

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, *ex rel.* NORTHWESTERN
OHIO BUILDING & CONSTRUCTION
TRADES COUNCIL, *et al.*,

Relators-Appellants,

v.

OTTAWA COUNTY IMPROVEMENT
CORPORATION, *et al.*,

Respondents-Appellees.

Case No. **02-1069**

On Appeal from the Court of
Appeals for Ottawa County, Sixth
Appellate District, Case No.
OT-07-017

**MEMORANDUM OF *AMICUS CURIAE*, THE OHIO STATE BUILDING AND
CONSTRUCTION TRADES COUNCIL, AFL-CIO, IN SUPPORT OF JURISDICTION**

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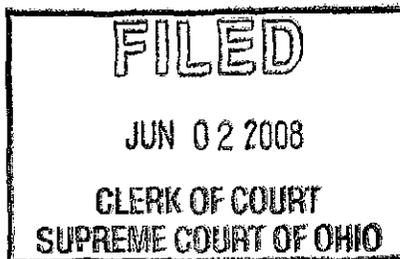
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STATEMENT OF PUBLIC OR GREAT GENERAL INTEREST

Amicus Curiae, the Ohio State Building and Construction Trades Council, AFL-CIO ("Council"), is a statewide organization representing construction trades unions throughout the State of Ohio. There are approximately 100,000 union construction tradesmen engaged in construction throughout the state.¹

The Ohio Prevailing Wage Law, R.C. 4115.03 *et seq.*, has for many decades protected the private sector collective bargaining agreements of union construction tradesmen by preventing the undermining of the collective bargaining process, *i.e.*, limiting the potential for the slashing of wage rates on public construction. *State, ex rel. Evans v. Moore*, 69 Ohio St.2d at 91. See also *Harris v. Van Hoose*, 49 Ohio St.3d at 26. The law was enacted as a means of fostering and encouraging collective bargaining as the preferred method of resolving labor disputes. *State, ex rel. Evans v. Moore*, 69 Ohio St.2d at 91.

This case involves the attempt of Respondents-Appellees Fellhauer Mechanical Systems, Inc. ("Fellhauer"), the Ottawa County Improvement Corporation ("OCIC"), and the Ottawa County Board of Commissioners ("County") (collectively, "Appellees") to avoid the clear requirements of the prevailing wage law through a creative public financing scheme in which they purported to narrowly define a public improvement "project" to exclude the actual

¹The Council's interest in cases dealing with the Prevailing Wage Law is well documented by its participation in numerous such cases before this Court. See *State, ex rel. Evans v. Moore* (1982), 69 Ohio St.2d 88; *State v. Buckeye Elec. Co.* (1984), 12 Ohio St.3d 252; *State, ex rel. Harris v. Williams* (1985), 18 Ohio St.3d 198; *Harris v. Van Hoose* (1990), 49 Ohio St.3d 24; *Episcopal Retirement Homes, Inc. v. Ohio Dep't of Indus. Relations* (1991), 61 Ohio St.3d 366; *Ohio Asphalt Paving, Inc. v. Ohio Dep't of Indus. Relations* (1992), 63 Ohio St.3d 512; *Harris v. Atlas Single Ply Sys., Inc.* (1992), 64 Ohio St.3d 171; *U.S. Corrections Corp. v. Ohio Dep't of Indus. Relations* (1995), 73 Ohio St.3d 210; *J.A. Croson Co. v. J.A. Guy, Inc.*, 81 Ohio St.3d 346, *cert denied* (1998), 525 U.S. 871, 119 S.Ct. 169, 142 L.Ed.2d 138; *Sheet Metal Workers' Int'l Ass'n, Local Union No. 33 v. Mohawk Mech., Inc.* (1999), 86 Ohio St.3d 611, 1999-Ohio-209.

construction of that improvement. The County and the OCIC together financed with public money nearly half of Fellhauer's proposed expansion of its business facilities in Port Clinton, Ohio. Fellhauer conceived the project to purchase and renovate the building from which it operated its business. The County and the OCIC agreed to loan Fellhauer \$336,750 of the total project cost of \$695,000. In their financing documents, however, Appellees specified that public money was purportedly to be used for "purchase" of the facility, while Fellhauer would use "private funds" for the renovation of the building. Because no public money was to be used for construction work on the facility, Appellees asserted that the prevailing wage law did not apply. The Court of Appeals herein agreed, in effect allowing Appellees to "subdivide" the project for the express purpose of avoiding application of the prevailing wage law. This Court should not allow this subterfuge to succeed at the expense of Ohio's working tradesmen and tradeswomen.

