

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 Court of
 : Appeals, Ninth Appellate District
 : Case No. CA-24898
 Plaintiffs/Appellants, :
 :
 v. : Summit County Court of Common Pleas
 : Case No. 2009-04-2636
 THE BARBERTON CITY SCHOOLS :
 BOARD OF EDUCATION, *et al.* :
 :
 Defendants/Appellees. :

**MEMORANDUM IN OPPOSITION TO THE EMERGENCY MOTION TO DISMISS
 FILED BY THE DEFENDANTS/APPELLEES
 THE BARBERTON CITY SCHOOLS BOARD OF EDUCATION AND
 THE OHIO SCHOOL FACILITIES COMMISSION**

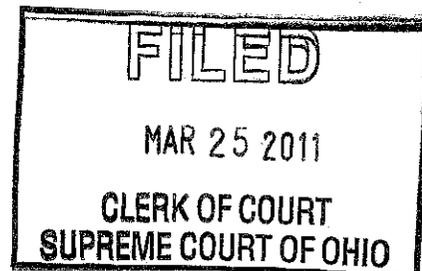
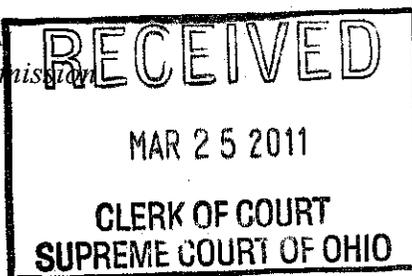
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MEMORANDUM IN OPPOSITION

This case is not moot for a variety of reasons. First, the Ohio School Facilities Commission's ("OSFC") Resolution 11-16, adopted February 24, 2011 is simply not a "Prevailing Wage Ban," as claimed by Appellees. The language of the Resolution 11-16 allows the continued application of so called Chapter 4115 prevailing wage requirements to school construction contracts, which the OSFC now admits is contrary to Ohio law. Resolution 11-16 provides in part:

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.

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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 District with 07-98 Agreements.

(Emphasis added).

When an action is "banned" as the OSFC claims, that action is prohibited, forbidden or barred, there is no leeway or "discretion" permitted in which that action can again be exercised, repeated or continued. Here, Resolution 11-16 allows the OSFC or the Executive Director to exercise discretion regarding the continued application of Resolution 07-98 and its unlawful prevailing wage requirement to projects already undertaken, and/or 07-98 agreements already approved by the OSFC prior to February 24, 2011. In this case, unlawful prevailing wage requirements are still being applied by the Barberton City Schools Board of Education ("Board")

and the OSFC on the Barberton Middle School Project, the U.L. Light Elementary School Project and the West Elementary School Project. These projects are expected to continue and last well into 2013.

Appellants are also aware of various other school projects where Resolution 07-98's prevailing wage requirements will continue to be applied to school projects, including, but not limited to: Ashtabula City Schools, Austintown Local Schools, Brookfield Local Schools, Cincinnati City Schools, Cleveland Municipal Schools, Dayton City Schools, Fremont City Schools, Hubbard EV, Maple Heights City Schools, Niles City Schools, the School for the Deaf and the Blind, Southington Local Schools, Toledo City Schools, and Western Reserve Local Schools. The OSFC has not claimed that the prevailing wage requirements applied to these school projects were banned, removed or otherwise suspended due to the enactment of Resolution 11-16.

Not only is the application of prevailing wage requirements continuing on school projects in Barberton and in other school districts, Appellants are informed that the OSFC is continuing to approve bids and contracts for school construction work after February 24, 2011, which include 07-98 Project Labor Agreements that also mandate the payment of prevailing wage on school projects.

