STATE OF NEW YORK DEPARTMENT OF LABOR

IN THE MATTER OF

W.M. SCHULTZ CONSTRUCTION, INC.;
and WILLIAM M SCHULTZ, as an
officer and/or shareholder of SCHULTZ
CONSTRUCTION, INC.,
and its substantially owned/affiliated entity
W.M. SCHULTZ CONSTRUCTION CORPORATION,

Prime Contractor

for a determination pursuant to Article 8 of the Labor Law as to whether prevailing wages and supplements were paid to or provided for the laborers, workers and mechanics employed on a public work project for the New York Racing Association in Saratoga Springs, New York.

REPORT
&
RECOMMENDATION

Prevailing Rate Case
PRC No. 2011001339
Case ID: PW01 2009011206

To: Honorable Mario J. Musolino
Acting Commissioner of Labor
State of New York

Pursuant to a Notice of Hearing dated October 20, 2014, a hearing in the above-captioned matter was scheduled to be held in Albany, New York. The purpose of the hearing was to provide the parties with an opportunity to be heard on the issues raised in the Notice of Hearing and to establish a record from which the Hearing Officer could prepare a Report and Recommendation for the Commissioner of Labor.

The hearing notice concerned an investigation conducted by the Bureau of Public Work ("Bureau") of the New York State Department of Labor ("Department") into whether W.M. Schultz Construction, Inc. ("Shultz Construction") complied with the requirements of Labor Law article 8 (§§ 220 *et seq.*) in the performance of a contract involving excavation services regarding a Concentrated Animal Feeding Operation ("CAFO") project and Stable Area Improvements at the Saratoga Race Course in Saratoga County, New York (the "Project") for the New York State Racing Association, Inc. ("NYRA"). Prior to the hearing being held, the parties stipulated to bifurcate the hearing to first address the issue of the applicability of Labor Law article 8 to the Project. They further stipulated to create an evidentiary record from which that determination would be made and stipulated that they would submit Proposed Findings of Fact and

Conclusions of Law addressed to that issue. Based on those stipulations, the hearing was canceled and a stipulated evidentiary record was received on March 25, 2015, consisting of Exhibits "1" through "25."

Pursuant to an agreed submission schedule, the Department submitted its Proposed Findings of Fact and Conclusions of Law ("Proposed Findings") on April 10, 2015. Counter-Proposed Facts and Conclusions of Law ("Counter-Proposed Findings") were received from the Respondents, Shultz Construction and William M. Shultz, on May 12, 2015. Respondent Shultz Construction's Counter-Proposed Findings included additional Exhibits "A" through "D." The Department then served its Reply on June 2, 2015, which it designated as Supplemental Proposed Findings. After the exchange of the parties' respective submittals, the Respondents requested and were granted oral argument to address the issues raised. That oral argument was held on September 25, 2015, following which the parties were then afforded the opportunity serve additional papers addressed to the issues raised at oral argument.[1]

Those supplemental papers, a December 11, 2015 letter from the Department and Supplemental Counter-Proposed Findings from the Respondents, were received by email on December 11, 2015. Respondent Shultz Construction submitted additional Exhibits "E" through "H" attached to its Supplemental Counter-Proposed Findings. The Department, in its December 11 letter, objected to the receipt in evidence of additional exhibits it anticipated Respondents would submit. After Respondent Shultz Construction served its Supplemental Counter-Proposed Findings with attached Exhibits "E" through "H," the Department wrote on December 14 specifically objecting to the receipt of Exhibit "E," and the Department offered Exhibit "I" in support of that objection. Respondent Shultz Construction wrote on December 15 in reply to the Department's objections, and advised that it did not object to the receipt of Exhibit "I" in evidence. Exhibit "E" and "I" are respectively a Verified Petition and Complaint and a Decision and Order in a Supreme Court action Respondent Shultz referred to in oral argument.[2] The Department also objected to Exhibits "G" and "H," which are copies of parts of the published Records on Appeal in cases cited herein.[3] Finally, the Department objects to the receipt of regulatory permits issued to NYRA relating to environmental work which are included in Exhibit

[1] Oral Argument was held on the record and a transcript of the argument was received on or about October 20, 2015.
[2] *New York Racing Association, Inc. v Smith*, Index No. 1019909 (Sup. Ct. Alb Co. 2009)
[3] *Matter of Pyramid Co. of Onondaga v. New York State Dept. of Labor*, 223 AD2d 285, 287 (3d Dept. 1996) and *Matter of 60 Market Street Assocs. v. Hartnett*, 153 AD2d 205, 207 (3d Dept. 1990), *affd* 76 NY2d 993 (1990), respectively.

"F." These are all public records, and while they may not be properly authenticated in accordance with strict evidentiary rules, for the reasons expressed by an eminent panel of the Second Circuit Court of Appeals in *Moss v. Federal Trade Commission*, 148 F. 2d 378, 379 (2d. Cir. 1945), I see no benefit in precluding the Commissioner or any reviewing court of the opportunity to review all potentially relevant information. The Exhibits are therefore received as marked, "E" through "I".

