

April 12, 2021

The Honorable Dennis Watkins
Trumbull County Prosecuting Attorney
4th Floor Administration Building
160 High Street N.W.
Warren, Ohio 44481-1092

SYLLABUS:

2021-006

1. Prevailing-wage law does not attach to enterprise-zone agreements under R.C. 5709.631, or community-reinvestment-area agreements under R.C. 3735.671, because neither constitutes a public authority undertaking or contracting for a public improvement pursuant to R.C. 4115.03, *et seq.*
2. It is permissible to mandate the hiring of a certain number or percentage of local workers under an enterprise-zone agreement under R.C. 5709.631 or a community-reinvestment-area agreement under R.C. 3735.671.



DAVE YOST

OHIO ATTORNEY GENERAL

Opinions Section
Office (614) 752-6417
Fax (614) 466-0013

30 East Broad Street, 25th Floor
Columbus, Ohio 43215
www.ohioattorneygeneral.gov

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OPINION NO. 2021-006

The Honorable Dennis Watkins
Trumbull County Prosecuting Attorney
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160 High Street N.W.
Warren, Ohio 44481-1092

Dear Prosecutor Watkins:

You requested an opinion regarding the authority of a board of county commissioners (“Commissioners”) to place additional conditions on the granting of tax exemptions. More specifically, you ask about the Commissioners’ power to impose conditions on the granting of tax exemptions in enterprise-zone and community-reinvestment-area agreements. I have framed your questions in the following manner:

1. May Commissioners require that applicants for an enterprise-zone tax-incentive agreement under R.C. 5709.631, or a community-reinvestment-area tax-incentive agreement under R.C. 3735.671, commit to compensating labor used in the site preparation and construction of the project at a prevailing wage?
2. Do Commissioners have the authority to add, as an additional term to an enterprise-zone or community-reinvestment-area tax-incentive agreement, that an applicant use a specified number or percentage of local workers in the site preparation and construction of the project?

3. Is there an alternative statutory economic incentive that allows the Commissioners to mandate the payment of the prevailing wage and mandate the use of a specified percentage or number of local workers?

I

Your request concerns two types of incentive programs: enterprise-zone programs and community-reinvestment-area programs.

An enterprise-zone program is designed “to encourage businesses to establish, expand, renovate, and occupy facilities and to create jobs within economically distressed zones.” 2012 Op. Att’y Gen. No. 2012-030, at 2-267, quoting 1989 Op. Att’y Gen. No. 89-013, at 2-55. Once an enterprise zone is designated, a board of county commissioners, with the additional consent of the legislative authority of each affected municipal corporation or board of township trustees, may enter into an agreement with an enterprise whereby the enterprise receives certain tax exemptions in exchange for creating or expanding a business within the designated zone. See 2012 Op. Att’y Gen. No. 2012-030, at 2-267. The form of the agreement is set forth in R.C. 5709.631. R.C. 5709.63(E).

A community-reinvestment area is a “property tax incentive program that promotes the construction and remodeling of commercial, industrial, and residential structures” within a designated area. *State ex rel. City of Lorain v. Stewart*, 119 Ohio St.3d 222, 2008-Ohio-4062, 893 N.E.2d 184, ¶ 26; 1996 Op. Att’y Gen. No. 96-030, at 2-112. To obtain the incentive, the property owner must file an application with the housing officer designated by the legislative authority. *State ex rel. City of Lorain* at ¶ 26-27; R.C. 3735.67(A) and 3735.65(A). As your request indicates is the case here, if any part of the new or remodeled structure is to be used for commercial or industrial purposes, the property owner shall enter into a written agreement

with the legislative authority pursuant to R.C. 3735.671. R.C. 3735.67(A).

In sum, both enterprise-zones and community-reinvestment areas are tax programs designed to create incentives for undertaking financial endeavors within a designated location. The authority bestowed upon the Commissioners by the General Assembly relates to the establishment of the designated locations, the granting or denying of an applicant, and to the addition of noncontradictory additional terms to the respective agreements set forth in R.C.5709.631 and 3735.671.

II

You first ask whether the Commissioners have the authority pursuant to R.C. 5709.631 and 3735.671 to mandate that applicants for an enterprise-zone or community-reinvestment-area agreement compensate at a prevailing wage labor used to prepare the site and construct the project. I conclude that the answer is “no.”

A

“Ohio’s prevailing wage law requires public authorities and contractors to pay the prevailing wage rate in a particular locality to laborers, workers, and mechanics on public improvement projects, the overall cost of which exceeds the applicable statutory threshold.” 2019 Op. Att’y Gen. No. 2019-028, Slip Op. at 7; 2-200. Thus, prevailing-wage law attaches when a “public authority,” with authorization, contracts for or constructs a “public improvement.” See R.C. 4115.04(A)(1).

