for the purposes of HVAC installation and tenant build-out requirements. A review of the building schematics indicates that its design and specifications are easily converted for the use of a private-sector tenant at the conclusion of the lease term. In fact, the building is located within a retail/commercial project and it likely that should the library vacate the building, it would be used for retail or other commercial use consistent with the other tenants of the Retail Center. The building schematics do not appear to be so distinctive as to prevent other non-public uses of the building at the conclusion of the lease term, and the lease term is not

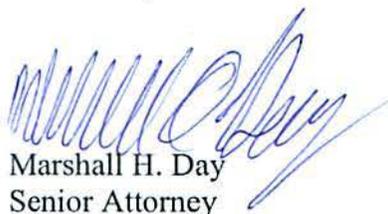
sufficiently long (15 years, with an option of 2 additional 5 year extensions) as to make the Town the constructive owner of the property. Further, the lease requires that for any fixtures installed within the building, the Town of Gates must remove such fixtures at the end of the lease and repair any damages caused as a result of the fixtures. Additionally, any alternation/additions to the interior of the building will be removed at the termination of the lease, and any damage shall be repaired by the Town of Gates. In the case of a fire, if the damage cannot be repaired within 60 days, the private developer can terminate the lease. If only a portion of the building is damaged by fire and a portion of the building can still be occupied by the Town of Gates, then the private developer is only obligated to restore the premises if there are adequate insurance proceeds available. If there are not adequate insurance proceeds, then the private developer may terminate the lease. If the building is taken for any public or quasi-public use in a condemnation proceeding, then the lease is automatically terminated and all compensation awarded as a result of the condemnation proceeding shall belong to the private developer. Given the totality of these factors, we do not believe the present project has a primarily public purpose. Therefore, it does not satisfy the second prong of the test for determining the applicability of Article 8. Accordingly, it is the opinion of this Department that Article 8 of the Labor Law is inapplicable to the project in question.

This opinion is based exclusively on the facts and circumstances described in your request and is given based on your representation, express or implied, that you have provided a full and fair description of all the facts and circumstances that would be pertinent to our consideration of the question presented. Existence of any other factual or historical background not contained in your letter might require a conclusion different from the one expressed herein. This opinion cannot be used in connection with any pending private litigation concerning the issue addressed herein, nor can it be used in connection with an investigation or litigation between a client or firm and the Department of Labor. If you have any further questions, please do not hesitate to contact me.

Very truly yours,

Maria L. Colavito, Counsel

By:


Marshall H. Day
Senior Attorney

cc: Pico Ben-Amotz
Christopher Alund
Dave Bouchard
Brian Robison
Robert Bibbins
Opinion File
Dayfile