

IN THE SUPREME COURT OF OHIO

STATE OF OHIO EX. REL.
NORTHWESTERN OHIO BUILDING
TRADES COUNCIL, ET. AL.

Appellants,

v.

OTTAWA COUNTY IMPROVEMENT
CORP., ET. AL.

Appellees.

Ohio Supreme Court Case No.: 2008-1069

On Appeal from the Ottawa County Court of
Appeal, Sixth Judicial Appellate District:

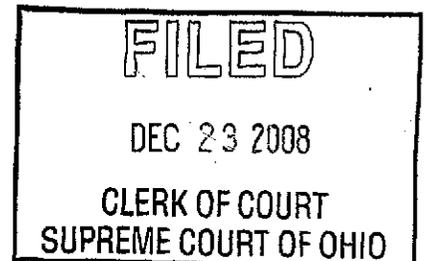
Case No. OT-07-017

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STATEMENT OF FACTS

Appellee Fellhauer Mechanical Systems, Inc. ("Fellhauer") adopts the Statement of Facts and Procedural History of this case as set forth in the Merit Brief filed by the Appellees Ottawa County Improvement Corp. and the Ottawa County Board of County Commissioners.

ARGUMENT

First and foremost, this Court has made it abundantly clear that:

The prevailing wage law evidences a legislative intent to provide a comprehensive, uniform framework for, *inter alia*, worker rights and remedies vis-à-vis private contractors, sub-contractors and material men **engaged in the construction of public improvements** in this state Above all else, the primary purpose of the prevailing wage law is to support the integrity of the collective bargaining process by preventing the undercutting of employee wages in the private construction sector.¹

The prevailing wage law achieves this purpose by requiring all contractors and subcontractors bidding on public works projects to pay their workers at the same rate of wages per classification, thereby removing any differential in labor costs between contractors from the competitive bidding process itself.² The longstanding legislative policy recognized by this Court for the enactment of prevailing wage laws is to ensure the government, as a large purchaser of construction services does not depress or undercut construction industry wages determined by collective bargaining agreements, because the government must award construction contracts to the lowest best or lowest most responsible bidder. Given that the cost of materials for most public works projects is the same, construction contractors would compete for these government construction contracts by undercutting or reducing construction industry employees' wages and

¹ *State ex rel. Evans v. Moore* (1982), 69 Ohio St.2d 88, 91, 23 O.O.3d 145, 147, 431 N.E.2d 311, 313.

² *International Union of Operating Engineers, Local 18, et al. v. Dan Wannemacher Masonry Co.*, (1988) 36 Ohio St. 3d 74, 79, 521 N.E. 2d 809, 814.

benefits to be the lowest bidder. Thus, union and non-union contractors have an equal opportunity to competitively bid on, and be awarded public-works contracts because prevailing wage laws effectively level the playing field for competition on government construction contracts.³

Here however, all of the public funds loaned to Fellhauer were expended to finance Fellhauer's acquisition of the land, building and equipment in its private plumbing, heating and electrical service and retail audio-visual and security systems business. None of these public monies provided for acquisition can be, will be, or were ever used for any type of construction, including renovation. There is no governmental entity requesting bids for the construction of a public improvement project, nor is Fellhauer's contemplated renovation of its retail store subject to competitive bidding requirements or prevailing wage requirements.

Simply put, the purposes and policies of prevailing wage law are not being fulfilled or furthered by finding prevailing wage law would apply in this instance. Simply because a governmental entity provides financing or funding to a private company for non-construction related expenditures does not trigger the application of prevailing wage laws. To contemplate such a requirement perverts the purpose and policy behind the enactment of the statute, and expands prevailing wage laws into the private sector where it will apply whenever a governmental entity provides any expenditure of public funds, even for non-construction related purposes.

Hence, according to Appellants' argument, prevailing wage laws will attach if a governmental entity provides public financing to a private company to purchase office chairs, computers and office equipment. Therefore, any planned or subsequent construction or

³ *Id.*

renovation contemplated by the private company to its office space or in the building it occupies will then subject the private company to compliance with Ohio's Prevailing Wage Laws. How long does this prevailing wage obligation attach – forever, or maybe until the loan is repaid? There is no answer provided in the statute because this expansion and interpretation of Ohio's Prevailing Wage Law was never contemplated by the Legislature. Simply stated, the intent of the Legislature is clear by the definitions provided in the statute – prevailing wage laws apply only to expenditures made by public authorities for the construction of a public improvement.

A. Proposition of Law No. 1: OCIC Does Not Meet the Statutory Definition of “Public Authority” within the Purview of Ohio’s Prevailing Wage Law Because there was Contract for Construction, and No Construction “By or For” OCIC.