APPEARANCES

The Bureau is represented by Department Counsel, Pico Ben-Amotz (Jeffrey G. Shapiro, Senior Attorney, of counsel). Shultz Construction is represented by Ernstrom & Dreste, LLP (John W. Dreste, Esq., of counsel). William M. Shultz is represented by Couch White, LLP (Harold D. Gordon, Esq., of counsel).

ISSUE

Was the contact between Shultz Construction and NYRA a public work contract subject to the requirements of Labor Law article 8?

STIPULATED FINDINGS OF FACT

The parties expressly stipulated in writing to the following facts, numbered "1" to "43":[4]

Parties

1. W.M. Schultz Construction, Inc. ("Schultz") is a New York corporation with its principal office in Ballston Spa, New York.

2. W.M. Schultz Construction Corporation was the predecessor corporate entity to Schultz, and no longer has any separate corporate existence.

3. William M. Schultz, an individual, is an officer and one of the five largest shareholders of Schultz.

[4] On March 25, 2015, the parties submitted written, bound "Stipulated Facts," containing 43 numbered paragraphs of stipulated facts, repeated herein verbatim, together with a marked stipulated evidentiary record containing Exhibits "1" through "25." The numbered "Exhibit" references herein are to the parties' joint exhibits that are part of that stipulated evidentiary record received on March 25, 2015.

4. The State of New York, Department of Labor ("Department") is an administrative agency of the State of New York, having an office at W. Averill Harriman State Office Campus, Building 12, Room 509, Albany, New York.

5. The New York Racing Association, Inc. ("NYRA") is a domestic not-for-profit corporation authorized to conduct business in the State of New York, having an office at 110-00 Rockaway Boulevard, Jamaica, New York.

The Underlying Project and Contract

6. On or about April 13, 2009, Schultz entered into an agreement (the "Contract") with NYRA to furnish materials labor, tools and equipment necessary for excavation services regarding NYRA's CAFO ("Concentrated Animal Feeding Operation") project and Stable Area Improvements (the "Project;), all located at Saratoga Race Course in the City of Saratoga Springs, County of Saratoga and State of New York. **Exhibit 1**.

7. The Contract followed the submission by Schultz of its response to NYRA's Request for Quotation (RFQ). The Schultz Response, dated March 24, 2009, attached the RFQ and related bid materials. **Exhibit 2**.

8. Included within the RFQ materials, as completed by Schultz, were blank hourly rate details, requiring that Schultz enter its proposed hourly rates, including hourly labor rates.

9. No prevailing rate schedule was included within the RFQ, nor is there any reference to prevailing wage requirements as being applicable with the RFQ.

10. In response to a pre-bid question, NYRA responded to all bidders advising that prevailing wage requirements would not apply to the Project. **Exhibit 3**.

11. After entry of the Contract, Schultz asked NYRA to reconfirm applicability of prevailing rate on or about May 20, 2009. **Exhibit 4**.

12. NYRA, in response, by email dated May 22, 2009, reiterated that prevailing wages did not apply to the Project. **Exhibit 5**.

13. Schultz made no inquiry to the Department as to whether the Department considered NYRA to be a public entity, or as to whether the Department considered the Project to be a public works project for the purposes of Article 8 of the NYS Labor Law.

14. Schultz duly performed the Contract, including the period from the week ending May 17, 2009, through the week ending November 29, 2009.

15. The Project work was in areas of the Saratoga Race Course grounds not open to members of the public.

16. The Project work involved horse showers and related concrete work and drainage relating to the showers.

17. NYRA paid Schultz for the Project with checks drawn on a NYRA account maintained at Commerce Bank, account number 031101017. **Exhibit 6**. Bank account records (redacted) for account number 031101017 are submitted as **Exhibit 7**.

DOL Internal Discussions and Investigation

18. The Department issued an opinion letter concerning applicability of Article 8 of the Labor Law to the Saratoga Raceway dated April 2, 1999. **Exhibit 8**.

19. The Department prepared and internally circulated a memorandum concerning the applicability of the Prevailing Wage Law to NYRA projects on October 30, 2008. **Exhibit 9**.

20. The Department issued an opinion letter concerning the applicability of the Prevailing Wage Laws to NYRA Projects, dated August 4, 2009, to the New York State Pipe Trades Association. **Exhibit 10**.

21. The Department did not publically circulate the October 30, 2008 memorandum.

22. The Department did not publically circulate the August 4, 2009 opinion letter.

23. Schultz made no FOIL request to the Department for records concerning the applicability of the Prevailing Wage Law to NYRA projects at any time prior to November 27, 2009.

24. The Department issued a letter to NYRA, dated November 27, 2009 disclosing that the DOL will consider work performed by Schultz on the Project subject to the Prevailing Wage Laws. **Exhibit 11**.

25. From on or about May 13, 2009 to on or about November 1, 2010, various complaints were filed with the Department with regard to the Project. **Exhibit 12** (with various items of personal identifying information redacted).

26. On or about November 5, 2009, the Department requested that Schultz furnish payroll records relating to the Project.

27. Schultz has cooperated with the Department and has provided requested documentation.

NYRA Status and History

28. NYRA, as it was constituted at the time of the Project, was formed on or about September 12, 2008 under Not-For Profit Corporation Law §402 and the Racing, Pari-Mutuel Wagering and Breeding Law (the "Racing Law) §201, et seq.