R.C. 4115.033 provides that "a public improvement project" shall not be "subdivided . . . into component parts or projects . . . unless the projects are conceptually separate and unrelated to each other, or encompass independent and unrelated needs of the public authority." See also Ohio Admin. Code §§ 4101:9-4-17(C) & 4101:9-4-19(B). The Ohio Attorney General opined more than 25 years ago that "[i]f a project is funded in part" by public moneys, "and in part through private sources, all laborers and mechanics on the project must be paid at the prevailing rates determined in accordance with R.C. Chapter 4115, regardless of whether the [public moneys] are applied to pay construction costs." Op. Ohio Att'y Gen. 82-096 (syllabus). Yet, the Court of Appeals in this case permitted Appellees to subdivide the project, allocate the public moneys to non-construction aspects of the project, and evade the application of the law. This decision adversely affects all construction tradesmen and tradeswomen in Ohio by undercutting their wages and undermining the collective bargaining process. This Court cannot allow the

decision below to stand. Accordingly, Amicus Curiae Ohio State Building and Construction Trades Council respectfully urges this Court to accept jurisdiction over this case and to reverse the decision of the Court of Appeals herein.

STATEMENT OF THE CASE AND THE FACTS

Fellhauer is in the business of providing plumbing, heating, and electrical services. It is also a retailer of audio-visual and security systems. It maintained its principal place of business at 2435 Gill Road in Port Clinton, Ohio in a facility that it previously leased. Sometime in 2006, Fellhauer decided that it would purchase the facility in which its business was located, and that it would renovate the building and expand its business operations. The total estimated cost of the project was \$695,000, at least \$135,000 of which was to be the cost of renovating the facility.

To finance its proposal, it applied for a loan from the County's Small Cities Community Development Block Grant program. The CDBG funds are federal funds distributed through the Ohio Department of Development ("Department") for the purpose of encouraging community and economic development. The Department distributes the CDBG funds to local governments which use them to make economic development loans.

Upon receiving Fellhauer's application, the County applied to the Department for funds, and its application was granted. The County then approved Fellhauer's loan application in the amount of \$300,000, with repayment over a fifteen-year term. Fellhauer's agreement with the County expressly provides that the "CDGB funds will be used for the acquisition of the land and building." The agreement also described the "project" and noted that it included renovations estimated to cost \$135,000.

Fellhauer also financed part of its project with a revolving loan in the amount of \$36,750 from the OCIC. The OCIC funded the loan with public money—conveyance fees on real estate

transfers within Ottawa County. This money was also allocated for the purchase of the building. Fellhauer asserted that it intended to use solely "private" money for the renovation.

Appellees failed to comply with the prevailing wage law on this project—they did not appoint a prevailing-wage coordinator, R.C. 4115.071(A), they did not ask the Director of the Department of Commerce to determine the applicable prevailing wage rates, R.C. 4115.04(A), they did not attach the applicable wage rates to the work specifications, *id.*, and they did not print the prevailing-wage rates on the bidding blanks for the project. *Id.* Accordingly, Appellants commenced the instant taxpayer action in the Court of Common Pleas for Ottawa County to restrain the unlawful expenditure of public money. They sought injunctive relief requiring compliance with the prevailing wage law.

Both the trial court and the Court of Appeals for Ottawa County, Sixth Appellate District, concluded that R.C. Chapter 4115 did not apply to the Fellhauer project. The Court of Appeals, in a 2-1 decision, concluded that the prevailing wage law did not apply because the project was not constructed by a "public authority" as that term is defined in R.C. 4115.03(A). The Court further permitted the Appellees to subdivide the project and held that, because no public money was used to pay construction costs, the prevailing wage law was inapplicable. Appellants have timely sought the review of this Court.

ARGUMENT

Amicus Curiae's Proposition of Law No. 1:

A PUBLIC AUTHORITY MAY NOT SUBDIVIDE A PROJECT BY ALLOCATING PUBLIC MONEY TO NON-CONSTRUCTION ASPECTS OF A PROJECT TO AVOID THE APPLICATION OF THE PREVAILING WAGE LAW.