Appellants' principle argument is that OCIC constitutes an “institution” as defined by O.A.C. § 4101:9-4-02(P) solely because OCIC is a Community Improvement Corporation organized under R.C. § 1724 and therefore, established for a “beneficial purpose.” In addition, Appellants' suggest that because OCIC is an “institution,” OCIC is also a “public authority” as defined in R.C. § 4115.03(A). Appellants further argue that as OCIC is a public authority and expended public funds to Fellhauer for acquisition of the land, building and equipment under R.C. § 4115.03(A), and prevailing wage compliance is required.

First, although OCIC is a Community Improvement Corporation organized under R.C. § 1724, it does not follow that OCIC meets the statutory definition of a “public authority” under Ohio's Prevailing Wage Law. Secondly, *assuming arguendo* that OCIC does meet the statutory definition of a “public authority,” the public financing provided by the OCIC for the acquisition of the land, building and equipment to Fellhauer does not subject any subsequent renovation done with private money by Fellhauer to compliance with Ohio's Prevailing Wage Law because:

(1) this private construction was not “by” or “for” OCIC (or any public authority for that matter); and (2) there was no “public improvement” as required under the statute.⁴

In its *entirety*, R.C. § 4115.03(A), defines a “public authority” as:

[A]ny 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.⁵

(Emphasis added).

Notwithstanding, Appellants’ selective approach to statutory construction has limited their definition of a *public authority* to “any institution supported in whole or in part by public funds.”⁶ What Appellants’ fail to realize is that their incomplete definition of a “public authority” blatantly ignores the mandate that there must be an entity authorized to enter into a contract for the construction of a public improvement or when “said sections apply to expenditures of such institutions,” referring to R.C. § 4115.032, which deem certain expenditures to be “public improvements” under Ohio’s Prevailing Wage Law.⁷

However, it is fundamental that prevailing wage law, by its nature, attaches to the wages of construction men and women engaged in the act of constructing “public improvements.”⁸

⁴ *Episcopal Retirement Homes, Inc., v. Ohio Dept. of Indus. Relations*, 61 Ohio St. 3d 366, 369 (1990).

⁵ R.C. § 4115.03(A)

⁶ Appellant’s Merit Brief at 4-5.

⁷ R.C. 4115.032 is titled “Construction Projects to Which Provisions Apply.” As the title clearly suggests, this Section only applies when there is public funds expended on “construction.”

⁸ *State ex rel. Evans v. Moore* (1982), 69 Ohio St.2d 88, 91, 23 O.O.3d 145, 147, 431 N.E.2d 311, 313. (“The prevailing wage law evidences a legislative intent to provide a comprehensive, uniform framework for, *inter alia*, worker rights and remedies vis-à-vis private contractors, sub-contractors and material men **engaged in the construction of public improvements** in this state.... Above all else, the primary purpose of the prevailing wage law is to support the

Despite this clear mandate, Appellants offer no evidence that any construction or renovation ever occurred at the Fellhauer building with public funds. To the contrary, Appellants suggest that the Ohio Department of Development Small Cities Community Development Block Grant Program Grant Agreement (“Agreement”) which references only contemplated renovations, i.e., “The Company now has the opportunity to purchase the facility, make renovations, and purchase machinery and equipment for expansion,” evinces actual construction or renovation activity.⁹ However, it is undisputed that no construction or renovation ever occurred at the Fellhauer building using public funds. Hence, the OCIC is not a “public authority” because it provided no public funds for construction, nor did it enter into a contract for the construction of a public improvement as defined by R.C. 4115.03(A).

Secondly, the above contemplated renovation was for the renovation of a portion of Fellhauer’s retail store facility. As the trial court correctly concluded, “the only renovation that will take place on the Fellhauer project is the home theater showroom which, under R.C. 166.01(D), is a point of final purchase retail facility and is specifically excluded from being an eligible project under R.C. 166.”¹⁰ Accordingly, had there been renovation with public funds, the renovation would have been exempt from the prevailing wage laws. Hence, the renovation of the Fellhauer building would not be deemed a “public improvement” project under R.C. 4115.032, and the OCIC would not be considered an “institution,” thereby a “public authority” under R.C. 4115.03(A), because “said sections [would not] apply to expenditures of such institutions.”

integrity of the collective bargaining process by preventing the undercutting of employee wages in the private construction sector.”

⁹ SUPP 0023 REL 0020 Ohio Department of Development Small Cities Community Development Block Grant Program Grant Agreement (“Agreement”).

¹⁰ Jdgmt. Entry at 5-6, this ruling was never been challenged by Appellants on Appeal.