29. A true and accurate copy of NYRA's Certificate of Incorporation is attached as **Exhibit 13**.

30. A true and accurate copy of the Statement of Organizations Action of the Sole Incorporate of NYRA is attached as **Exhibit 14**.

31. A true and accurate copy of the Unanimous Written Consent of the Board of Directors of NYRA, setting forth various resolutions and respect to NYRA's formation, is attached as **Exhibit 15**.

32. A true and accurate copy of NYRA's by-laws, as of timeframes pertinent herein, is attached a **Exhibit 16**.

33. NYRA was formed after of near the conclusion of the Chapter 11 bankruptcy of NYRA's predecessor, also known as the New York Racing Association, Inc. ("Old NYRA"), bearing Case No. 06-12618 in the United States Bankruptcy Court, Southern District of New York.

34. At or near the conclusion of Old NYRA's Chapter 11 bankruptcy, a State Settlement Agreement was entered into by and among Old NYRA, NYRA ("New NYRA" therein), The State of New York, the New York State Non-Profit Racing Association Oversight Board and the New York State Division of the Lottery. **Exhibit 17**.

35. Pursuant to Racing Law §206, NYRA performs its functions under a Franchise Agreement with the State. A true and accurate copy of NYRA's Franchise Agreement is attached as **Exhibit 18**.

36. In furtherance of its Franchise, NYRA also entered into ground lease agreements with the State for each of the three Racetrack properties including that for the Saratoga Race Course. **Exhibit 19**.

37. Subsequent to the Project, in 2012 the legislation concerning NYRA was amended ("2012 Amendments").

38. NYRA presently operates under, and pursuant to the 2012 Amendments.

39. NYRA, through its professional accountants, prepared Audited Financial Statements, including for the years ending December 2008 and 2009, December 31, 2010 and 2011, and December 2012. **Exhibits 20, 21 and 22**.

Department Notice of Hearing

40. By Notice of Hearing and Designation of Hearing Officer, dated October 20, 2014 (the "Notice"), the Department has scheduled a hearing. **Exhibit 23**.

41. The Notice issued nearly five years after the Department first notified Schultz of the DOL position concerning prevailing wage requirements on the Project.

42. Schultz has no history of prior prevailing wage violation.

43. During the pertinent time period, Schultz had earned annual construction revenue of approximately $13,000,000,00.

SUPPLEMENTAL FINDINGS OF FACT

In addition to the parties stipulated facts, based upon the evidentiary record, I find the following additional facts:

44. Pursuant to the State Settlement Agreement, Old NYRA was required to file such documents with the State as were necessary to create NYRA as a Type "C" New York State not-for-profit corporation, under the general supervision of the Office of the Attorney General; to file with the Secretary of State articles of incorporation in the form annexed to the Settlement Agreement; and NYRA was required to adopt by-laws and a Code of Conduct substantially in the form annexed to the Settlement Agreement. **Exhibit 17, State Settlement Agreement, § 2.3**

45. Old NYRA conveyed all of its right, title and interest in the Aqueduct, Belmont and Saratoga Racetracks to the State f New York in consideration for, *inter alia*, (a) one hundred five million dollars ($105,000,000.00) and (b) "the support payments and capital expenditure payments to be made by the State or the VLT operator, as the case may be, to NYRA over the Term of the Franchise… ." ***Id.* at § 2.4**

46. Pursuant to the State Settlement Agreement, Old NYRA, NYRA and the State agreed that, in the event VLT operations at Aqueduct did not commence by March 31, 2009, the State and NYRA would negotiate in good faith to provide NYRA with payments necessary for capital expenditures in maintaining and upgrading the Racetracks. ***Id.* at § 2.8.**

47. The parties further agreed that "[u]pon commencement of VLT Operations at Aqueduct, and thereafter for the term of the license to operate VLT's at Aqueduct, an amount

equal to four percent (4%) (the "CAPEX Amount") of VLT Revenues shall be deposited by the VLT Operator, or distributed by the VLT Operator for the purpose of being deposited, into a [NYRA] account designated by NYRA (the "CAPEX Account") to be used by [NYRA] for capital expenditures in maintaining and upgrading the Racetracks… ." ***Id.***[5]