Attached as Exhibit "A" are two letters dated February 25, 2011 and March 8, 2011 between Ryan Martin, President of the Northern Ohio Chapter of Associated Builders and Contractors ("ABC") and Richard Hickman, the Executive Director of the OSFC concerning a Project Labor Agreement being applied to the Euclid City School District Project following the alleged "repeal" of Resolution 07-98. Mr. Hickman, in responding to an objection by ABC that

the Project Labor Agreement is in direct conflict with the terms of Resolution 11-16 states, in part, as follows:

...By its terms, Resolution 11-16 applies to all contracts not yet advertised for bid as of February 24, 2011. The limited exception to immediate application is the ability of school districts to request a waiver of Resolution 11-16 in those limited circumstances where a district had already entered into an approved agreement under the authority of former Resolution 07-98 (e.g., a PLA). The review and consideration of any waiver requests will be handled on a case-by-case basis.

(Emphasis added).

As such, “waivers” can and will be granted to school districts who are proceeding to bid and award contracts with prevailing wage and project labor agreement requirements following the repeal of Resolution 07-98. Thus, Resolution 11-16 is not a “Prevailing Wage Ban” or an “affirmative ban” as claimed by the OSFC and therefore, this case is not moot. As stated by the OSFC in its Emergency Motion to Dismiss, “a defendant’s voluntary cessation of a challenged practice” will, in many cases, NOT be sufficient to moot a case, unless “subsequent events make it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.” *Friends of the Earth v. Laidlaw Environmental Servs., Inc.*, 528 U.S. 167, 169. Given the “waivers” granted by the OSFC and the continued application of Resolution 07-98 to school projects after February 24, 2011, it is certainly NOT absolutely clear that such conduct will not likely recur in the future.

The only way the OSFC or the Board can moot this case is to immediately halt the application of prevailing wage requirements on all school projects. The repeal of Resolution 07-98 means nothing from a mootness prospective if the OSFC and the Board continue the practice challenged by Appellants. As such, the Board and the OSFC’s Emergency Motion to Dismiss should be denied.

A. This Case was Not Moot Prior to the Enactment of Resolution 11-16.

The OSFC and the Board have continuously argued that Appellants are pursuing a “lifeless claim,” because the lower courts have already ruled on the underlying merits of this case. First, the enactment of Resolution 11-16 where the OSFC now admits that prevailing wage requirements cannot be applied to school projects bears some weight on the reconsideration of the lower court’s improperly rendered decisions. At the very least on remand, the enactment of Resolution 11-16 should be considered an admission against interest. The reasoning stated in the Resolution for “banning” prevailing wage requirements from being applied to school projects mirrors the legal arguments made by Appellants throughout this entire case.

Second, and as stated before, Appellants do not “admit” or “concede” that the lower courts reached the merits of their underlying claims regarding the application of prevailing wage requirements to school projects. Appellants have merely pointed out to this Court what the Ninth District stated in its decision and made arguments regarding those findings. See *State ex rel. Northern Ohio Builders & Contractors v. Barberton City School Bd. of Edn.* 188 Ohio App.3d 395, 408-409, 2010 Ohio 1826 at ¶31. Appellants submit that this Court accepted Appellant’s Proposition of Law No. 1 involving taxpayer standing because it was improper for the Ninth District to decide or comment of the merits of the underlying claims after determining that all Appellants lacked standing in the case. See *Ohio Pyro, Inc. v. Dept. of Commerce*, 115 Ohio St. 3d 375, 2007 Ohio 5024, P27, 875 N.E.2d 550; *Cuyahoga Cty. Bd. of Commrs. v. State*, 112 Ohio St. 3d 59, 2006 Ohio 6499, P22, 858 N.E.2d 330 (Standing is a preliminary inquiry that must be made before a court may consider the merits of a legal claim.). As such, this Court can hold that the merits of Appellants case will be heard on remand, provided this Court determines Taxpayers have standing.