Assuming arguendo that OCIC does meet the statutory definition of a “public authority,” and that the contemplated “construction” to the retail portion of the home theater showroom occurred, there still must be a construction project which meets the definition of a “public improvement” to trigger the application of prevailing wage law. An expenditure of public funds alone by a public authority is simply not enough to trigger the application of prevailing wage laws. The statute mandates that there be a “public authority” and a “construction” of a “public improvement;” all three elements must be present. As provided by R.C. 166, renovations to the point of sale facility are exempt from prevailing wage coverage; therefore, there can be no “public improvement” in this case by operation of R.C. 4115.032. Thus, the only other way prevailing wage law can be triggered is if this private renovation could be considered a “public improvement” project “*by*” or “*for*” the OCIC pursuant to R.C. 4115.03(C).

First, R.C. § 4115.03(C) defines a “public improvement” as:

[A]ll 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.¹¹

(Emphasis added).

To satisfy the statutory definition of “public improvement,” without the application of R.C. 4115.032, there must be construction either “by” or “for” a “public authority.” Without these essential elements, prevailing wage law simply does not apply to funds expended by OCIC or the County to Fellhauer for the acquisition of the land, building and equipment.

As noted above, the “Fellhauer project,” as labeled by the Appellants, did not involve any actual construction or any actual renovation with public funds. Setting this aside, it is undisputed

¹¹ O.R.C. § 4115.03(C)

that Fellhauer expanded its private plumbing, heating and electrical service and retail business by acquiring land, building and equipment. Looking to R.C. § 4115.03 *et seq.*, it is apparent that the Fellhauer acquisition did not involve the construction of any public buildings, roads, streets, alleys, sewers, ditches, sewage disposal plants and/or water works. Given this, there simply was no “public improvement.”

As discussed further below, expenditures by a public authority alone do not trigger prevailing wage; the plain text of the statute and Court precedent mandate that there also be a “public improvement.” Appellants’ argument that an expenditure of public funds by a public authority for any reason triggers prevailing wage law is incorrect and contrary to the express provisions of the statute when read as a whole. If Appellants were correct, the Legislature would not have bothered to include R.C. 4115.032 (mandating certain construction projects as public improvements), or have included definitions for “construction” or “public improvement” within the statute. Appellants’ reading of the statute renders these sections and other definitions entirely superfluous. Contrary to Appellants’ assertions, providing public money or public financing for non-construction related expenditures does not automatically trigger any prevailing wage obligations.

B. Proposition of Law No. 2: The Public Expenditures of Funds by an “Institution” Alone Does Not Trigger the Application of Ohio’s Prevailing Wage Law; There Must Also be a Construction of a Public Improvement.

Appellants are asking this Court to disregard specific statutory terms in the Ohio Revised Code as well as prior court precedent so as to expand the reach of the prevailing wage law to any expenditure of public funds for whatever purpose, be it construction related or not. Specifically, here, Appellants argue that prevailing wage law attaches to *any expenditure* by any “institution” or public authority regardless of whether there has been “construction of a public improvement.”

In fact, Appellants' posit that the words *construction* and *public improvement* are needless surplusage within the statute. However, Appellants' perfunctory¹² inquiry into the legislative history of § 4115.03(A) is nothing more than a creative attempt to mask their underlying objective – to expand the reach of prevailing wage to any expenditure by an institution or public authority, regardless of the specific intent of the Legislature for enacting and maintaining Ohio's Prevailing Wage Law in the first place. Thus, Appellants seem to be attempting to obtain a ruling from this Court regarding whether construction occurs presently or at anytime in the future, the requirements of Ohio's Prevailing Wage Law will always apply to the Fellhauer building because it was initially acquired with public funds.

First, Appellants seek to make an artificial distinction between a public authority and a public improvement by suggesting that the last clause in R.C. § 4115.03(A), “[o]r any institution supported in whole or in part by public funds,” is completely disjunctive from the remainder of the paragraph, and therefore, in isolation, triggers the application of the prevailing wage law. To the contrary, it is well settled that a basic rule of statutory construction is that “words in statutes should not be construed to be redundant, nor should any words be ignored.”¹³ Moreover, statutory language “must be construed as a whole and given such interpretation as will give effect to every word and clause in it.”¹⁴ No part should be treated as superfluous unless that is

¹² The Legislative Service Commission has indicated that in order for prevailing wage to apply, there must be a public improvement. *See* MEMBERS ONLY: AN INFORMATIONAL BRIEF PREPARED FOR MEMBERS OF THE OHIO GENERAL ASSEMBLY BY THE LEGISLATIVE SERVICE COMMISSION STAFF, Vol. 126 Issue 2 at 4(February 25, 2005); *See also* OHIO LEGISLATIVE SERVICE COMMISSION 127TH GENERAL ASSEMBLY S.B. 376 (as introduced)(stating “[P]revailing Wage Law only applies to construction of a public improvement the costs of which is above the statutorily prescribed thresholds.”).

¹³ *E. Ohio Gas Co. v. Pub. Util. Comm.* (1988), 39 Ohio St.3d 295, 299, 530 N.E.2d 875.

