

OPINION NO. 71-054**Syllabus:**

The trimming and removal of trees along the streets and highways of a city through contract, between the city and a contractor who is to perform the work, is "construction" as defined in Section 4115.03, Revised Code, and such contract is subject to the provisions of Section 4115.03 through 4115.15, Revised Code.

To: Bernard W. Freeman, Huron County Pros. Atty., Norwalk, Ohio
By: William J. Brown, Attorney General, September 13, 1971

I am in receipt of your request for my opinion, which you state as follows:

"Is the trimming and removal of trees along the streets and avenues of the city a public improvement, and a contract therefore, subject to the provisions of Chapter 4115 of the Revised Code with respect to wages to be paid on public works?"

It appears that the tree trimming and removal is being done to restore the street to a sound condition by reason of the obligation, under Section 723.01, Revised Code, of a municipal corporation to keep its streets open, in repair and free from nuisance. As so understood, the question is the applicability of the minimum wage provisions, or the so-called Little Davis-Bacon Act of Ohio, to employees of the contractor, Sections 4115.03 et seq., Revised Code.

Section 4115.03, supra, contains the following definitions:

"As used in sections 4115.03 to 4115.10, inclusive, of the Revised Code: (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 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.

"(B) 'Construction' means any construction, reconstruction, improvement, enlargement, alteration, repair, painting or decorating, of any public improvement fairly estimated to cost more than two thousand dollars and performed by other than full time employees who have completed their probationary periods in the classified service of a public authority.

"(C) 'Public improvement' includes all buildings, roads, streets, alleys, sewers, ditches, sewage disposal plants, water works, and all other structures or works constructed by the state or any political subdivision thereof.

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Essentially, the issue is whether the trimming and removal of trees along the street by the city is "construction" as so defined, there being no question that improvement, enlargement, alteration or repair of an already existing "public improvement" is as much "construction" as is the original opening of a street or erection of a building. (See Opinion No. 2161, Opinions of the Attorney General for 1938, dealing with the earlier form of the minimum wage law as contained in Section 17-3, General Code.)

It has been long established that activities in the nature of maintenance do not come within the purview of the statute, while the related activities of repair do. The nature of this distinction has been discussed by two of my predecessors. In Opinion No. 2161, supra, it was said, at page 651, as follows:

"* * * In the ordinary sense of the word, the word 'repair' is used to indicate a changing of form, as for example, if a hole in a street is filled in, the substance or form of the street is materially changed. I have no hesitancy in stating that, in my opinion, the above quoted statutes were not intended to include ordinary maintenance operations and that the employment of labor for purposes other than those enumerated in the statute is not regulated by the statutory provisions.

"In your communication you refer to 'street cleaning.' I am of the opinion that this is maintenance: likewise, "street sprinkling and flushing." There is also a reference to 'street signs.' If by this is meant the erection of street signs, I do not believe there is any reason why such work would not be governed by the statute. Certainly it comes within the term "construction" as that term is defined in Section 17-3, supra. You also refer to 'waste collection and incineration' in your communication. I do not believe that these operations would constitute repair. Such activities are in the same category as "snow removal" and the cleaning of city buildings and are in the nature of maintenance. However, the repair of city buildings and streets and the repair of the water works plant are functions which have been regularly performed by the municipality and does not alter the fact that such work is 'repair' of a "public improvement" as these terms are used in Sections 17-3 and 17-5. I know of no reason to exclude such repair work from the provisions of this legislation merely because it has been regularly performed by the municipality."

In Opinion No. 1494, Opinions of the Attorney General for 1939, it

was said, at page 2210, as follows:

"The term 'maintenance' when used in its broad sense might well include reconstruction, enlargement, improvement, alteration, repair of highways, and all other types of duties with reference to highways other than original construction. It is an established rule of statutory interpretation that "words of commerce or trade, in a statute relating to those subjects, are primarily to be taken in their accepted commercial or trade signification." (Black, Interpretation of Laws, Section 58.) In the case of Seaboard National Bank v. Western, 147 Mo., 467, the court pointed out that the term 'maintenance' has a different meaning than "repairs" and states that it means the doing of such acts as will preserve the highway from decay and the effects of ordinary use, while 'repairs' means the restoration of a street already defective from use and decay. Webster defines the term as "to hold, or keep in any particular state or condition, to keep up." From an examination of the cases which have distinguished between the meaning of the words 'maintenance' and "repair" with reference to highways, it would appear that the term 'maintenance' has an established meaning of performing such acts as will preserve a constructed highway in its original condition and from the effects of use and decay; while the term "repair" means to restore the highway to its original condition after it has become in an unsound or poor condition by reason of decay, injury, dilapidation or partial destruction.

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"In other words, the doing of such acts as would preserve the improvement in its original condition and prevent it from becoming out of repair is maintenance; the returning of the improvement to its original condition after it has been permitted to become damaged constitutes a repair."

In the light of those views, it might be argued that tree trimming is maintenance work. Tree removal, however, is unquestionably work in the nature of repair or alteration. Removal constitutes a major change, a change required by the damage that has occurred.

Since the contract with which you are concerned involves both trimming and removal and since removal is an alteration or repair within the statutory definition of "construction", I must conclude that the minimum wage provisions of Sections 4115.03 et seq., supra, apply. Otherwise, it could become possible to avoid the requirements of those provisions by including maintenance work with "con-

struction" work in the same contract. In other words, it is my opinion that where two activities are required in one contract and one such activity is "construction" as defined in Section 4115.03, supra, the contract work is subject to the minimum wage provisions. Thus, it is not necessary to determine whether or not tree trimming is "construction".

In specific answer to your question, it is my opinion and you are so advised that the trimming and removal of trees along the streets and highways of a city through contract, between the city and a contractor who is to perform the work, is "construction" as defined in Section 4115.03, Revised Code, and such contract is subject to the provisions of Sections 4115.03 through 4115.15, Revised Code.