48. The State, the New York State Franchise Oversight Board ("FOB") and NYRA entered into a Franchise Agreement that (a) established performance standards relating to, among other things, (i) CAFO compliance, (ii) substantial improvement of the backstretch housing conditions and working environment, (iii) levels and items of capital expenditure, and (iv) maintenance of the tracks and facilities such that their physical appearance will not detract from the community, recognizing that NYRA's ability to make major track investments and other capital expenditures is subject to the daily payments from the State or the VLT operator in an amount equal to four percent (4%) of VLT Revenues (**Exhibit 18, Franchise Agreement, §2.2)**; (b) provided that NYRA and the State agreed that, in the event VLT operations at Aqueduct did not commence by March 31, 2009, the State and New NYRA would negotiate in good faith to provide NYRA with payments necessary for capital expenditures in maintaining and upgrading the Racetracks (***Id***. **at § 2.9)**; (c) that provided that upon commencement of VLT Operations at Aqueduct, and thereafter for the term of the license to operate VLT's at Aqueduct, an amount equal to four percent (4%) (the "CAPEX Amount") of VLT Revenues shall be deposited by the VLT Operator, or distributed by the VLT Operator for the purpose of being deposited, into a NYRA account designated by NYRA (the "CAPEX Account") to be used by NYRA for capital expenditures in maintaining and upgrading the Racetracks (***Id***.); (d) provided a state financing mechanism for the State, through the Urban Development Corporation, to borrow to pay for capital expenditures at the racetracks secured by the VLT Revenue distributions (***Id.*** **at § 2.12 [(b]**); and (e) that authorized NYRA and the FOB, on behalf of the State, to enter into racetrack ground leases (***Id.*** **at § 2.6)**.

49. In consideration for the Franchise, NYRA is required to pay, as a Franchise Fee, an amount equal to the lesser of (a) Adjusted Gross Income and (b) Operating Cash, as those terms are defined in the Franchise Agreement. **Exhibit 18, §2.4.** Adjusted Net Income mean's NYRA's audited net income, PLUS depreciation and amortization recognized in the calendar

5 The Stipulated CAPEX Amount relating to the 4% VLT Revenues to pay for Racetrack capital expenditures is codified in New York State Tax Law Section 1612 (f) (3).

year, MINUS (a) the monies received by NYRA for capital expenditures received from the State or the 4% VLT revenue, and (b) principal payments on debt service. **Exhibit 18, §§1.2, 2.9**

50. The State, acting through the FOB, and NYRA entered into a ground lease of the Saratoga Race Course that provided, among other things, for the right of NYRA, subject to the restrictions imposed by legislation, the Franchise Agreement and applicable requirements, to develop, redevelop, refurbish, renovate or make such other improvements, capital expenditures or otherwise ("Alterations"), to the leased premises and the fixtures and improvements thereon, as shall be necessary or desirable. **Exhibit 19, Saratoga Race Course Ground Lease, § 4.1 (a).**

51. Pursuant to the terms of the lease, NYRA delivered to the FOB, concurrently with the execution of the lease, a five-year capital expenditure plan (the "Capital Plan"), which the FOB approved, setting forth in reasonable detail the capital expenditures and the budgeted costs which New NYRA proposed to make to the leased premises for 2008-2013. ***Id.* at § 4.1 (c).**

52. Any additional Alterations not set forth in the Capital Plan required the FOB's prior written approval, unless the cost would be less than one hundred thousand dollars ($100,000.00) to complete and would not affect any structural elements or building systems. ***Id***..

53. In September 2008, after NYRA entered into the Franchise Agreement, in order to remediate old NYRA's environmental law violations, and to comply with a NY Department of Environmental Conservation ("DEC") order, "… NYRA committed to a work plan in 2009 which includes constructing 90 horse wash pads and sewer connections for the bar area sanitary sewer, providing storm drain connections for barn roof drainage, constructing a drainage control system around the inner and outer perimeter of the two dirt tracks, and constructing drain lines to direct clean run-off away from the sump, as well as enlarging the sump by dredging." **Exhibit 22, December 31, 2012 Financial Statement, p. 53**

54. This is the same type of work the parties stipulated Shultz Construction performed under the contract.**¶16, *supra***.

55. NYRA paid Shultz in excess of 1.5 million dollars for work performed on the contract. **Exhibit 6.**

56. All Alterations made by NYRA become the property of the State upon expiration of the lease. **Exhibit 19 at § 4.1 (f).**

57. No State support payments were received by NYRA during the period 2009. **Exhibit 20, Note 1 to Financial Statements December 31, 2009 and 2008, p. 12, Capital Expenditures**.

58. No State support payments were received by NYRA during the period 2010 and 2011. **Exhibit 21, Note 1 to Financial Statements December 31, 2011 and 2010, p. 9, Capital Expenditures**.

59. VLT operations at Aqueduct did not commence until October 28, 2011. ***Id.***

60. As noted earlier, the Franchise Agreement contains a "State Financing" provision, which authorized the State, through the Urban Development Corporation, to borrow to pay for capital expenditures at the racetracks secured by the VLT Revenue distributions. **Exhibit 18, § 2.12 (b**).

61. In June 2010, NYRA and the New York State Urban Development Corporation d/b/a Empire State Development Corporation ("ESDC") entered into a loan agreement, subsequently assigned by ESDC to the VLT Operator in December 2010, under which NYRA borrowed Sixteen Million Seven Hundred Thousand Dollars ($16,000,000.00) under a Twenty-Five Million Dollar ($25,000,000.00) facility. **Exhibit 21, p. 11, Financing**. In 2011, NYRA borrowed the remaining Eight Million Three Hundred Thousand ($8,300,000.00) of the loan facility. ***Id*. at p. 11, Financing; Note 13, p.36, Loan Payable**. The agreement provides that for the proceeds to be disbursed as determined by the New York State Director of the Division of Budget, for the purpose of funding operating expense at the Racetracks. **Exhibit 21, Note 13**. That loan is being paid through a deduction from NYRA's VLT distributions. **Exhibit 22, p. 8, Long-Term Debt; Note 14, Loan Payable**.