¹⁴ *Id.*

manifestly required, and a court should avoid that construction which renders a provision meaningless or inoperative.¹⁵

Sections 4115.03(A) and 4115.03(C) read:

(A) “**Public authority**” means 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.

(C) “**Public improvement**” includes 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. When a public authority rents or leases a newly constructed structure within six months after completion of such construction, all work performed on such structure to suit it for occupancy by a public authority is a “public improvement”. Public improvement does not include an improvement . . .

Appellants’ argument that an institution’s expenditures alone triggers prevailing wage suggests that the Legislature intended the absurd result of paying prevailing wage for any expenditure made by institutions, regardless of whether the expenditure is related to a contract for construction services. What Appellants’ fail to appreciate is that the “public improvement” mandate is the focus of prevailing wage law. That is, the legislative intent behind enacting

¹⁵ *Id. Accord, American Woodenware v. Schoreling* (1917), 96 Ohio St. 305, 313:

It is elementary that, if possible, in construing such an instrument as here being examined, effect should be given to every part and every word, and that in the absence of a clear reason to the contrary no part of a provision should be treated as superfluous. The court will avoid any construction which renders a provision meaningless or inoperative. Not only this, but in construing a particular phrase reference should be had to other provisions in the same section in order to ascertain the intention of the enacting body.

prevailing wage is “to provide a comprehensive, uniform framework for, *inter alia*, worker rights and remedies vis-à-vis private contractors, sub-contractors and material men **engaged in the construction of public improvements** in this state . . . Above all else, the primary purpose of the prevailing wage law is to support the integrity of the collective bargaining process by preventing the undercutting of employee wages in the private construction sector.”¹⁶

Furthermore, the requirement that there be a *public improvement* in order for prevailing wage law to apply has been made abundantly clear by this Court. See *Episcopal Retirement Homes Inc. v. Ohio Dept. of Includ. Relations*, 61 Ohio St.3d 366, 369 (1990) (“By its terms, Ohio’s prevailing wage law applies to all construction projects that are ‘public improvements’ as defined in R.C. 4115.03(C)”); *U.S. Corrections Corp. v. Ohio Dept. Indus. Relations* (1995), 73 Ohio St.3d 210, 218 (“Ohio’s prevailing wage law applies to all construction projects that are ‘public improvements.’”); *Accord, United Bhd. of Carpenters & Joiners of Am. v. Bell Eng. Ltd., Inc.*, 2006-Ohio-1891 (3rd Dist.) (“The prevailing wage law takes effect anytime a public authority ‘contracts for’ a public improvement.”).

Thus, contrary to Appellants’ contention, the existence of public funding alone unrelated to construction does not trigger prevailing wage obligations without there being a “construction of a public improvement.” Likewise, Appellants’ contention that any expenditure of public funds automatically triggers prevailing wage requirements has been considered and rejected. See *Harris v. Bi Mi Jo, Inc.*, 1991 Ohio App. LEXIS 1869, *4, 652 N.E.2d 766 (9th Dist.).

Furthermore, if a public improvement is not needed to trigger prevailing wage compliance, Appellants’ fail to explain to this Court why the defined terms “public improvement” appears together with “public authority” in nearly every section of Ohio’s

¹⁶ *State ex rel. Evans v. Moore* (1982), 69 Ohio St.2d 88, 91, 23 O.O.3d 145, 147, 431 N.E.2d 311, 313.

Prevailing Wage Law.¹⁷ Hence, Appellants' conclusory statement that: "[i]t was intended as an independent declaration of applicability that [public improvement] effectively created a second class of projects subject to the Prevailing Wage Law," is wholly without merit.¹⁸

Appellants' argument is clearly unsound as R.C. 4115.03(A) and Court precedent mandate that there be "[a] contract for the construction of a public improvement."¹⁹ Appellants' attempt to read out the fundamental requirement of a "construction of a public improvement project" from the statute is simply flawed and bears no rational connection to the intent of the Legislature, the purpose of the prevailing wage law, or long standing court precedent.

Notwithstanding, the expansion of Fellhauer's private business simply cannot be deemed a public improvement. First, R.C. 4115.03(C) defines a public improvement in part as:

[A]ll 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.** When a public authority rents or leases a newly constructed structure within six months after completion of such construction, all work performed on such structure to suit it for occupancy by a public authority is a "public improvement". . .

(Emphasis added).

It is irrefutable that the contemplated Fellhauer home theater showroom renovation was not constructed by a person by and for the OCIC, nor would it be renovated by the OCIC. As noted by the trial court, the Ohio Supreme Court's guidance in *Episcopal Retirement*

¹⁷ See, e.g., §§. 4115.03, 4115.032, 4115.033, 4115.04, 4115.06, 4115.07, 4115.08, 4115.09, and 4115.10.