Because the prevailing-wage law applies only when a “public authority” contracts for a “public improvement,” it is important to know what both terms mean. Each is defined in the Revised Code. *First*, a “public authority” is defined 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 or to construct the same by direct employment of labor, or any institution supported in whole or in part by public funds.” R.C. 4115.03(A). *Second*, “public improvements” are “all buildings, roads, streets, alleys, sewers, ditches, sewage disposal plants, water works, 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[.]” R.C. 4115.03(C). In addition, “[w]hen a public authority rents or leases a newly constructed structure within six months after completion of such construction, all work performed on such structure to suit it for occupancy by a public authority is a ‘public improvement.’” *Id.*

Binding case law imposes one more condition on the prevailing-wage law’s applicability: the project must be constructed “*for* a public authority in order for the prevailing wage statutes to apply.” *Episcopal Retirement Homes, Inc. v. Ohio Dept. of Indus. Relations*, 61 Ohio St.3d. 366, 369, 575 N.E.2d 134 (1991) (Emphasis added); *see Northwestern Ohio Bldg. & Constr. Trades Council v. Ottawa Cty. Improvement Corp.*, 122 Ohio St.3d. 283, 2009-Ohio-2957, 910 N.E.2d 1025, ¶ 20; *see also* 2000 Op. Att’y Gen. No. 2000-006, at 2-29. This requirement is satisfied only if “the public authority receive the benefit of the construction, either through maintaining a possessory or property interest in the completed project or through the use of public funds in the construction of the project.” *U.S. Corr. Corp. v. Ohio Dept. of Indus. Relations*, 73 Ohio St.3d 210, 219, 652 N.E.2d 766 (1995), quoting *Episcopal Retirement Homes, Inc.* at 370.

In sum, “a project must” entail construction of a public improvement, and that improvement must “be constructed pursuant to a contract with a public

authority and for a public authority in order for the prevailing wage statutes to apply.” *Episcopal Retirement* at 369.

Those conditions are not met here. Neither an enterprise-zone program nor a community-reinvestment-area program involves a public improvement constructed for a public authority. To the contrary, both programs deal with a private party applying for an incentive for undertaking a financial endeavor within a designated area or zone. *See* R.C. 5709.63 and 3735.67. Furthermore, based on your request letter, and on subsequent conversations with your office, it is my understanding that no public funds are used, that the Commissioners retain no possessory or property interest in the completed projects, and the Commissioners are not renting or leasing the properties associated with either program as carried out in Trumbull County. Therefore, the Commissioners are not a public authority engaging in or contracting for a public improvement for the purposes of R.C. 4115.03(A) and (C).

B

In addition to the prevailing-wage law not applying by its own force to enterprise-zone and community-reinvestment-area agreements, the Commissioners *cannot* contractually mandate the payment of the prevailing wage in either agreement. It is important to note that Commissioners are creatures of statute, and possess “only those powers that are provided by statute, either expressly or by necessary implication.” 2018 Op. Att’y Gen. No. 2018-009, Slip Op. at 2; 2-81; 2012 Op. Att’y Gen. No. 2012-030, at 266; 2017 Op. Att’y Gen. No. 2017-044, Slip Op. at 2; 2-421. As such, all authority held by the Commissioners must expressly or implicitly come from statute.

The Commissioners have the statutory authority to enter into contracts on behalf of the county in a variety of matters. *See generally* 2014 Op. Att’y Gen. No. 2014-

004, Slip Op. at 1 to 2; 2-24; 2004 Op. Att’y Gen. No. 2004-031 at 2-275; *see also* R.C. 307.02; R.C. 307.04; R.C. 307.15; R.C. 307.69. The authority to mandate prevailing-wage terms is not expressly provided in statute, so I must determine if it is implied. For the matter at hand, the Commissioners’ contractual authority comes from the statutes authorizing both types of incentive agreements. Both statutes state that “[a]greements may include terms not prescribed” by statute, provided those terms “shall in no way derogate” from the terms that are prescribed”. *See* R.C. 3735.671 and 5709.631. At first glance, it appears that the Commissioners may add the noncontradictory term that the prevailing wage must be paid. Such a view, however, does not consider the statutory limitations found in the prevailing-wage statutes. As set forth above, prevailing-wage law attaches when a “public authority,” with authorization, contracts for or constructs a “public improvement.” *See* R.C.4115.04(A)(1). For reasons already stated, that prerequisite is not met here. Moreover, allowing the prevailing-wage law to contractually apply to non-public authorities constructing or contracting for non-public improvements diverges from the rationale and view held by the Ohio Supreme Court.