As noted above, the prevailing wage law, R.C. Chapter 4115, has for many decades

protected the private sector collective bargaining agreements of union construction tradesmen by preventing the undermining of the collective bargaining process, *i.e.*, limiting the potential for the slashing of wage rates on public construction. *State, ex rel. Evans v. Moore*, 69 Ohio St.2d at 91. See also *Harris v. Van Hoose*, 49 Ohio St.3d at 26. The law was enacted as a means of fostering and encouraging collective bargaining as the preferred method of resolving labor disputes. *State, ex rel. Evans v. Moore*, 69 Ohio St.2d at 91. This Court has long held that “[t]he legislative intent is served if *all claims* are enforced through one of the three methods provided in the statute,” and has, therefore, rejected a “construction of the statute [that] would eviscerate the legislative intent.” *Van Hoose*, 49 Ohio St.3d at 27 (emphasis in original). The Court of Appeals' decision herein completely eviscerates the legislative intent behind the prevailing wage law by allowing Ohio governmental entities, when distributing public money to finance economic development projects involving construction, to conspire with the businesses to which it provides such financing to evade the application of the prevailing wage law. This Court should not allow the Court of Appeals' decision to stand.

R.C. 4115.033 provides that "a public improvement project" shall not be "subdivided . . . into component parts or projects . . . unless the projects are conceptually separate and unrelated to each other, or encompass independent and unrelated needs of the public authority." See also Ohio Admin. Code § 4101:9-4-17(C) ("A public authority may not subdivide a project into component parts or projects of less than the threshold unless such projects under the threshold are conceptually separate and unrelated to each other, or encompass independent and unrelated needs of the public authority. * * *").

In this case, Appellees assert that the prevailing wage law does not apply to the Fellhauer project because Fellhauer's loan agreement with the County provided that the proceeds of the

loan were to be used solely for the purchase of the property. The loan agreement, however, clearly indicated that the scope of the economic development project included the renovation of the facility and the expansion of Fellhauer's business operations. Undoubtedly, neither the County nor the Department of Development would have provided financing for the project if it provided no economic development value to the community. The purchase of a building, without the further development of the property, would deliver little economic benefit for the community. Clearly, the purchase and *renovation* of the building were considered the "project" that was being funded with public money. Nevertheless, Appellees have attempted to impermissibly subdivide the project into "purchase" and "construction" phases simply to avoid the application of the prevailing wage law.

Indeed, the Ohio Department of Commerce has adopted a regulation that provides that "[w]here the Ohio Revised Code specifically designates a project as a public improvement for the purposes of the application of the state's prevailing wage law because it is financed by certain obligations * * * [c]onstruction on any phase of the project is subject to the requirements of sections 4115.03 to 4115.16 of the Revised Code and requires payment of the prevailing rates of wages *even if the funds made available were for non-construction aspects of the project.*" Ohio Admin. Code § 4101:9-4-19(B) (emphasis added).² Both the County and the OCIC provided loans of public funds for this economic development project. "[E]ven if the funds made available were for non-construction aspects of the project," the prevailing wage law must

²The Court of Appeals cites to Ohio Admin. Code § 101:9-4-02(BB)(1)(d) to support its holding that the public funds must be used for the actual construction of the project in order for the prevailing wage law to apply. As noted by the Appellants herein, that section simply does not support the Court's holding, and even if it did, that regulation would be invalid as in conflict with the express provisions of R.C. 4115.03(A).

be held to apply to any and all construction on the project.

The Ohio Attorney General addressed this issue in a formal opinion more than 25 years ago. Op. Ohio Att'y Gen. 82-096. In that opinion, the Attorney General considered a situation in which both private money and proceeds from the sale of industrial development bonds were used to finance a construction project. The Attorney General noted that R.C. 165.01, like R.C. 4115.03(A), makes the prevailing wage law applicable to projects financed "in whole or in part" by public funds. The Attorney General concluded that "[i]f a project is funded in part" by public moneys, "and in part through private sources, all laborers and mechanics on the project must be paid at the prevailing rates determined in accordance with R.C. Chapter 4115, regardless of whether the [public moneys] are applied to pay construction costs." Op. Ohio Att'y Gen. 82-096 (syllabus).

This case is factually analogous to the situation addressed by the Attorney General. Fellhauer was provided with public money to fund the expansion of its business operations. Although Appellees attempted to allocate the public monies to non-construction aspects of the project, it is clear that the overall project involved construction. The project was, therefore, funded "in whole or in part" with public money, and the prevailing wage law applied. The Court of Appeals erred in holding otherwise.

Amicus Curiae's Proposition of Law No. 2:

A COMMUNITY IMPROVEMENT CORPORATION IS A "PUBLIC AUTHORITY" AS THAT TERM IS DEFINED IN R.C. 4115.03(A), BECAUSE IT IS AN INSTITUTION SUPPORTED IN WHOLE OR IN PART BY PUBLIC FUNDS, AND CONSTRUCTION PROJECTS IT FUNDS WITH PUBLIC MONEY ARE SUBJECT TO THE REQUIREMENTS OF THE PREVAILING WAGE LAW.