¹⁸ Appellants' Merit Brief at 7.

¹⁹ O.R.C. § 4115.03(A); See *State ex rel. Evans v. Moore* (1982), 69 Ohio St.2d 88, 91, 23 O.O.3d 145, 147, 431 N.E.2d 311, 313; See also *Episcopal Retirement Homes Inc. v. Ohio Dept. of Indus. Relations*, 61 Ohio St.3d 366, 369 (1990); See *U.S. Corrections Corp. v. Ohio Dept. Indus. Relations* (1995), 73 Ohio St.3d 210, 218.

Homes holds that to constitute a “public improvement” under O.R.C. § 4115.03(C), “it is still required . . . that the project be constructed by a public authority or by a person who, pursuant to a contract with a public authority, constructs a structure for a public authority.”²⁰

Here, the trial court properly rejected any suggestion that the contemplated Fellhauer renovation of the home theater showroom was “by” a public authority because Fellhauer is “a private, for profit corporation.”²¹ As noted by the trial court, the project was not “for” a public authority because neither Ottawa County, nor OCIC “receive[ed] the benefit of the acquisition and/or rehabilitation of the property.”²² Indeed, the contemplated renovation of a point-of-final retail facility (which is excluded from the definition of “eligible project” in R.C. 166.01(D) and therefore, the prevailing wage requirements of R.C. Ch. 166 do not apply), is not a public improvement under Ohio’s Prevailing Wage Law. Also, the trial court specifically found that the project’s creation of jobs for Ottawa County residents was “not sufficient to establish a benefit to the Board of County Commissioners or OCIC” under the Ohio Supreme Court’s ruling in *Episcopal Retirement Homes*.²³

Hence, because there is: (1) no “public authority” who entered into a contract for construction; (2) no public funds expended on any construction or renovation; (3) no “institution” subject to R.C. 4115.032 as any contemplated renovation would be exempt from prevailing wage laws pursuant to R.C. 166; (4) no construction was ever performed on the building, and none is planned in the future; and (5) there is no public improvement project;

²⁰ Jdgmt. Entry at 6.

²¹ *Id.* at 7.

²² *Id.*

²³ *Id.* Appellants’ failed to file objections to the Magistrate’s decision in the Trial Court and therefore waived any right to contest this ruling.

prevailing wage laws do not apply to the facts of this case, and Appellants' taxpayer action was properly dismissed by the trial court and the Court of Appeals.

C. Proposition of Law No. 3: The Requirement in R.C. Chapter 4115 that There must be a Construction of a Public Improvement for Ohio's Prevailing Wage Law to Apply to a Project is Established Explicitly by Ohio's Prevailing Wage Statute, R.C. 4115.03 et seq., Not by an Administrative Rule.

Similarly, Appellants argue that the last clause in the "public authority" definition in R.C. § 4115.03(A) renders superfluous the statute's clear and repeated limitation that prevailing wage requirements apply only to "construction." Moreover, Appellants suggest that the Court of Appeals read a restriction into R.C. 4115.03(A) by interpreting O.A.C. 4101:9-4-02(BB)(1)(d) as requiring that expenditures of public funds be on actual construction. Specifically, Appellants argue that the Court of Appeals: (1) required compliance with prevailing wage law only when public expenditures are spent on actual construction; (2) understood "construction" as being only actual physical work on the Fellhauer building; and (3) interpreted the regulation in a way that subdivided the total overall project costs.

It is fundamental that Ohio's Prevailing Wage Law applies to ensure proper payment of workers' wages on public works construction projects. Indeed, the statutory definition of "public improvement" in R.C. § 4115.03(C) clearly refers to "works constructed by . . . or . . . for a public authority," and R.C. § 4115.04(A), which sets forth operative prevailing wage requirements, explicitly notes that such requirements apply to "construction" of a public improvement. *See also* R.C. § 4115.032 (titled "Construction projects to which provisions apply"). Moreover, this Court has repeatedly recognized that prevailing wage law applies only to workers engaged in the construction of public improvements.

The purpose and policy behind the enactment prevailing wage laws is to protect construction employees' wages and benefits when the government, as a large purchaser of

construction services, awards construction contracts to the lowest bidder. Contrary to Appellants' assertion, "construction," and more so, a "construction of a public improvement" are two mandatory elements for determining the application of prevailing wage law. It then logically follows that the public funds or financing expended must be for construction actual services for prevailing wage to apply.

To hold otherwise, would apply prevailing wage law to all expenditures of public entities to any private person regardless of whether there is a "construction," or whether the funds were to be used for construction or some other non-construction related activity, such as the purchase of equipment, remediation of brownfields, or the a acquisition of real property. Contrary to Appellants' claims, public entities may provide public funds to private individuals and companies for a variety of non-construction related reasons. It is illogical and a stretch to argue that if "construction" was somehow contemplated as part of an overall "project," prevailing wage requirements would automatically apply when any public funds were involved in some other non-construction related aspect.²⁴ The statute clearly provides when prevailing wage applies: (1) when there is a construction of a public improvement by or for a public authority; or (2) when a project is deemed a construction of a public improvement pursuant to R.C. 4115.032. Neither element is present in this case.