In *Episcopal Retirement Homes, Inc. v. Ohio Dept. of Indus. Relations*, the Ohio Supreme Court evaluated whether the prevailing-wage law applied to a project funded by R.C. Chapter 140 bonds. *See Episcopal Retirement Homes, Inc.*, at 366. In addition to noting the prevailing-wage law requirement set forth above, the Court looked at the purpose of R.C. Chapter 140 bonds. *Id.* at 371. The Court noted that the bonds exist to “provide a mechanism whereby public and nonprofit hospital agencies can construct and upgrade their facilities with tax-exempt obligations, thus lowering their construction costs.” *Id.* In consideration of that purpose, the Court found that “[a]llowing public and nonprofit hospital agencies to lower their construction costs through the use of tax-exempt financing and then

insisting that they pay prevailing wages on their construction projects works at cross-purpose.” *Id.*

In *Northwestern Ohio Bldg. & Constr. Trades Council v. Ottawa Cty. Improvement Corp.*, the Ohio Supreme Court evaluated whether prevailing-wage law applies whenever a public authority expends public funds, regardless of whether the project qualifies as a “public improvement” under R.C. 4115.03(C). See *Northwestern Ohio Bldg. & Constr. Trades Council v. Ottawa Cty. Improvement Corp.*, 122 Ohio St.3d. 283, 2009-Ohio-2957, 910 N.E.2d 1025, ¶ 17. The Court, once again, evaluated the statutory requirements for when prevailing-wage law applies, and considered the ramifications of expanding the application of the prevailing-wage law. *Id.* at ¶ 18-20. In so doing, the Court found that the prevailing-wage law does not automatically apply whenever a public authority expends public funds on a project. *Id.* at ¶19. The Court stated that a contrary view “would *unjustifiably expand the scope of the prevailing-wage law* to include projects that are not public improvements, that are not constructed by a public authority, or that do not benefit a public authority.” *Id.* (Emphasis added).

Applying these views and holdings to the matter at hand, offering a financial incentive under either an enterprise-zone or a community-reinvestment-area agreement to only turnaround and increase the construction costs by mandating the payment of the prevailing wage represents the type of cross-purpose noted by the Court in *Episcopal Retirement Homes, Inc. v. Ohio Dept. of Indus. Relations*. And, similar to applying the prevailing-wage law whenever public funds are expended, contractually mandating the payment of the prevailing wage for a non-public improvement undertaken by a non-public authority that results in no benefit to a public authority would unjustifiably expand the scope of the prevailing-wage law.

In summary, prevailing-wage law does not apply to an enterprise-zone agreement or a community-reinvestment-area agreement. In addition, the Commissioners lack the statutory authority to contractually mandate the payment of the prevailing wage in either agreement.

III

Your second question asks whether the Commissioners can mandate that applicants for an enterprise-zone or community-reinvestment-area agreement use a certain number or percentage of local workers in the site preparation and construction. At present, no authority limits the Commissioners' ability to add such language to either agreement.

Turning first to permissibility, it is important to once again note that Commissioners are creatures of statute, and possess "only those powers that are provided by statute, either expressly or by necessary implication." 2018 Op. Att'y Gen. No. 2018-009, Slip Op. at 2; 2-81; 2012 Op. Att'y Gen. No. 2012-030, at 266; 2017 Op. Att'y Gen. No. 2017-044, Slip Op. at 2; 2-421. As such, all authority held by the Commissioners must expressly or implicitly come from statute.

As stated above, the Commissioners have the statutory authority to enter into contracts on behalf of the county in a variety of matters. *See generally* 2014 Op. Att'y Gen. No. 2014-004, Slip Op. at 1 to 2; 2-24; 2004 Op. Att'y Gen. No. 2004-031, at 2-275; *see also* R.C. 307.02; R.C. 307.04; R.C. 307.15; R.C. 307.69. The statutes that provide the terms for an enterprise-zone and a community-reinvestment-area agreement state that "[a]greements *may* include terms not prescribed", provided that such terms "shall in no way derogate from the information and statements prescribed by this section." *See* R.C. 5709.631(A) and 3735.671(A) (Emphasis added). The use of the word "may" in a statute denotes the granting of discretion. *E.g., Miller v. Miller*, 132 Ohio St.3d 424, 2012-Ohio-2928, 973

N.E.2d 228, ¶ 28. As such, the Commissioners may add noncontradictory terms to either agreement.