Finally, the OSFC claims that Appellants Verified Amended Complaint only covered the bidding for the early site work contract for the Barberton Middle School Project, which is complete. This assertion is clearly erroneous. Appellants Verified Amended Complaint not only encompassed the entire construction of the Barberton Middle School, but all contracts undertaken by the Board that included an unlawful prevailing wage requirement. See Amended Complaint ¶1 and ¶2. Further, Appellants also directly challenged the authority of the OSFC, though Resolution 07-98 or otherwise, which allowed, permitted or otherwise granted authority to school districts to adopt unlawful prevailing wage requirements on OFSC funded projects. *Id.* Given the list of school projects that continue to apply prevailing wage requirements, Appellant's threat of future and continued injury is far from "wispy." Appellants are being injured each day these unlawful prevailing wage requirements are applied to work on the Barberton School Projects.

Indeed, since R.C. 4115.04(B)(3)'s enactment in 1997, (which removed school construction projects from prevailing wage law requirements), to the enactment of OSFC Resolution 07-98 in July of 2007, it was the position of the OSFC that R.C. 4115.04(B)(3) prohibited school boards from applying prevailing wage requirements. When a change in administration occurred in 2006, the OSFC reinterpreted R.C. 4115.04(B)(3) to allow prevailing wage requirements on school projects. A change in administration again in 2011, and the enactment of Resolution 11-16 has returned the interpretation that R.C. 4115.04(B)(3) prohibits the application of prevailing wage requirements on school projects.¹ What shall the

¹ The OSFC claims that Taxpayers are not entitled to attorney's fees in a common law taxpayer action. However, Taxpayer's could be entitled to attorney's fees if they prove bad faith on the part of the OSFC. See *East Liverpool City Sch. Dist. ex rel. Bonnell v. Bd. of Educ.* 2006-Ohio-3482 (7th Dist.). Appellants may be able to prove bad faith if this case is remanded based upon

interpretation of R.C. 4115.04(B) be in 2015 if a new administration is elected? Moreover, the point being this is not an issue that the OSFC has the authority to decide, because the General Assembly has spoken clearly and directly through R.C. 4115.04(B)(3) when prohibiting prevailing wage on school construction projects. Taxpayers are entitled to a decision from the Court to settle this issue once and for all. Certainly, the history of the application of prevailing wage requirements to school projects demonstrates that this issue is capable of repetition, yet evading review.

This exception to mootness applies when the challenged action is too short in duration to be fully litigated before its cessation, and there is a reasonable expectation that the same complaining party will be subject to the same action again. *Dispatch Printing v. Loudon* (2001), 91 Ohio St.3d 61, 64, 2001-Ohio-268. Given the completely different interpretations by the OSFC of the same statutory section, R.C. 4115.04(B)(3), Appellants submit the likelihood that prevailing wage requirements will again be applied in the future to school projects during another change in administrations is great. Thus, it is clear that Appellants' claims herein are not moot as they are capable of repetition, yet evading review.

B. Taxpayers have Judicial Redress in this Case.

The Taxpayers have judicial redress in this case so long as prevailing wage requirements are still being applied by the Board and the OSFC to school projects in Barberton and elsewhere. The fact that the OSFC has now once again, changed its position regarding the applicability of prevailing wage requirements to school projects through Resolution 11-16 is irrelevant, as they continue to apply Resolution 07-98 prevailing wage requirements. In fact, the OSFC retained the "discretion" to grant "waivers" to school boards who are currently bidding projects and still

the OSFC prior and new interpretation of R.C. 4115.04(B)(3). The OSFC complete change in position makes Appellants a "prevailing party."

applying unlawful Resolution 07-98 requirements. Unless and until the Board and the OSFC completely cease to apply such requirements to ongoing projects, a court can still grant the Taxpayers “effectual relief.”

In *Miner v. Witt* (1910), 82 Ohio St. 237, 238, 92 N.E. 21, the Ohio Supreme Court addressed the issue of when a matter becomes moot:

The duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it. It necessarily follows that when, pending an appeal from the judgment of a lower court, and without any fault of the defendant, an event occurs which renders it impossible for this court, if it should decide the case in favor of the plaintiff, to grant him any effectual relief whatever, the court will not proceed to a formal judgment, but will dismiss the appeal. And such a fact, when not appearing on the record, may be proved by extrinsic evidence.