Secondly, Appellants argue that the Court of Appeals understood "construction" as actual physical construction work on the Felhauer building. Appellants' suggest that limiting the term "construction" to the "total overall project cost" under R.C. 4115.03(B) to include only physical

²⁴ For example, a city or county becomes the owner of property formerly occupied by a failed industrial enterprise that requires environment remediation to make the property marketable. After expending public funds for the remediation work, the city or county loans money to a new enterprise to finance the purchase of the remediated property and the new enterprise with its own funds constructs improvements upon the remediated property. In such a case, appellee argues prevailing wages do not apply, whereas appellants argue that prevailing wages would apply.

construction impermissibly restricts the application of R.C. 4115.03(B).²⁵ However, Appellants' Merit Brief fails to reference the page number upon which Appellants base this proposition. Moreover, a review of the Court of Appeals' Decision does not support Appellants' contention; there is nothing in the record to suggest that the Court of Appeals limited the definition of the term "construction" to "actual physical construction."²⁶

More so, "total overall project costs" as used in R.C. 4115.03(B) does not include the costs of "equipment" or "acquisition of real property." "Total overall project costs," as properly determined by the Court of Appeals, is meant to refer to only "actual construction costs;" hence, that is why this language was placed into the definition of "construction." Both R.C. 4115.03(B)(1) and (B)(2) specifically refer to "new construction" or the "renovation" of a "public improvement." Appellants claim that the total overall project cost is inextricably linked to the "cost of actual construction for a public improvement," meaning that the costs are specifically construction related and include all contracts for construction work including, but not limited to, electrical, heating ventilating and cooling work, plumbing work, general trades work, etc. . . . where the total overall project construction cost is more than the prevailing wage threshold of \$50,000.

Contrary to Appellants' assertions, R.C. 4115.03(B), as well as R.C. 4115.033, is meant to prevent public authorities from subdividing the total construction project cost into component parts or individual construction contracts to avoid the application of prevailing wage law. For example, if the electrical contract for a public improvement project was \$23,000, the general trades contract \$49,000, the plumbing contract \$25,000, and the heating and cooling contract \$35,000, a public authority could not lawfully subdivide the "overall project cost" into four

²⁵ Appellants' Merit Brief at 11.

²⁶ *Id.*

individual contracts to evade the prevailing wage threshold of \$50,000. Thus, Appellants' argue that the total overall project cost refers to the construction cost of the alleged public improvement as a whole (here, if done, was estimated to be \$132,000), which is higher than the \$50,000 threshold that triggers prevailing wage applicability.²⁷ Appellants' interpretation of this statutory language to include the lending of public money for "equipment and real property," to be added to the total overall construction costs for the alleged public improvement project, simply misrepresents the purpose of the statutory provisions and belies the Legislature's intent set forth in R.C. 4115.03(B) and 4115.033 to only prevent the subdividing of individual construction contracts.

If the acquisition of real property or of equipment with public funds was contemplated as part of the "overall project cost," surely the Legislature would have defined the term "total project cost," in the statute, or specially stated in the definition of "construction" that the expenditure of public funds for these non-construction related expenses were to be included to determine the applicability of the prevailing wage. The Appellants' interpretation of these statutory sections is simply incorrect.

Moreover, *assuming arguendo* that the Court of Appeals understood construction as "actual physical work on the Fellhauer building," this proposition does little to support Appellants' contention that prevailing wage law applies. That is, prevailing wages apply only when there has been construction or renovation with public funds. As stated many times herein, there has been no construction or renovation that occurred at the Fellhauer building paid for with

²⁷ This interpretation regarding the restriction on only subdividing construction contracts for a public improvement project is fully supported by the interpretive Administrative Code, See O.A.C. 4101:9-4-17.

public funds. It is axiomatic that without workers' who engaged in any form of construction, wages are not paid and therefore, prevailing wage law is not triggered.

Appellants' final proposition, that the Court of Appeals interpreted the regulation in a way that subdivided the total overall project costs is the same as Appellants' Proposition of Law No. 4 and is discussed below.

D. Proposition of Law No. 4: The Fellhauer Project was Not Sub-Divided to Avoid the Statutory Thresholds of Ohio's Prevailing Wage Law. Public Funds must be Explicitly Allocated for the Construction of a Public Improvement as Mandated by Statute in order for Prevailing Wage Requirements to Apply to the Project.