“Ohio’s prevailing wage law applies to all construction projects that are ‘public improvements.’” *U.S. Corrections Corp. v. Ohio Dep’t of Indus. Relations* (1995), 73 Ohio St.3d 210, 218. A “public improvement” is defined as:

all buildings, roads, streets, alleys, sewers, ditches, sewage disposal plants, water works, and all other structures or works constructed by a public authority of the state or any political subdivision thereof *or by any person who, pursuant to a contract with a public authority, constructs any structure for a public authority of the state or a political subdivision thereof.*

R.C. 4115.03(C) (emphasis added). Moreover, a “public authority” is defined as:

any officer, board, or commission of the state, or any political subdivision of the state, authorized to enter into a contract for the construction of a public improvement or to construct the same by the direct employment of labor, *or any institution supported in whole or in part by public funds and said sections apply to expenditures of such institutions made in whole or in part from public funds.*

R.C. 4115.03(A) (emphasis added).

In this case, the Court of Appeals—contrary to the trial court—concluded that the OCIC was not an “institution supported in whole or in part by public funds,” and accordingly, its financing of Fellhauer’s project with loans from public funds did not subject the project to the prevailing wage law. This holding cannot be sustained.

The prevailing wage law itself does not define the term “institution.” That term is, however, defined in the Ohio Department of Commerce’s regulations:

“Institution” means any society or corporation of a for-profit, not-for-profit, public or private character established or organized for any charitable, educational

or other beneficial purpose.

Ohio Admin. Code § 4101:9-4-02(P). The OCIC is a "community improvement corporation" organized under R.C. Chapter 1724. R.C. 1724.01 provides that such corporations "may be organized . . . for the sole purpose of advancing, encouraging, and promoting the industrial, economic, commercial, and civic development of a community or area." This must be considered a "beneficial purpose" under Ohio Admin. Code § 4101:9-4-02(P). To hold otherwise is to ignore the mission of community improvement corporations to bring economic, commercial, and civic development to Ohio's communities for the benefit of such communities. See *International Bhd. of Elec. Workers, Local 8 v. Bryan Senior Center, Inc.* (Williams App. March 3, 2006), No. WM-05-006, 2006-Ohio-971 at ¶ 18 ("In this case, it is undisputed that the project was a public improvement project and that the Center, even though a non-profit corporation, was a public authority in connection with the project.").

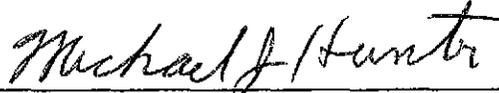
This Court must reverse the Court of Appeals' holding that the OCIC is not an "institution" subject to the prevailing wage law under R.C. 4115.03(A). Because it is an "institution" under the prevailing wage law, the projects it finances, in whole or in part, must be constructed in compliance with the law, and the lower courts should have awarded the requested declaratory and injunctive relief.³

³Although not addressed by the Court of Appeals, the Fellhauer project was also subject to the prevailing wage law because the project was constructed "by any person who, pursuant to a contract with a public authority, constructs any structure for a public authority of the state or a political subdivision thereof." R.C. 4115.03(C). The County, as a political subdivision of the State of Ohio, is unquestionably a "public authority" as that term is defined in R.C. 4115.03(A). Moreover, Fellhauer was a "person," see R.C. 1.59(C), who had a contract with the public authority, *i.e.*, the loan agreement, which set forth the requirement that Fellhauer "was to complete certain enumerated improvements on the property" *Harris v. City of Cincinnati* (Hamilton App. 1992), 79 Ohio App.3d 163, 169. And finally, the Fellhauer project was constructed "for a public authority." As this Court held in *Episcopal Retirement Homes, Inc. v.*

CONCLUSION

For the foregoing reasons, and for the reasons stated by Relators-Appellants, *Amicus Curiae*, The Ohio State Building and Construction Trades Council, AFL-CIO, respectfully urges this Court to accept jurisdiction over this case and to reverse the decision of the Court of Appeals for Ottawa County, Sixth Appellate District.

Respectfully submitted,



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Ohio Dep't of Indus. Relations (1991), 61 Ohio St.3d 366, "[c]onstruction of a project 'for a public authority' necessitates that the public authority receive the benefit of the construction, either through maintaining a possessory or property interest in the completed project *or through the use of public funds in the construction of the project.*" 61 Ohio St.3d at 370. See also *Harris v. City of Cincinnati*, 79 Ohio App.3d at 170-71.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was sent via regular U.S.

Mail Service this 2nd day of June, 2008 to the following:

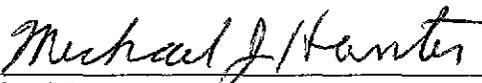
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