Looking to the addition of terms mandating the use of a certain number or percentage of local workers in the site preparation and construction, such an addition appears permissible. No statutorily-prescribed terms restrict the Commissioners from adding such a requirement, and the addition of such a requirement does not detract from any of the terms already set forth by statute.

Furthermore, the Commissioners' adding such a requirement would comply with the General Assembly's policy of encouraging political subdivisions to use enterprise zones and community-reinvestment areas to, among other things, retain existing employment and create new employment opportunities within the political subdivision. *See* R.C. 5709.671; *see also* 1983 Op. Att'y Gen. No. 83-087, at 2-344 (Absent constitutional or statutory restrictions, an issuer of industry development bonds has the discretion to mandate the use of local labor because it meets the broad purpose of improving the welfare of the state). Thus, the Commissioners' requiring the use of local workers is permissible because such a requirement may retain the employment of local workers and possibly result in an increase in employment opportunities.

This is consistent with R.C. 9.75 [originally enacted as R.C. 9.49], which the Supreme Court of Ohio upheld in *City of Cleveland v. State*, 157 Ohio St.3d 330, 2019-Ohio-3820, 136 N.E.3d 466. That statute prohibits public authorities from requiring contractors, "as part of a prequalification or process for the construction of a specific *public improvement* or the provision of professional design services for that *public improvement*, to employ as laborers a certain number or percentage of individuals who reside within the defined geographic area or service area of the public authority." R.C. 9.75(B)(1) (Emphasis added). The

same law prohibits public authorities from providing “a bid award bonus or preference to a contractor as an incentive to employ as laborers a certain number or percentage of individuals who reside within the defined geographic area or services area of the public authority.” R.C. 9.75(B)(2). The first of these subsections applies only to contracts for the construction of a “public improvement.” R.C. 9.74(B)(1). As already explained, projects constructed under the incentive programs at issue here are not “public improvements.” The second subsection deals with “bid award bonus[es],” which are not implicated by the incentive programs you ask about.

A word of caution: the General Assembly has interpreted Section 1 of Ohio’s Bill of Rights as conferring an “inalienable and fundamental right ... to choose where to live.” H.B. No.180, 131st Gen. A. (2016), at Section 3(A); *see* Sub. S.B. No. 82, Section 2(A), 126 Ohio Laws 803. The General Assembly said this in the Act passing R.C. 9.75, suggesting its view that restrictions on where workers come from violate the Ohio Constitution. Attorney General opinions do not take positions on constitutional issues. *See e.g.*, *Beagle v. Walden*, 78 Ohio St.3d 59, 62, 676 N.E.2d 506 (1997) (“Interpretation of the state and federal Constitution is a role exclusive to the judicial branch”); *see also* 2019 Op. Att’y Gen. No. 2019-015, Slip Op. at 4; 2-111 (“Ultimately, only a court may determine whether a board of education’s policy is constitutional”); *see also* 2014 Op. Att’y Gen. No. 2014-034, Slip Op. at 12; 2-308 to 2-309 (“Whether a county’s tobacco use testing policy is constitutional must be answered by the courts and cannot be determined by a formal opinion of the Attorney General”) *see also* 2002 Op. Att’y Gen. No. 2002-032, at 2-210 fn.1 (“[T]he power to determine whether the enactments of a legislative body comply with the provisions of the United States Constitution or the Ohio Constitution rests exclusively with the judiciary, and that such a determination cannot be made by means of a formal opinion of the Attorney General”). As such, this

opinion takes no view on whether the term you ask about would be held unconstitutional.

IV

Your third question asks if there are any alternative statutory economic incentives that may allow the Commissioners to mandate the payment of the prevailing wage and mandate the hiring of a specific number or percentage of local workers. I cannot answer to the potential existence of any alternative statutes that may allow for both the mandatory payment of the prevailing wage and the mandatory use of a certain number or percentage of local workers. If the County identifies what it believes to be an alternative basis, I would be happy to provide an opinion on the availability of that purported alternative.

Conclusion

Based on the foregoing, it is my opinion, and you are hereby advised as follows:

1. Prevailing-wage law does not attach to enterprise-zone agreements under R.C. 5709.631, or community-reinvestment-area agreements under R.C. 3735.671, because neither constitutes a public authority undertaking or contracting for a public improvement pursuant to R.C. 4115.03, *et seq.*

2. It is permissible to mandate the hiring of a certain number or percentage of local workers under an enterprise-zone agreement under R.C. 5709.631 or a community-reinvestment-area agreement under R.C. 3735.671.

Respectfully,

A handwritten signature in blue ink that reads "Dave Yost". The signature is written in a cursive style with a large, looping "Y" and a long, sweeping "O".

DAVE YOST
Ohio Attorney General