Finally, Appellants' argue that the "Fellhauer project" consisting of public funds to purchase the land and building and private money to renovate the home theater showroom, was impermissibly subdivided in contravention of R.C. § 4115.033 and O.A.C. 4101-9-4-17(C). However, in forwarding this argument to the Court, Appellants' appear to concede that in order for prevailing wage to apply, there must not only be a public authority, but also a construction of a public improvement.²⁸ Setting aside the fact: (1) that no construction or renovation *ever* occurred on the Fellhauer building with public funds; and (2) that the Fellhauer building was not a public improvement; the Fellhauer building and land acquisition was never "subdivided" as Appellants' state so as to stay below the triggering prevailing wage threshold levels outlined in R.C. § 4115.03 B(1) and (2). Appellants' proposed interpretation of these statutory sections is wholly without merit. Even in the absence of case law or legislative history, the plain language of the statute provides the Legislature's clear intention to prevent public authorities from subdividing a construction project into component parts or contracts. If the Appellants' wish to

²⁸ Both R.C. § 4115.033 and O.A.C. § 4104:9-4-17(C) apply solely and expressly to a "public improvement." Their reliance on these provisions in support of their proposition is completely inconsistent with their earlier argument that the statute's provisions relating to a "public improvement" do not apply at all. *See* Memo. Supp. Juris. At 6.

change the prevailing wage law to include land acquisition and equipment as part of a overall construction project, then this is an argument that should be presented to the Ohio Legislature, as there is no support for Appellants' argument given the clear meaning of the statute.

Simply stated, public financing earmarked and used for land and building acquisition, or for equipment purchases is not part of any total overall cost of any construction project. The statutory sections cited to by Appellants are not supportive of Appellants' arguments. Furthermore, even if Appellants were correct, which they clearly are not, there is simply no entity in this case who could qualify as a "public authority" under the statute that could have improperly attempted to "subdivide" any construction project into individual construction contracts to avoid the threshold limits that trigger prevailing wage compliance. No construction of a public improvement ever took place given the reasons stated above.²⁹

As stated before, for a construction project to be subject to prevailing wage requirements it must satisfy three elements.³⁰ First, the project must be a "public improvement" as defined in R.C. 4115.03(C) or R.C. 4115.032.³¹ Second, there must be a "construction," and the project's total overall construction cost must exceed the statutory threshold provided in R.C. 4115.03(B)(1) and (2).³² Third, there must be a "public authority," as defined by R.C.

²⁹ In the Court below, the Appellants' attempted to argue that Fellhauer was a "public authority" under R.C. 4115.03(A), but wisely withdrew this argument.

³⁰ The Legislative Service Commission has indicated that in order for prevailing wage to apply, there must be a public improvement. See MEMBERS ONLY: AN INFORMATIONAL BRIEF PREPARED FOR MEMBERS OF THE OHIO GENERAL ASSEMBLY BY THE LEGISLATIVE SERVICE COMMISSION STAFF, Vol. 126 Issue 2 at 4-6 (February 25, 2005). See also OHIO LEGISLATIVE SERVICE COMMISSION 127TH GENERAL ASSEMBLY S.B. 376 (as introduced)(stating "[P]revailing Wage Law only applies to construction of a public improvement the costs of which is above the statutorily prescribed thresholds.").

³¹ *Id.*

³² *Id.*; See also O.R.C. § 4115.03(C).

4115.03(A), and the construction project must not be specifically exempted from coverage by Ohio's prevailing wage law.³³ Turning to the statute at issue, R.C. 4115.033 provides:

No public authority shall subdivide a public improvement project into component parts or projects, the cost of which is fairly estimated to be less than the threshold levels set forth in divisions (B)(1) and (2) of section 4115.03 of the Revised Code, unless the projects are conceptually separate and unrelated to each other, or encompass independent and unrelated needs of the public authority. (Emphasis added).

In other words, a public authority cannot avoid the prevailing wage requirements by subdividing construction projects into separate components parts or projects. As such, the clear purpose of the law is to prevent a public authority from subdividing the overall construction of the public improvement project into individual separate construction contracts, to get below the threshold level (\$50,000) which triggers prevailing wage compliance.³⁴ The fact that R.C. 4115.033 was meant to apply only to a "public authority" subdividing a construction project into individual construction contracts to evade prevailing wage obligations is demonstrated by language used in the interpretive Administrative Code. O.A.C. 4101:9-4-17, titled "Scope of Project," provides:

(A) The construction of a public improvement shall be "fairly estimated to be more than the threshold," based on the prevailing wage rates in the locality at the time the project is to be let out for bidding, whether done at one time or in phases.

