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1. WAGES—CONSTRUCTION ON PUBLIC LAND FINANCED IN FULL BY PRIVATE FUNDS—NO CONTRACT BETWEEN PRIVATE CONTRACTOR AND PUBLIC AUTHORITY—TITLE IN PRIVATE HANDS UNTIL STRUCTURE COMPLETED — STRUCTURE WHEN COMPLETED TO BE TRANSFERRED AS GIFT TO PUBLIC AUTHORITY—SECTION 17-4, G. C. AS TO PREVAILING WAGES ON PUBLIC IMPROVEMENT DOES NOT APPLY.

2. IF CONSTRUCTION THE RESULT OF CONTRACT BETWEEN PRIVATE CONTRACTOR AND PUBLIC AUTHORITY OR IS UNDERTAKEN BY PUBLIC AUTHORITY WITH ITS OWN FORCE, SECTION 17-4, G. C. APPLIES.

SYLLABUS:

1. Where construction takes place on public land financed in full by private funds and is not the result of a contract between the private contractor and the public authority, and title to the structure rests in private hands until construction is completed, whereupon it will be transferred as a gift to the public authority, the provisions of Section 17-4 of the General Code, relating to prevailing wages on a public improvement do not apply.

2. If such construction is the result of a contract between the private contractor and the public authority or it is undertaken by the public authority with its own force, then the provisions of Section 17-4, General Code, do apply.

Columbus, Ohio, July 11, 1949

Mr. Albert A. Woldman, Director, Department of Industrial Relations
Columbus, Ohio

Dear Sir:

Your request for my opinion reads as follows:

"There has recently come to our attention a matter involving G. C. 17-4 and 17-4a (prevailing wages) which we feel requires an interpretation from you.

"In the city of Troy, Ohio, a 'winter sports arena' is in process of construction. This project is being constructed on public land owned by the City of Troy, which has a specific requirement set forth in the deed to the land, that the land be used for park and playground purposes.

"On or about December 15, 1946, a plan was submitted by the H. Foundation to the city council of Troy for the utilization of said public land referred to above, for an extension of the park system of said City of Troy. This plan incorporated the construction of a new athletic stadium, winter sports arena, athletic field, a new golf course, club house, and approaches thereto, including a bridge. Said H. Foundation proposed to furnish $300,000 of the estimated cost of $750,000—remainder $450,000 to be furnished by the City of Troy through a bond issue which was to be submitted as an emergency issue to the voters. Complete title to the buildings erected on said public land was to be vested in the City of Troy upon completion. The $300,000 contributed by the said H. Foundation, and contributed in the form of the said 'winter sports arena', was to be a gift to the City of Troy.

"The plan was accepted by the Council of the City of Troy, and the aforementioned bond issue was placed before the voters on March 5, 1947. The bond issue was approved by the voters. The project is now in the process of construction. Construction is going ahead on said 'winter sports arena'—the work being done by forces of and being paid for by the said H. Foundation.

"Affidavits have been sent to this office that the said H. Foundation is not paying a prevailing wage, set up in the manner prescribed in G. C. 17-4, (the prevailing wage act) on the operations. We request that you render an opinion answering the following questions:

(a) In the event of public ownership of the land and an agreement, verbal or written, that title to a completed structure on said land will be vested in a governmental subdivision, is any construction on said land to be construed as public construction or not?

(b) Are the provisions of G. C. 17-4 and G. C. 17-4a applicable to construction of a building, the costs of erection and materials of which are being paid for by private interests, whose title, by agreement, will be vested in a governmental subdivision on completion of construction?"

As I understand the problem presented, there has never been a contract entered into between the City of Troy and the H. Foundation to erect the "winter sports arena." The construction of the arena is under the complete control of the H. Foundation, who is supervising and erecting the arena with its own forces. Title to the arena vests in the H. Foundation until construction is complete, whereupon it will be transferred to the city of Troy. All wages and materials used are being paid for by the Foundation. A contract for the construction of the arena has never been

the subject of advertising or bidding as is required in the various lowest responsible bidder statutes. The arena is being constructed on public land. The H. Foundation is not paying a prevailing wage under Section 17-4 of the General Code.

The answer to the question of whether a pervailing wage must be paid turns upon an interpretation of Section 17-4 of the General Code. To better understand Section 17-4 definitions of the terms used therein are necessary. These definitions are contained in Section 17-3, General Code, which reads as follows:

> "The term '*public authority*', as used in this act, shall mean any officer, board, or commission of the state of Ohio, or any political subdivision thereof, authorized by law to enter into a contract for the construction of a public improvement or to construct the same by the direct employment of labor. The term '*construction*', as used in this act, shall mean any construction, reconstruction, improvement, enlargement, alteration or repair of any public improvement fairly estimated to cost more than three hundred dollars. The term '*public improvement*', as used in this act, shall include all buildings, roads, streets, alleys, sewers, ditches, sewage disposal plants, water works and all other structures or works constructed by the state of Ohio or any political subdivision thereof. The term 'locality', as used in this act, shall mean the county wherein the physical work upon any public improvement is being performed. The term 'public authority' shall also mean any institution supported in whole or in part by public funds and this act shall apply to expenditures of such institutions made in whole or in part from public funds."