(Emphasis added).

Appellants seek a declaration in this case that all construction contracts that the Board and the OSFC have entered into are *void ab initio*, as the prevailing wage requirements contained therein are contrary to Ohio law. Declaring that contracts which contain unlawful prevailing requirement are void is a remedy that can be afforded to Barberton Taxpayers. See *Buchanan Bridge Co. v. Campbell* (1899), 60 Ohio St. 406, 54 N.E. 372 (failure to comply with statutes renders government contracts void); *City of Lancaster v. Miller* (1898), 58 Ohio St. 558, 51 N.E. 52; *McCloud v. City of Columbus* (1896), 54 Ohio St. 439, 44 N.E. 95 (courts will leave the parties to such an unlawful transaction where they have placed themselves, and will refuse to grant relief to either party); *Pincelli v. Ohio Bridge Corp.* (1966), 5 Ohio St. 2d 41, 213 N.E. 2d 356 (the requirements for competitive bidding on contracts for the erection, alteration, or repair of county bridges by private contract, set forth in Section 153.31, are mandatory, and a contract

made without compliance with such sections is void and unlawful); *Lathrop Co. v. City of Toledo* (1966), 5 Ohio St. 2d 165, 172, 214 N.E. 2d 408, 412 (many times this court has held that no recovery can be had on a contract that is entered into contrary to one or more of the legislated requirements) *Kraft Construction Co. v. Cuyahoga Cty. Bd. of Commrs.* (1998), 128 Ohio App.3d 33, 45, 713 N.E.2d 1075 (a contractor involved in negotiations with public authorities must “ascertain whether the contract complies with the Constitution, statutes, charters, and ordinances so far as they are applicable. If he does not, he performs at his peril”).

Further, injunctive relief can be granted against the Board and the OSFC to prevent the continued application of prevailing wage requirements to Barberton school projects as well as other school projects approved by the OSFC under Resolution 07-98 that are still ongoing. As stated in Resolution 11-16, the May 22, 2002 Legislative Service Commission Report No. 149 and in the Briefs filed by Appellants in the Courts below, the prevailing wage requirement imposed by the Board and the OSFC significantly increases the costs of construction. Thus, any relief granted by a Court at this time would certainly reduce the unlawful and unnecessary financial burden being placed upon Barberton Taxpayers.

Simply because the construction has started or is underway does not prevent a court from declaring the prevailing wage requirement is unlawful, void, or unenforceable, and enjoin the Board and the OSFC from applying it to school projects. For example, if the Board and the OSFC had instead included a bid specification that banned persons on the basis of race from working on school projects, this Court would certainly not declare the case moot simply because construction had begun or that it was underway, as the unlawful application of that provision would continue to be applied throughout the construction project.

Granting injunctive and declaratory relief in this case, provided this Court finds the Taxpayers have standing, can still prevent the unlawful expenditure of hundreds of thousands of dollars slated to be lost to Barberton Taxpayers and/or millions of dollars to Ohio taxpayers as a whole because of the continued application of Resolution 07-98 requirements. (See the May 22, 2002, Legislative Service Commission Report, No. 149 where the LSC found indications that the prevailing wage exemption saved Ohio taxpayers nearly half a billion dollars over just the five year period of the study).

C. This Case is of Great Public Interest.

This case not only involves a 72 million dollar expenditure by the Board and the OSFC to construct three (3) schools in Barberton, which are still ongoing, but also involves the potential expenditure of hundreds of millions dollars of taxpayer money to fund school construction across the State. As such, this case presents an issue of great public and general interest for a court to decide, provided this Court holds that the Taxpayers herein have standing. See *Greater Cincinnati Plumbing Contactor's v. City of Blue Ash* (1995), 106 Ohio App.3d 608.

