OPINION NO. 87-007

Syllabus:

A private developer who, pursuant to a performance bond contract with a city, installs water mains and conduits, fire hydrants, and other water system appurtenances, controls, and fixtures in connection with the construction of a private housing subdivision is not required to comply with the provisions of the prevailing wage rate law set forth in R.C. 4115.03-.16, since such installation is not a "public improvement," as defined in R.C. 4115.03(C).

To: Lynn C. Slaby, Summit County Prosecuting Attorney, Akron, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, March 20, 1987

You have requested my opinion whether a private developer is obliged to comply with the prevailing wage rate law in the construction of a private housing subdivision. Your letter provides the following pertinent background information:

> A private developer intends to construct a housing development on private land with the total construction being privately financed. All housing units will be sold to private parties. As part of their planning and regulation of subdivisions, the City of Akron requires that every developer execute a performance bond and contract with the City, a copy of which is attached, requiring surety for the completion of the development and a contractual obligation to meet all City specifications in construction. The agreement also requires that the developer reimburse the City for its expenses incurred in the inspection, approval, and testing of the work; costs of all plans, specifications, and tap-in fees for water mains; a

> three (3) year maintenance bond; and dedication of all improvements to the City. By this agreement no public funds are expended in creation of the subdivision.

According to the specific terms of the performance bond contract, the private developer must install, within the subdivision, water mains with valves, fire hydrants, and other related water system appurtenances, controls, and fixtures in connection with the construction of the private residences. See R.C. 711.101 (a municipal corporation may establish rules and regulations for the construction of water mains and other improvements prior to the sale, lease, or improvement of lots in a subdivision). See also R.C. 711.07 (a plat, upon recording, vests in the municipal corporation the fee of the parcel of land intended for public uses). You wish to know whether the private developer, in constructing such water system improvements within the subdivision, must comply with the provisions of the prevailing wage rate law as set forth in R.C. 4115.03-.16.

R.C. 4115.10(A) prohibits payment of less than the prevailing rate of wages in the following terms:

> No person, firm, corporation, or public authority that constructs a public improvement with its own forces the total overall project cost of which is fairly estimated to be more than four thousand dollars shall violate the wage provisions of sections 4115.03 to 4115.16 of the Revised Code, or suffer, permit, or require any employee to work for less than the rate of wages so fixed, or violate the provisions of section 4115.07 of the Revised Code. (Emphasis added.)

See R.C. 4115.05 ("[e]very contract for a public work shall contain a provision that each laborer, workman, or mechanic, employed by such contractor, subcontractor, or other person about or upon such public work, shall be paid the prevailing rate of wages provided in this section"). See also R.C. 4115.04 (Department of Industrial Relations shall determine the prevailing rate of wages for the class of work called for by the public improvement).

Thus, the dispositive inquiry is whether installation of the water system improvements and various appurtenances, controls, and fixtures incidental thereto, as described in the private developer's performance bond contract, constitutes "construction" of a "public improvement," and thereby falls within the scope of R.C. 4115.10(A). These particular terms, as used in R.C. 4115.03-.16, are defined in R.C. 4115.03. R.C. 4115.03(B) states, in part, that, "'[c]onstruction' means any construction, reconstruction, improvement, enlargement, alteration, repair, painting, or decorating, of any public improvement."[1] The latter term is defined in R.C. 4115.03(C), which provides, in part, as follows:

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[1] The term "construction," as defined in R.C. 4115.03(B), has been the subject of several Attorney General opinions. Among the activities found to be included thereunder are: the reclamation of strip mines, 1979 Op. Att'y Gen. No. 79-046; the installation of computers, security systems, and similar equipment, 1977 Op. Att'y Gen. No. 77-076; the removal of turbo-generators and related equipment from a municipal building, 1976 Op.

> "Public improvement" includes all buildings, roads, streets, alleys, sewers, ditches, sewage disposal plants, water works,[2] 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. (Emphasis and footnote added.)

See also R.C. 4115.03(A) (defining "[p]ublic authority," in part, as "any officer, board, or commission of the state, or any political subdivision of the state, authorized to enter into a contract for the construction of a public improvement"). Thus, in order for the water system improvements in question to come within the definition of a "public improvement," as set forth in R.C. 4115.03(C), they must be constructed "pursuant to a contract with a public authority." In this instance, the improvements are being constructed pursuant to a performance bond contract entered into between the city and the private developer. Such construction must also be undertaken "for a public authority." R.C. 4115.03(C). Cases and previous Attorney General Opinions have considered, either explicity or implicitly, several factors in determining whether particular construction is, as a matter of law, undertaken "for a public authority": (1) whether public funds or their equivalent are made available, either directly or indirectly, by the public authority for the purpose of financing in whole or in part the cost of such construction; (2) whether such public authority owns or retains a possessory interest in the real property upon which the construction takes place at the time such construction commences; and (3) whether such construction is for the benefit of such public authority.

In the case of public funds, the law implicitly recognizes that construction financed with funds generated through the auspices of a public authority is undertaken for that public authority. See Harris v. Bennett, No. CV83-2131 (Lucas County Ct. App. July 26, 1985) (unreported) ("[t]he enactment of R.C. 4115.04 ensures that employees on publicly funded projects are paid the prevailing rate of wages"); Evans v. MMT, Piqua, Ohio Venture Project, No. 83CA45 (Miami County Ct. App. March 1,

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Att'y Gen. No. 76-041; and the trimming and removal of trees along the streets and highways of a city, 1971 Op. Att'y Gen. No. 71-054.

