

In the
Supreme Court of Ohio

STATE EX REL., NORTHERN OHIO	:	Case No. 2010-0943
CHAPTER OF ASSOCIATED BUILDERS &	:	
CONTRACTORS, INC., et al.,	:	On Appeal from the
	:	Summit County
Plaintiff-Appellants,	:	Court of Appeals,
	:	Ninth Appellate District
v.	:	
	:	Court of Appeals Case
BARBERTON CITY SCHOOLS BOARD OF	:	No. CV 2009 04 2636
EDUCATION, et al.,	:	
	:	
Defendant-Appellees.	:	

**EMERGENCY MOTION TO DISMISS OF APPELLEE
OHIO SCHOOL FACILITIES COMMISSION**

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EMERGENCY MOTION TO DISMISS

The Ohio School Facilities Commission respectfully requests that the Court dismiss this case as moot. The case is scheduled for oral argument on April 19, 2011.

The Court accepted this case to determine whether Barberton city taxpayers had standing to challenge Commission Resolution 07-98, which permitted school boards, in their discretion, to require that bidders comply with Ohio's Prevailing Wage Law. That resolution no longer exists. On February 24, 2011, the Commission, through Resolution 11-16, both formally rescinded the prior resolution that underlies this case and affirmatively banned any future school facilities contracts from including prevailing-wage specifications. This new Prevailing Wage Ban moots the Taxpayers' case. The Commission presents this as an emergency motion to ensure that the Court can consider it before oral argument.

A. This case was no longer a live controversy even before the Prevailing Wage Ban.

Even before the Prevailing Wage Ban, the Taxpayers were pursuing a lifeless claim. In its merit brief, the Ohio School Facilities Commission asked that the Court dismiss this case as improvidently granted for two reasons. OSFC Br. 5-8. First, this Court accepted jurisdiction solely to address an issue of standing, but the Taxpayers conceded in their opening brief that the lower courts already issued rulings on the underlying merits of the case. And because those rulings would not be disturbed by the Court's resolution of the standing issue, any dispute about standing is a purely theoretical one. Second, the primary subject of the Taxpayers' complaint—the early site work contract—was long ago completed, making that claim moot. All that remained of the Taxpayers' case was their concern about future injury—that at some unspecified time yet to come the school board could perhaps enter a contract that included prevailing wage terms. As the Commission previously explained, that wispy claim was too speculative to confer standing.

B. The Prevailing Wage Ban moots the Taxpayers' claim of future injury.

Since briefing in this case concluded, yet another reason for dismissing the case has emerged. The Taxpayers' claim of future injury has evaporated. On February 24, 2011, through OSFC Resolution 11-16, the Commission "rescind[ed] resolution[] 07-98"—the resolution that formed the basis for the Taxpayers' complaint against the Commission and the Barberton School Board, Am. Comp. ¶ 34. Under Resolution 07-98, school boards had been permitted, in their discretion, to require that bidders "pay the prevailing wage rate and comply with the other provisions set forth in Ohio's Prevailing Wage Law." Model Standards ¶ 17, Resolution 07-98. The Taxpayers' complaint alleged that Resolution 07-98 conflicted with R.C. 4115.04, which exempts school districts from mandatory compliance with prevailing-wage requirements.

The Prevailing Wage Ban changes that policy. Going forward, "[t]he Commission will not approve any contracts that . . . mandate[] wage levels," save for a narrow exception for federally-funded projects that is not applicable here. Resolution 11-16, ¶ 2. The ban also prevents school districts from including in their bid specifications any term that "identifies and requires any single source of employee referrals;" "stipulates a specific source of insurance and benefits including health, life and disability insurance and retirement pensions;" "controls or puts limits on staffing;" "requires proprietary training programs or standards;" or "designates assignment of work." Resolution 11-16, ¶ 2. The ban "appl[ies] to all contracts that require Commission approval that have not been advertised for bid as of February 24, 2011," *id.* ¶ 3, and the Commission will not entertain school boards' requests for special conditions that "conflict with" the terms of the new resolution, *id.* ¶ 4.

Not only, then, does the Prevailing Wage Ban rescind the Commission's previous authorization of prevailing-wage specifications, but it affirmatively prohibits school districts from incorporating prevailing-wage specifications into their contracts in the future.

The impact of the Prevailing Wage Ban on this case is decisive. Even if the Taxpayers could overcome the preexisting procedural flaws that made this case a dead letter and inappropriate for review—flaws that the Commission detailed in its merit brief, OSFC Br. 5-8—this new development, the Prevailing Wage Ban, inters their claim once and for all.