62. All NYRA payments to Shultz Construction on the contract occurred prior to the June 10, 2010 ESDC loan agreement. **Exhibit 6.**

63. At least Five Million ($5,000,000.00) of the One Hundred Five Million Dollars ($105,000,000.00) paid by the State to Old NYRA was transferred from Old NYRA to NYRA in or about November 2008. **Respondent Shultz Construction Proposed Findings, p.17, ¶ 102; Exhibit B 3, p 5 of 6.**

CONCLUSIONS OF LAW

JURISDICTION OF ARTICLE 8

New York Constitution, article 1, § 17 mandates the payment of prevailing wages and supplements to workers employed on public work. This constitutional mandate is implemented through Labor Law article 8. Labor Law § 220, *et seq*. "Labor Law § 220 was enacted to ensure that employees on public works projects are paid wages equivalent to the prevailing rate of similarly employed workers in the locality where the contract is to be performed and authorizes the [Commissioner of Labor] to ascertain said prevailing wage rate, as well as the prevailing 'supplements' paid in the locality." *Matter of Beltrone Constr. Co. v McGowan*, 260 AD2d 870, 871-872 (1999). Labor Law §§ 220 (7) and (8), and 220-b (2) (c), authorize an investigation and hearing to determine whether prevailing wages or supplements were paid to workers on a public work project.

The New York State Court of Appeals has recently adopted a three-prong test to determine whether a particular project constitutes a public works project. *De La Cruz v. Caddell Dry Dock & Repair Co., Inc.*, 21 NY3d 530, 538 (2013). The Court states the test as follows:

> First, a public agency must be a party to a contract involving the employment of laborers, workmen, or mechanics. Second, the contract must concern a project that primarily involves construction-like labor and is paid for by public funds. Third, the primary objective or function of the work product must be the use or other benefit of the general public. *Id.*

The Public Agency Contracting Test

Prior to the Court's *De La Cruz* decision, the long-standing test to determine whether a particular project constituted public work required that two conditions be satisfied: (1) a public agency[6] must be a party to a contact involving the employment of laborers, workers or mechanics, and (2) the contact must concern a "public works" project. *Matter of Erie County Indus. Dev. Agency v. Roberts*, 94 A.D.2d 532 (4th Dept. 1983), *affd* 63 N.Y.2d 810 (1984). *See, also, Matter of Pyramid Co. of Onondaga v. New York State Dept. of Labor*, 223 AD2d 285 (3d Dept. 1996). Respondents agree that the first prong of the *Erie County* test remains unchanged

[6] A public agency is one of the public entities specified in Labor Law § 220 (2). The Court of Appeals has made clear that the definition of public agency may not be expanded beyond those specifically designated entities. *Matter of M.G.M. Insulation Inc. v. Gardner,* 20 NY3d 469, 475 (2013); *Matter of New York Charter School Assoc. v. Smith*, 15 NY23d 403, 410(2010).

after *De La Cruz*.[7] In order to satisfy the first prong of the *Erie County* test, the "public agency contract" test, it has never been necessary that a public agency be a direct party to the construction contract. *See*, *Bridgestone/Firestone, Inc. v. Hartnett*, 175 AD2d 495, 497 (3d Dept. 1991) (involving warranty work).[8] So, for example, the Appellate Division has found that a county's agreement to lease a new building proposed to be constructed by a limited partnership (and actually constructed by a private construction company pursuant to a separate construction contract that the county was not a party to) necessarily involved the employment of workers to construct the building, and that lease agreement was therefore sufficient to satisfy the first prong of the test. *Matter of 60 Market Street Assocs. v. Hartnett*, 153 AD2d 205, 207 (3d Dept. 1990), *affd* 76 NY2d 993 (1990).

Likewise, in its *National R.R. Passenger* decision, the Appellate Division found that the financing and implementation agreements that allowed Amtrak to consolidate its lines in New York's Penn Station satisfied the first prong of the *Erie County* test. *Matter of National R.R. Passenger Corp. v. Hartnett*, 169 AD2d 127, 129-130 (3d Dept. 1991). In that case, Amtrak contracted with a private construction company for clearing, grubbing and track removal and fencing preparatory to the installation of the contemplated improvements, and that company then subcontracted with other companies for portions of the work. *Id.* at 129. The State was not a party to the construction contracts, but had entered into agreements with Amtrak to, among other things, share 40% of the cost of the project, which agreements further provided for State Department of Transportation ("DOT") approval of contractor selection and change orders. *Id*. The Court found that "[t]he contractual arrangements between the State and Amtrak rather easily satisfied the first of these elements (referring to the first prong of the *Erie County* test), in that a public agency is one of the parties and Amtrak is obligated thereunder to go forward with the project, necessarily involving the employment of workers and mechanics *(see, Matter of 60 Mkt. St. Assocs. v Harnett*, 153 AD2d 205, 207, *affd* 76 NY2d 993)." *Id*. at 130.