[2] A municipal corporation is independently empowered to construct and maintain water works and structures and appurtenances related thereto. See, e.g., R.C. 743.01 ("[t]he legislative authority of a municipal corportion may take possession of any land obtained for the construction or extension of water works, reservoirs, or the laying down of pipe"); R.C. 743.12 ("[o]n the written request of any number of citizens living outside the limits of a municipal corporation, the municipal corporation may extend, construct, lay down, and maintain aqueduct and water pipes"); R.C. 743.17 (a municipal corporation may establish a part of its water works within the limits of another municipal corporation, provided the latter consents thereto). See generally City of Stow v. City of Cuyahoga Falls, 7 Ohio App. 3d 108, 454 N.E.2d 561 (Summit County 1982).

1984) (unreported) ("the prevailing wage law reflects a lawful exercise of the state's spending power"). See generally State ex rel. McClure v. Hagerman, 155 Ohio St. 320, 98 N.E.2d 835 (1951) (municipal funds may only be spent for municipal purposes). Thus, for example, the prevailing wage rate law is, in a variety of instances, made applicable to construction that is financed by the proceeds of bonds issued by or through a public authority, or loans therefrom. See, e.g., R.C. 122.452 (loans by the Department of Development to a political subdivision of the state for the construction of various public improvements may be made on the condition that prevailing wages are paid to laborers and workmen on such projects); R.C. 165.031 (prevailing wages shall be paid on projects funded by the issuance of industrial development bonds); R.C. 1551.13 (grants by the Department of Development for the construction of energy resource development facilities may be made on condition that prevailing wages are paid in connection with such construction). See also 1984 Op. Att'y Gen. No. 84-035 (a facility constructed for a county agricultural society, the purchase or lease price of which is paid wholly or partly with public funds, is a "public improvement" within the meaning of R.C. 4115.03(C)); 1984 Op. Att'y Gen. No. 84-010 (the provisions of the prevailing wage rate law apply to projects funded in whole or in part through the issuance of hospital revenue bonds pursuant to R.C. Chapter 140); 1982 Op. Att'y Gen. No. 82-096 (the provisions of the prevailing wage rate law apply to projects funded by the issuance of industrial development bonds pursuant to R.C. Chapter 165); 1981 Op. Att'y Gen. No. 81-076.

Construction undertaken upon land that a public authority owns or in which it has a possessory interest at the time such construction commences would also appear to indicate that, as a general matter, such construction is for the public authority. See Op. No. 84-035 at 2-106, n.1 ("the manner in which a county agricultural society controls property upon which the construction will be undertaken, whether by ownership [or] lease...does not affect this analysis regarding the applicability of the prevailing wage laws"). See generally 1976 Op. Att'y Gen. No. 76-041. Finally, construction that inures to the benefit of a public authority would also appear to be for a public authority. See 1982 Op. Att'y Gen. No. 82-079.

I do not conclude that these particular water system improvements are constructed "for a public authority." According to your letter no public funds shall be made available by the municipality to the private developer for the installation and construction of the improvements. In addition, although the developer is required under the terms of the performance bond contract to dedicate the improvements to the public use upon completion, and pursuant to R.C. 711.07, a plat, upon recording, must vest in the city the fee of the parcel of land intended for public use, the municipality does not own, nor will it have a possessory interest in, the land that is the subject of such improvements at the time that construction thereof commences. With respect to the third factor, the municipality does realize a tangible benefit from the installation of these water system improvements. In this regard, these improvements certainly contribute to the overall health, safety, and general welfare of the larger surrounding community. Thus, the construction in question does, in fact, inure to the benefit of the public authority. These water system improvements are also intended to benefit prospective

homeowners within the subdivision, since the homes in question must be furnished with an adequate supply of running water for the use of their occupants. The installation of water mains, conduits, and related control fixtures by the private developer furthers that end. Additionally, the absence of such improvements will not render any easier the developer's task of persuading prospective homeowners to purchase the homes he has constructed. Thus, the improvements in question advance, albeit in slightly different ways, the interests of the municipality, the private developer, and the prospective homeowners.

Absent a showing that public funds are being made available by the public authority to underwrite the costs of constructing such improvements, or that the municipality retains an ownership or possessory interest in the subject premises at the time construction thereof commences, the presence of the aforementioned public benefit, standing alone, is not sufficient to conclude that the construction is, as a matter of law, "for a public authority." Cf. Op. No. 82-079 (the rehabilitation of private residences for which federal funds are provided is not the "construction" of a "public improvement" for purposes of R.C. Chapter 4115, even though public purposes, such as the prevention of urban blight, are served by the rehabilitation).[3] In these circumstances, therefore, the installation of those water system improvements does not constitute a "public improvement," as defined in R.C. 4115.03(C), since their installation is not undertaken "for a public authority." Thus, a private developer who undertakes the water system improvements in question is not required to comply with the provisions of the prevailing wage rate law as set forth in R.C. 4115.03-.16.

Based on the foregoing, it is my opinion, and you are advised that a private developer who, pursuant to a performance bond contract with a city, installs water mains and conduits, fire hydrants, and other water system appurtenances, controls, and fixtures in connection with the construction of a private housing subdivision is not required to comply with the provisions of the prevailing wage rate law set forth in R.C. 4115.03-.16, since such installation is not a "public improvement," as defined in R.C. 4115.03(C).

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[3] I specifically make no determination whether the type of public benefit shown in this case would, in conjunction with the presence of one or both of the other factors set forth above, result in a finding that a public improvement was being constructed.