There is nothing left of the Taxpayers' case. The Taxpayers' reply brief staked their continuing interest in this litigation on a theory of future injury—the possibility that their tax monies “will pay for the construction of the various school projects in Barberton, all of which will include an unlawful prevailing wage requirement,” Reply Br. 5 (emphasis added). Because the Commission will not approve any future contracts that include the prevailing-wage terms to which the Taxpayers originally objected, Resolution 11-16, ¶¶ 2, 3, the Taxpayers' claim that they will suffer future injury—the *only claim that possibly could have survived the completion of the early site work contract*—has morphed from the speculative into the impossible.

To be sure, under federal mootness doctrines, “a defendant’s voluntary cessation of a challenged practice” will, in many cases, not be sufficient to moot a case. See *Friends of the Earth, Inc. v. Laidlaw Envt'l Servs., Inc.* (2000), 528 U.S. 167, 189 (quotations and citations omitted). But even assuming that this Court recognizes the same exception to mootness, it cannot revive the Taxpayers' claim. When “subsequent events ma[ke] it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur,” the “voluntary cessation” exception to mootness loses its force. *Id.* at 189 (quotations and citations omitted). Here, the Commission has both rescinded its prior position and *prohibited* any future contracts from incorporating the prevailing wage. This change in the law provides the kind of clarity necessary to ensure that no live controversy remains.

In short, the Prevailing Wage Ban moots this case. It provides that no additional school contracts will include prevailing wage terms, and it has obviated any need for judicial redress. Were the Taxpayers to prevail in this Court and have the case remanded for on-the-merits adjudication—relief they are not entitled to anyway owing to the other fatal flaws with their case—there is no redress a declaratory judgment could deliver that the Prevailing Wage Ban has not already supplied. And lacking any injury that can be redressed, all that remains of the Taxpayers’ appeal is an invitation for this Court to write an advisory opinion on taxpayer standing—a generally precluded option under the best of circumstances, but especially so with such a damaged legal vehicle for review.

Now, even more so than before, the Court should dismiss the case.

C. There is no remaining reason for the Court to hear this case.

Even setting aside all the doctrinal principles that compel dismissal, there is no outstanding reason to continue this litigation. In the past, this Court has acknowledged that under certain exceptional circumstances, it may decide a case of great public interest even if the case is “moot as to the parties.” See, e.g., *Wallace v. Univ. Hospitals of Cleveland* (1961), 171 Ohio St. 487, 489.

This case does not warrant such indulgence from the Court. While it may be important for this Court at some point to further delineate the boundaries of taxpayer standing, this case is not an appropriate vehicle for doing so. It is both marred by procedural problems and lacking a well-developed record.

Nor does the underlying merits question the Taxpayers hope to litigate on remand require this Court to take such an extraordinary step. Even if the school district’s use of prevailing wage law presented an issue of great public interest at the outset of this case, the completion of the early site work project coupled with the new Prevailing Wage Ban eliminates any lingering

interest in the underlying merits of the action. Measured against the type of cases in which this Court has seen fit to work past its presumption against issuing advisory opinions—when, for example, there is “a constitutional question of great public interest” that is “highly likely . . . [to] recur” *Smith v. Leis*, 2005-Ohio-5125, ¶¶ 16-17—this case simply does not fit that bill.

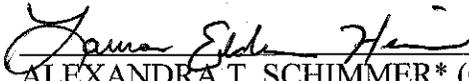
To the extent that the Taxpayers are pressing onward with the hope of securing attorney’s fees, that is a futile quest. First, and most critically, attorney’s fees are unavailable in common-law taxpayer suits. See *State ex rel. Citizens for Better Portsmouth v. Sydnor* (1991), 61 Ohio St. 3d 49, 54; *E. Liverpool City Sch. Dist. ex rel. Bonnell v. Bd. of Educ.*, 2006-Ohio-3482 ¶ 48 (7th Dist.) (“[A] taxpayer bringing a common law taxpayer action is not entitled to attorney fees.”). Second, even if fees were available in common-law taxpayer actions, *these* Taxpayers could not satisfy the prerequisite for obtaining them: demonstrating that they are prevailing parties. An agency’s voluntary change of its policy does not make the Taxpayers prevailing parties for the purpose of securing fees—especially where, as here, they consistently *failed to prevail* over the course of the litigation. See, e.g., *Buckhannon Bd & Care Home, Inc. v. W. Virginia Dept. of Health and Human Res.* (2001), 523 U.S. 598. Third, to even get to the question whether the Taxpayers are prevailing parties, the Court would not only have to issue an advisory opinion on the standing issue here, but the parties and the courts would have to endure empty legal theater on remand. That is, the Taxpayers, on remand, would have to persuade the trial court, the Ninth District and perhaps even this Court to: (1) overlook that the policy at the heart of this lawsuit no longer exists, and (2) grant them some unspecified (and, in reality, unavailable) form of judicial redress. This Court should not indulge such a flight of fancy.