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[7] *Respondent Shultz Contracting Proposed Findings*, p. 20.

[8] The Department contends, in part, that a public agency is a direct party to the contract, as it contends that NYRA is in fact a "Commission appointed by law," one of the public entities specifically referenced in Labor Law § 220 (2). See, *Department's Proposed Findings of Fact and Conclusions of Law*. Respondents vigorously dispute that novel contention. *See, Respondent Shultz Construction's Counter-Proposed Findings of Fact and Conclusions of Law; Respondent William M. Shultz's Counter-Proposed Findings of Fact and Conclusions of Law.* This report does not address that contention as it concludes that the public agency contract test is satisfied under traditional public agency contract analysis without the need to find that NYRA is a State Commission.

The Court of Appeals has recently recognized the continuing vitality of this principal by citing with approval these decisions in its *Charter School* and *M.G.M. Insulation* decisions. *Matter of M.G.M. Insulation Inc. v. Gardner,* 20 NY3d 469, 475 (2013); *Matter of New York Charter School Assn. v. Smith*, 15 NY3d 403, 409 (2010). In its *Charter School* decision, the Court stated that "Labor Law §220 (2), by its terms, requires that the contract be particular to the 'work contemplated' by the parties. In other words, construction or renovation work must be involved (citations omitted)." *Matter of New York Charter School Assn. v. Smith*, 15 NY3d at 409. The Court specifically cited the lease agreement in *60 Market Street* and the financing and implementation agreements in *National R.R. Passenger* as examples of agreements sufficient to satisfy Labor Law §220 (2), which it then distinguishing from the charter school agreement involved in the *Charter School* case, finding that no such work was specifically or expressly contemplated in the involved charter school agreement. *Id.*

In *M.G.M. Insulation*, which involved the issue of whether a not-for-profit voluntary fire company's project to construct a new firehouse was subject to Labor Law article 8, the Department argued, among other things, that service agreements entered into with the Village satisfied the public agency contract test. *Matter of M.G.M. Insulation Inc. v. Gardner,* 20 NY3d 469, 475. The Court found, however, that the service agreements were contracts for emergency services pursuant to the Village Law, which empowered a Village to contract with a local fire corporation to furnish fire protection, and did not "include any provision contemplating the work involved here: the construction of a new firehouse (*see Charter School Assn., 15 NY3d at 409*). Thus, the service agreements are not a contract for public work within the meaning of the prevailing wage law." *Id*. The Court again did not reject prior case law, but simply found that the agreements upon which the Department sought to rely lacked the necessary reference to construction or renovation work.

Here, the State Settlement Agreement, Franchise Agreement, lease agreement and implementing legislation all contemplated and made provision for capital improvement and maintenance projects.[9] Moreover, the Saratoga Ground Lease specifically contemplated and authorized construction-like work under a pre-approved five year capital plan, which pre-

[9] The Franchise agreement specifically requires NYRA to, *inter alia*, comply with the requirements of State Concentrated Animal Feeding Operations (CAFO) nutrient management plan and remediate and notify the FOB of any violations. Exhibit 18, §2.2 (c).

approved work presumably included work on this Project, since it was contracted for and commenced shortly thereafter.[10] Since the State is one of the parties to the Franchise Agreement and Saratoga Ground Lease, and those agreements contemplated the construction and renovation work performed, and obligated NYTRA to perform that work, the first prong of the *De La Cruz*, "public agency contract" test is satisfied. *Matter of National R. R. Passenger Corporation v. Hartnett*, 169 AD2d 127, 130.[11]

Furthermore, even if these Agreement are deemed to provide an insufficient contractual link or nexus to satisfy the public agency contract test (*see, e.g., Matter of Pyramid Co. of Onondaga v. New York State Dept. of Labor*, 223 AD2d 285, 287 (3d Dept. 1996), then surely the 2007 Labor Law section 220 amendment intended to redress the outcome of the Appellate Division's *Pyramid* decision applies. Labor Law § 220 (2); *See, Matter of New York Charter School Assn. v. Smith,* 15 NY3d 403, 410. In the *Pyramid* case, the owner of a mall property, acting under a DOT permit, contracted with a private contractor to construct a public road on State land providing direct interstate highway access from its shopping mall property. *Matter of Pyramid Co. of Onondaga v. New York State Dept. of Labor*, 223 AD2d at 286. The project was largely constructed on State land and following completion and acceptance by DOT was to be turned over to the State. *Id.* The Appellate Division found that although the project was a "public work project," as defined by case law,[12] as it was intended to benefit the motoring public, Labor Law article 8 did not apply since it was undisputed that the State "… was not a party to any contract involving construction of the project *(see, Matter of National R. R. Passenger Corp. v Hartnett, supra).*" *Id.* at 287. Critically, the Court found that the DOT permits did not create *any* contractual rights but merely granted a right of access to the State Highway. *Id*. Since the only

[10] A copy of the approved five-year capital plan was not included in the Stipulated Record for this hearing. If the work was not included in the pre-approved 5-year capital plan, pursuant to the terms of the lease agreement, specific authorization by the State FOB would have been required. No such authorization was included in the Stipulated Record.