That part of Section 17-4 which is pertinent to your inquiry reads as follows:

> "It shall be the duty of every public authority authorized to *contract for or construct with its own forces* for a public improvement, before advertising for bids or undertaking such construction with its own forces, to have the department of industrial relations ascertain and determine the prevailing rates of wages of mechanics and laborers for the class of work called for by the public improvement, in the locality where the work is to be performed; and such schedule of wages shall be attached to and made part of the specifications for the work, and shall be printed on the bidding blanks where the work is done by contract. * * *"
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> (Emphasis added.)

Since there is no contract involved in the instant case, the public authority i.e. the City of Troy would have no reason to have the Depart-

ment of Industrial Relations ascertain the prevailing rate of wages. There being no advertising for bids, this provision of law does not apply.

The public authority i.e. the City of Troy, is not in the instant case constructing "with its own forces." That it may have authority to construct, is not the question involved. Therefore, this provision of law does not apply.

The fact could, I believe, be disputed that this is a public improvement as defined in Section 17-3. That section defines a public improvement as including "all buildings, roads, streets, alleys, sewers, ditches, sewage disposal plants, water works and *all other structures or works constructed by the state of Ohio or any political subdivision thereof.*" The "winter sports arena" is being constructed neither by the State of Ohio nor a political subdivision thereof; it is being constructed by a private contracter, free of any privity with either, but the fact remains that this building is being constructed on public land. Is this fact, in and of itself, sufficient to bring the construction within the purview of Section 17-4, General Code?

The case of Clymer v. Zane, 128 O. S. 359, 191 N.E., 123 is in point to show the court's attitude toward this particular legislation. In that case Zane sued Clymer to recover the difference between wages paid and wages claimed to be due by virtue of a contract between Clymer and the State of Ohio for the construction of a highway, and the statute (Section 17-4 et seq.) relative to the rate of wages to be paid by such contractor, plus a penalty equal to such difference imposed by such statute. The answer denied liability upon the ground that the work done was not within the purview of the statute. The plaintiff was an employee of the defendant and worked in a gravel pit near a section of the road that was being improved by the defendant under contract with the state. The greater portion of the sand and gravel used on the road was obtained from the pit where plaintiff worked. The court held as disclosed by the syllabus:

> "1. Penal statutes and statutes which impose restrictions upon the conduct of business must be strictly construed and their scope cannot be extended beyond the usual meaning of their terms.
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> "2. Sections 17-3, 17-4, 17-5 and 17-6, General Code, and any contract made in compliance therewith must be construed together, and the scope of the provisions of those sections and the contract cannot be extended beyond the ordinary intendment of Section 17-6 which imposes the penalty and gives the right of recovery.

"3. A private enterprise, separate in time and in space, is not necessarily a part of a public improvement because owned and operated by the contractor in charge of the public improvement, and workmen employed in such private enterprise cannot be held to be employees upon a public improvement solely because material prepared in such enterprise is used in the public improvement."

In 1935 Section 17-4 was amended and Section 17-4a, General Code, was enacted. From the terms of the amendment and the enactment it may be readily seen that they were intended to cover the situation in the Clymer case. Section 17-4 as amended, reads in part:

"* * * But a minimum rate of wages for common laborers, on work coming under the jurisdiction of the state department of highways, shall be fixed in each county of the state by said department of highways, in accordance with the provisions of section 17-4a of this act. * * *"

Section 17-4a, which has been amended since 1935 i.e. 1939, read as enacted in 1935 (116 v. 206) as follows:

"* * * Serving laborers, helpers, assistants and apprentices shall not be classified as common labor and shall be paid not less than the wage in the locality as a result of collective agreement or understanding and if no such agreement or understanding exists, shall be paid not less than the prevailing rate of wages to be ascertained as provided in section 17-4 of this act. The wages to be paid for a legal day's work, to laborers, workmen or mechanics upon any material to be used upon or in connection therewith, shall not be less than the prevailing rate for a day's work in the same trade or occupation in the locality within the state where such public work on, about or in connection with such labor is performed in its final or completed form is to be situated, erected or used and shall be paid in cash. Such contracts shall contain a provision that each laborer, workman or mechanic, employed by such contractor, sub-contractor or other person about or upon such public work, shall be paid the wages herein provided. * * *"

However, even though the particular facts of the Clymer case are no longer the law, the first branch of the syllabus is still regarded as sound. Section 17-4 et seq. is still a penal statute and, as such, should be strictly construed. See 93 A. L. R. 1249. Therefore, strictly construed, the statute does not apply to the instant case.

It is impossible to answer specifically the questions you ask because each case rests on its facts. The situation presented in your letter is un-

usual, but as a general proposition it might be stated that where construction takes place on public land financed in full by private funds and not under contract between the private contractor and the public authority, and title to the structure rests in private hands until the construction is completed, whereupon it will be transferred as a gift to the public auhority, the provisions of Section 17-4 of the General Code, relating to prevailing wages on a public improvement do not apply. If such construction is the result of a contract between the private contractor and the public authority or it is undertaken by the public authority with its own force, then the provisions of Section 17-4, General Code, do apply.

Respectfully,

HERBERT S. DUFFY,
Attorney General.