CONCLUSION

For these reasons, the Court should dismiss the appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Emergency Motion to Dismiss of Appellee Ohio School Facilities Commission was served by U.S. mail this 15th day of March, 2011 upon the following counsel:

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APPENDIX

RESOLUTION 11-16

THE OHIO SCHOOL FACILITIES COMMISSION

February 24, 2011

RESCINDING RESOLUTIONS 07-98 AND 07-16

WHEREAS, the 122nd Ohio General Assembly established the Ohio School Facilities Commission (Commission) under Chapter 3318 of the Ohio Revised Code (ORC); and

WHEREAS, in accordance with ORC Chapter 3318, the Commission is granted authority to administer the Classroom Facilities Assistance Program and any other program created by legislative enactment, and to distribute funds appropriated by the General Assembly for construction of new school buildings, reconstruction and renovation of existing school buildings; and

WHEREAS, the Commission is committed to ensuring efficient procurement of contractors for Commission projects to build the school buildings funded by the Commission; and

WHEREAS, the Commission believes open contracting for publicly funded construction projects aids in lowering the costs of such projects; and

WHEREAS, ORC Section 3313.46 of the Ohio Revised Code requires School Districts to award contracts to contractors submitting the lowest responsible bid after competitive bidding; and

WHEREAS, the Commission previously adopted Resolution 07-98, which included Attachment A entitled Model Responsible Bidder Workforce Standards, and which amended Resolution 07-16, which included Attachment A entitled Model Responsible Bidder Requirements, to provide preapproval for certain responsible bidder criteria for potential adoption by local Board's of Education ("School District") participating in Commission programs; and

WHEREAS, the Commission now believes that many of the Model Responsible Bidder Workforce Standards contained in Exhibit A to Resolution 07-98 are redundant with current law, serve to restrict efficient procurement by increasing project costs or restricting competition by otherwise qualified contractors, or are not reasonably related to responsible bidder criteria; and

WHEREAS, Section 4115.04(B)(3) of the Ohio Revised Code states that prevailing wage requirements "do not apply to . . . Public Improvements undertaken by, or under contract for, the board of education of any school district," and

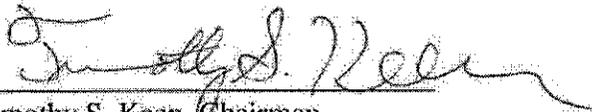
WHEREAS, the Commission has determined it is prudent to rescind Resolution 07-98 and Attachment A adopted on July 26, 2007 and Resolution 07-16 and Attachment A adopted on February 15, 2007.

NOW, THEREFORE BE IT RESOLVED THAT:

1. The Commission hereby rescinds: (1) Resolution 07-98 and Attachment A to that resolution entitled the Ohio School Facilities Commission Model Responsible Bidder Workforce Standards, and (2) Resolution 07-16 and Attachment A thereto.
2. The Commission will not approve any contracts that require the adoption of any agreements or specifications that attempt to impose any of the following requirements as a condition of submitting a bid or entering into a construction contract for or relating to a Commission project: (a) identifies and requires any single source of employee referrals; (b) stipulates a specific source of insurance and benefits including health, life and disability insurance and retirement pensions; (c) controls or puts limits on staffing; (d) requires proprietary training programs or standards; (e) designates assignment of work; or (f) mandates wage levels, except in those instances of federal Davis-Bacon wage requirements. None of the above requirements should be construed to limit consideration of local inclusion goals, or otherwise be used to contravene Ohio's Encouraging Diversity Growth and Equity ("EDGE") Program or other programs required by law.
3. This Resolution shall apply to all contracts that require Commission approval that have not been advertised for bid as of February 24, 2011. However, for those School Districts where the Commission previously approved an agreement authorized under Resolution 07-98 ("07-98 Agreements"), the Commission retains discretion to review the terms of the 07-98 Agreements and determine the applicability of this Resolution. Such a review shall only be conducted at the discretion of the Commission or at the request of a School District.
4. The Commission will continue to consider the request of School Districts participating in a Commission program to include additional terms, conditions, or specifications to the Commission's standard conditions of contract ("Special Conditions") so long as those Special Conditions do not conflict with this Resolution. Those Special Conditions adopted by School Districts are subject to Commission approval.
5. The Commission authorizes its Executive Director to continue to approve or disapprove those Special Conditions submitted by School Districts to the Commission for approval or to determine the applicability of this Resolution to those School Districts with 07-98 Agreements.

6. Following the adoption of a Resolution of a School District to establish Special Conditions and following approval of those Special Conditions by the Commission, the Commission authorizes the Executive Director to permit a School District to include the Special Conditions in the contract documents.
7. The Executive Director is authorized to waive or amend provisions of a School District's Project Agreement to facilitate the implementation of this Resolution.
8. Nothing in this Resolution precludes the Commission from making further determinations concerning the Commission's general and specific conditions of Contract.

In witness thereof, the undersigned certifies the foregoing Resolution was duly adopted at an open meeting held on February 24, 2011 by the members of the Ohio School Facilities Commission.



Timothy S. Keen, Chairman