[11] Chief Judge Lippman, dissenting in *M.G.M. Insulation*, noted that " [w]hen public entities enter into agreements involving, even remotely, public payment for construction, the threshold for public entity contracting within the description of Labor Law § 220 (2) has been crossed (citation omitted)." *Matter of M.G.M. Insulation Inc. v. Gardner*, 20 NY3d 469, 479. The State Settlement Agreement and Franchise Agreement created a public funding mechanism utilizing, *inter alia*, VLT revenue to pay for the contemplated construction work that would be performed pursuant to these agreements (¶¶47, 48, *supra*.). In so doing, the threshold for public entity contracting had been crossed. (*See*, Public Funding Discussion, pp. 16-20, *infra*.).

[12] The Court cited, generally, *Matter of Sarkisian Bros. v. Hartnett*, 172 AD2d 895 (3d Dept 1991), *lv denied* 78 NY2d 859 (1991) and *Matter of Long Is. Light. Co. v. Industrial Commr. of N.Y. State*, 40 AD2d 1003 (2d Dept 1972), *affd* 34 NY 2d 725 (1974). The court found, citing *Sarkisian Bros.*, that the fact Pyramid undertook the project for profit did not detract from its primary objective to benefit the public. *Id.*

contract concerning the project was between Pyramid and the construction company Pyramid hired to perform the work, the first prong of *Erie County* test could not be satisfied. *Id*. Labor Law section 220 (2) was thereafter amended to close what was deemed to be a loophole in the Labor Law. *See, Matter of New York Charter School Association v. Smith*, 15 NY3d 403, 410. The amendment extended the coverage of Labor Law section 220 (2) to any contract for public work entered into by a third party acting in the place of, on behalf of and for the benefit of any of the covered public entities pursuant to any lease, permit or other agreement between such third party and the public entity. Labor Law § 220 (2). "The purpose of the amendment was to enforce prevailing wage laws on jobs, like the one in *Pyramid*, in which private parties are carrying out public work projects on behalf of public owners." *Matter of New York Charter School Assn. v. Smith*, 15 NY3d at 411.[13] Here, NYRA, the lessee of State-owned property, contractually obligated to repair, maintain and improve that State-owned racetrack property, which produces substantial benefits for the State, contracted with a private construction company to perform a

[13] Respondents argue that the amendment's language is intended to be narrowly construed, to apply only to a specific construction project, where the public agency promptly assumed ownership of the work product, as in the Pyramid case, and only where the involved third-party has an agency type relationship with the public entity, since the courts have construed the statutory phrase "on behalf of" to connote a direct representative or agency relationship, citing *N.Y. Constr. Materials Ass'n v. N.Y.S. Dept. of Envtl. Conservation*, 83 AD3d 1323, 1327 (3d Dept 2011). *See, William Shultz Supplemental Counter-Proposed Findings*, pp. 3-10. Respondents further cite The Third Restatement of Agency, which defines agency as the "fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents to so act." *Id*. at p.10, fn. 4. That narrow a construction would not remediate the loophole perceived in the *Pyramid* decision, since the creation of an agency relationship would require an agreement, as indicated in the Third Restatement, and that is specifically what the court found to be lacking in the *Pyramid* case. *Matter of Pyramid Co. of Onondaga v. New York State Dept. of Labor*, 223 AD2d 285, 287. Such an agency agreement would have presumably supplied the necessary contractual link obligating the State and Pyramid to pursue the project that the court found to be lacking in the DOT permit. *See, Matter of National R. R. Passenger Corp. v. Hartnett*, 169 AD2d 127, 130. The relationship here between the State and NYRA is highly interconnected and symbiotic. The record discloses that the State was intimately involved in its corporate formation and corporate structure; the State ensured its oversight over the management of NYRA's affairs and its finances; the State created a public funding mechanism to both support its operations and pay for its capital expenditures; NYRA was required to submit for pre-approval detailed five year capital expenditure plans; prior written State approval is required for all substantial racetrack Alterations beyond those pre-approved in the five year capital plans; NYRA is obligated to meet performance standards or suffer the potential pain of the loss of its franchise and leases; it is obligated to pay over to the State, as franchise fee, the lesser of its adjusted gross income and operating revenue. With respect to the case at hand, NYRA was specifically obligated by the agreements to become CAFO compliant, and this case does in fact involve a single specific CAFO construction project (assuming *arguendo* that such a requirement is necessary, which I do not, as one could easily envision the creation of a separate entity whose sole purpose would be to undertake construction projects in the place of, on behalf of, and for the benefit of some public entity, for reasons entirely divorced from a desire to evade prevailing wage requirements, in which event the amendment should properly cover all projects undertaken). The State benefits immediately and directly by NYRA's ability to operate in compliance with environmental regulations, since it enables NYRA to continue to conduct the operations that generate substantial revenue for the State, not to mention the all other benefits addressed in the public benefit section of this analysis. *See, also, Dalton v. Pataki*, 5 NY3d 243, 268 (2005).

portion of that required work, which involved environmental remediation, and as such was obviously acting in the place of, on behalf of and for the benefit of state, which benefit is more fully developed in the discussion of the third prong of the *De La Cruz* test that follows.