(B) Whenever a contract for the construction of a public improvement project exceeding the threshold in value is awarded to a contractor by a public authority, and the contractor begins performance but is unable to complete the project, and it therefore becomes necessary for the public authority to contract with a new contractor to complete the project, any new

³³ *Id.* ; See also O.R.C. 4115.04 and R.C. 166

³⁴ It is undisputed that at the time this case was filed, the prevailing wage threshold levels established by the Department of Commerce under R.C. 4115.03(B)(1) and (2) were \$69,853 for "new construction of any public improvement" and \$20,955 for "[a]ny reconstruction,[etc.]...of any public improvement." The \$50,000 and \$15,000 thresholds originally included in the statute are adjusted by the Department of Commerce every two years to meet inflation.

contractor shall be required to pay the prevailing rates of wages regardless of whether the contract awarded to the **succeeding contractor for completing the project is worth less than the threshold.**

(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. Phases may be considered as separate projects only where the public authority has proposed construction of the project in separate and distinct phases, the proposal to construct in phases is based upon lack of adequate funding necessary to award the contract as a whole, and a period of six months or longer of construction inactivity will occur between each phase. A single project which exceeds the fifteen-thousand-dollar limit as set forth in this rule shall constitute construction of a public improvement regardless of how many separate contracts are included within the project. (Emphasis added).

It is clear from the Administrative Code, as well as from R.C. 4115.033 that both are clearly addressing “contracts for the construction of a public improvement.” The “subdividing” language used is only related to the “contract for the construction” of a public improvement and only constitutes a prohibition to subdivide construction contracts into component parts to evade the prevailing wage threshold. The Administrative Code clearly references the awarding of contracts to bidders, discusses completing construction projects in phases and what happens when a bidder is unable to complete the project, all in the context of “threshold levels” triggering prevailing wage obligations. As such, the clear language of the statute and Administrative Code provide that these sections only apply to the subdividing of public improvement construction projects into individual construction contracts.

Neither the statute, nor the Administrative Code mentions or includes public funds being expended on real property or equipment acquisition, nor is there a stated intent or language included that could lead to a reasonable conclusion that such expenditures were meant to be included in the “total overall project cost” of a construction project.

Indeed, a public entity can provide financing to private individuals for land acquisition and equipment purchases without ever considering any type of construction. Simply because Fellhauer disclosed to the CDGB and OCIC that he may renovate the home theater showroom with its own private funds, did not make a difference in Fellhauer obtaining the loans from the CDGB and OCIC for the building, land and equipment acquisition. If no construction was performed or contemplated, Fellhauer could have still received the OCIC and the CDBG loans for there stated purpose, as the loans were wholly independent of any construction project. Public financing used for land, building and equipment acquisition are simply not part of any overall construction project, nor are these expenditures construction related in anyway. It is undisputed that the public loans provided by the CDGB and OCIC to Fellhauer were meant exclusively for land and equipment acquisition. Therefore, there was no “subdividing” of any construction project in component parts, projects or contracts.

Notwithstanding the clear meaning of the statute, Appellants’ suggest that the Fellhauer Project was subdivided into the component parts: (1) acquisition of land; (2) renovation of the building; (3) purchase of machinery and equipment; and (4) the costs of general administration³⁵ so as to avoid paying prevailing wage. The acquisition of land, purchase of machinery and equipment, as well as the costs of general administration are not component parts or separate contracts related to the construction of any public improvement project. The only way these statutory sections could apply to this case is if there was a construction of a public improvement, and the OCIC or County attempted to subdivide the renovation of the public improvement into component parts or contracts to avoid triggering the prevailing wage threshold amount.

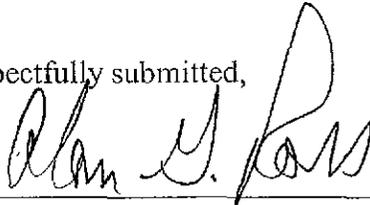
³⁵ Appellants’ Merit Brief at 12-13.

However, because there is no public authority, no renovation or construction, and no public improvement, these statutory sections are simply inapplicable to instant matter.³⁶

CONCLUSION

For all the reasons stated herein, Fellhauer Mechanical respectfully requests this Court to adopt its Propositions of Law and/or dismiss this case for ripeness and/or mootness.

Respectfully submitted,



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³⁶ As noted earlier, renovation of a home theater showroom located in the retail store, under R.C. 166.01(D), is a point of final purchase retail facility and is specifically excluded from being an eligible project under R.C. 166 and therefore, Prevailing Wage does not apply.

CERTIFICATE OF SERVICE

This is to certify that one copy of the foregoing Merit Brief of Appellee Fellhauer Mechanical Systems, Inc. was served this 23rd day of December 2008 via U.S. Mail, postage prepaid, upon the following:

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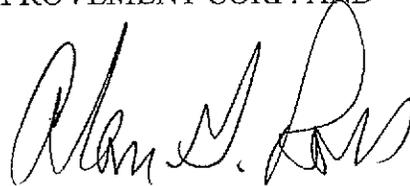
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