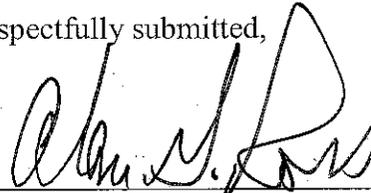
The court in *Village of West Unity ex rel. Jeff Beltz v. Richard Merillat* (6th Dist.) 2004-Ohio-2682, found that a taxpayer action claiming violations of prevailing wage law, R.C. 4115.03 to R.C. 4115.16, was not moot. In so finding, the court stated that although the construction of the storage building being challenged by the taxpayer had been completed, a decision regarding whether or not prevailing wage law applied to the project was a matter of “public and great general interest.” *Id.* at ¶17. The court noted that the project was “a public improvement funded by the taxpayers” and that a decision in the case “will affect not only those taxpayers residing in the Village, but will also affect taxpayers throughout Ohio.” *Id.* The court

reaffirmed the proposition that prevailing wage law is a matter of statewide concern and issues arising under this law are not mooted by the completion of the construction project. *Id.*

Similarly, the issues raised by Appellants here are of “public or great general interest” in that it involves the authority of a school board and the OSFC to apply prevailing wage requirements to a school project. As stated in *Village of West Unity*, determinations regarding whether prevailing wage applies to public construction projects are matters of “public or great general interest,” which overcomes a mootness challenge. With the stated legislative purpose behind the enactment of R.C. 4115.04(B)(3) being to save school districts and Ohio taxpayers money on school construction projects, the far reaching effects of this case throughout the State of Ohio are self evident.

For the reasons stated herein, it is respectfully requested that this Court deny the Board and the OSFC’s Emergency Motion to Dismiss.

Respectfully submitted,



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COUNSEL FOR APPELLANTS

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Memorandum in Opposition to the Motion to Dismiss filed by Barberton City Schools Board of Education was served via ordinary U.S. mail, postage prepaid, upon the following:

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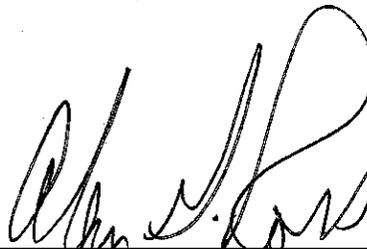
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this 24th day of March 2011.



Counsel for Appellants

APPENDIX



Ohio School Facilities Commission
10 West Broad Street, Suite 1400
Columbus, Ohio 43215

John R. Kasich
Governor

Richard M. Hickman
Executive Director

March 8, 2011

Ryan Martin
Northern Ohio Chapter
Associated Builders and Contractors, Inc.
9255 Market Place West
Broadview Heights, Ohio 44147

Re: Resolution 11-16 Application to Euclid City School District Bid Package #4

Dear Mr. Martin:

This letter acknowledges receipt of your February 25, 2011 letter to me concerning the Northern Ohio ABC Chapter's request that the OSFC exercise its authority to eliminate the PLA requirement from Bid Package #4 of the Euclid City School District ("Euclid") project.

As an initial matter, OSFC appreciates your interest in the Euclid project and shares your concerns about immediate implementation of Resolution 11-16. The Commission adopted Resolution 11-16 on February 24, 2011, as part of an effort to reduce construction costs and help continue the mission of the OSFC. Resolution 11-16 rescinded OSFC Resolution 07-98 and removed pre-approval for certain model responsible workforce standards. By its terms, Resolution 11-16 applies to all contracts not yet advertised for bid as of February 24, 2011. The limited exception to immediate application is the ability of school districts to request a waiver of Resolution 11-16 in those limited circumstances where a district had already entered into an approved agreement under the authority of former Resolution 07-98 (e.g., a PLA). The review and consideration of any waiver requests will be handled on a case-by-case basis.

Euclid submitted a waiver request to allow bid package #4 to bid with the PLA it entered into in 2010. Euclid's waiver request was based on the following circumstances: (1) its receipt of a federal bond requiring payment of federal Davis Bacon prevailing wages; (2) its local decision to adopt the PLA based on representation to the local community during the bond campaign; (3) OSFC's approval of the PLA in 2010 under the authority of Resolution 07-98; (4) over 50% of the project having already been advertised with the PLA requirement, including two district wide bid packages for controls and technology; (6) the timing of the bid advertisement (February 25, 2011) in relation to the adoption of Resolution 11-16; and (7) the concern that any bidding delays could threaten the aggressive project schedule and add significant costs to the project.

In its consideration of Euclid's request, OSFC evaluated not only the unique circumstances presented by Euclid, but also considered potential legal consequences raised by its counsel. And based on that evaluation, particularly potential cost impacts to the project, OSFC granted Euclid a conditional waiver of the immediate application of Resolution 11-16 to bid package #4. That

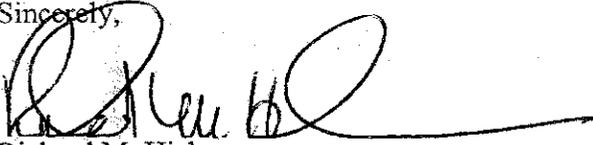
waiver is limited to bid package number #4 in its present form and is not a waiver of application for any additional contracts not yet advertised for bid on the Euclid project. In addition, OSFC specifically reserved the right to revisit application of Resolution 11-16 if the bids received for bid package #3 (which was advertised prior to the passage of Resolution #11-16) and bid package #4 are not awardable.

While I appreciate that you may be disappointed with OSFC's decision, please understand that notwithstanding the waiver to Euclid, OSFC is aggressively reviewing those limited districts that could potentially seek a waiver and are working to insure that the intent of Resolution 11-16 is applied appropriately to those districts. To that end, OSFC is already aware that at least one school district (Circleville City) has already taken action to rescind its PLA based on Resolution 11-16. Likewise, other than for any approved PLAs or federal Davis Bacon requirements, the specific requirement for the payment of state prevailing wage (or other mandated wage) by contract is not subject to waiver and will no longer be approved for any contracts not yet advertised as of February 24, 2011.

We appreciate ABC and its members continued interest in OSFC's projects and hope that ABC members will continue to bid and help build Ohio's schools.

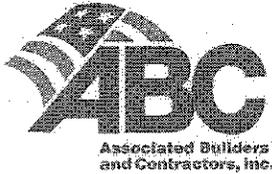
Please do not hesitate to contact me should you have any further questions or concerns related to this matter.

Sincerely,



Richard M. Hickman
Executive Director

Cc: Steve Berezansky, OSFC Chief of Projects



Northern Ohio
Chapter

February 25, 2011

Richard Hickman
Executive Director
Ohio School Facilities Commission
10 West Broad, Suite 1400
Columbus, OH 43215

VIA FACSIMILE

Dear Executive Director Hickman:

I would like to congratulate you on your selection as Executive Director of the OSFC. In my capacity as President of the Northern Ohio Chapter of Associated Builders and Contractors (ABC) I represent approximately 300 construction-related small businesses that have been severely and negatively impacted by the proliferation of school construction contracts containing union-only Project Labor Agreements (PLA's).

Yesterday's resolution prohibiting such agreements (and other criterion contained in Resolution 07-98) was welcomed news.

As Resolution 11-16 states, for projects that contain elements of Resolution 07-98 which have been advertised for bid, yet not awarded, prior to February 24, 2011, "the Commission retains discretion to...determine the applicability of this Resolution."

I would like to bring your attention to a current project which meets the criteria to be a candidate for OSFC review according to Resolution 11-16.

The Euclid School District has advertised for bids and the bid opening is scheduled for March 10, 2011. This school district has adopted a PLA for the particular project. The bids are for two elementary schools, Glenbrook and Roosevelt, whose combined budgets are \$24,264,898.

On behalf of ABC members desiring the opportunity to be a successful bidder on this project, I am requesting that the OSFC exercise its authority to eliminate the PLA and rebid the project using, in the words of Chairman Keen, "free and open competition."

Very truly yours,


Ryan Martin
President/CEO