Unlike the *Charter Schools* case, where the Court determined that it need not address the application of amended section 220 because the facilities contracts involved projects in which the charter school owned the building, and the charter schools were thus the sole beneficiaries of the work, here we are concerned with improvements upon state-owned land and facilities, where the State derives substantial current benefit from the lease operations, and where the ownership of all improvements revert to the state upon lease termination, and where the maintenance and improvement of those facilities is required by the lease terms.[14]

Construction-Like Labor Paid For By Public Funds

The second prong of the *De La Cruz* test requires that the contract concern a project that primarily involves construction-like labor and is paid for by public funds.[15] This case involves work performed by a private construction company, Shultz Construction, for CAFO and stable area improvements made on a State-owned thoroughbred racetrack, the Saratoga Race Course. The work was performed pursuant to a contract with the State's franchisee and now-controlled

[14] An example of the current benefit provided to the State is given by the Court of Appeals in *Dalton v. Pataki*, 5 NY3d 243, wherein the Court upheld the constitutionality of a statutory scheme mandating reinvestment of VLT revenue, holding that the Legislature was entitled to determine that the mandatory reinvestment of a percentage of racetrack profits in enhanced purses and breeding funds would improve the health of a declining racing industry, and that a revitalized racing industry would attract more visitors, where VLTs are located, and thus increase video lottery gaming and thereby raise addition revenue for education. *Id*. at 268. This same revitalization logic applies to the repair, maintenance and improvement of these racetrack facilities. Furthermore, those cases holding that State ownership alone was insufficient to create a public work project involved cases where the property was put to purely private purpose or where public ownership was temporary and served only to confer tax benefit. *See, e.g. Davidson Pipe Supply Co., Inc. v. Wyoming Co. Indus. Dev. Agency*, 85 NY2d 281, 286 (1995). Where there is both public ownership and public benefit, as with a State owned public building, the work is indisputably public work. *Bridgestone/Firestone, Inc. v. Hartnett*, 175 AD2d 495, 497

[15] Note that the involved *contract* must *concern a project*, the same formulation used in the second prong of the *Erie County* test, which the courts have construed to authorize an indirect contractual connection. *Matter of 60 Market Street Assocs. v. Hartnett*, 153 AD2d 205, 207; *Matter of National R. R. Passenger Corp. v. Hartnett*, 169 AD2d 127, 130; *Bridgestone/Firestone, Inc. v. Hartnett*, 175 AD2d 495, 497. The *project* must then *primarily* involve construction-like labor. Respondents incorrectly suggest that the involved contract must primarily involve construction, which they contend neither the Franchise Agreement nor Saratoga ground lease have as their primary objective. *See*, *William Shultz Supplemental Counter-Proposed Findings*, p. 5; *Shultz Construction Supplemental Counter-Proposed Findings*, p.8-9. That, however, is not the *De La Cruz* formulation.

lessee, NYRA.[16] NYRA, pursuant to, among other things, the lease terms, was responsible for racetrack repair, maintenance and capital improvements, which the State arranged to pay for through the creation of a statutorily codified funding mechanism utilizing State lottery revenue.[17] NYRA had not only the right, but the responsibility, the duty, to maintain and improve the property.[18] It is required by specific performance standards to perform certain work, including CAFO compliance; and it was required to produce and deliver, concurrent with the execution of the Saratoga lease, a five-year capital plan. *See*, ¶¶ 48, 51, *supra*.[19] The State retains ownership of all improvements upon lease termination or expiration.

There can be no serious contention that the work for the CAFO and Stable Area Improvements Project did not primarily involve construction-like labor. The issue is whether the Project was paid for with public funds. The record established that NYRA provided checks to Shultz Construction in payment for its services on the Project (Exhibit 6), and thus Shultz Construction argues that NYRA, a private not-for-profit corporation, not the State, paid for the Project.[20] This narrow view ignores the contractual and legislative design of a system that directs state lottery revenue to NYRA for the specific purpose of funding capital expenditures at these state owned racetracks.[21] It further ignores the specific protections built into that design to

[16] Public control was effected through the 2012 legislation referenced in paragraphs "37" and "38," *supra.* At the time the Project was performed, the State had minority representation on the lessee's board of directors (11 of 25 seats). NY Racing Law §207 (1)(a); Exhibit 13. Nevertheless, it appears that NYRA's formation and governance, incorporating documents, implementing legislation, franchise agreement and racetrack leases were all negotiated between the State and old NYRA as a comprehensive package for NYRA to emerge from old NYRA's Chapter 11 bankruptcy. See,L. 2008, ch. 18; Exs. 17, 18, 19; Stipulated Facts, ¶¶28-36. In addition to the State's involvement in NYRA's corporate governance, it also exercises significant supervision of NYRA, creates a mechanism to provide support for operational expenses and to pay for capital expenditures, and it heavily regulates the horse racing industry, pari-mutuel betting and VLT operations generally. *See*, L. 2008, ch. 18. The State also received a *franchise fee* from NYRA in an amount "*equal to* the lesser of [*NYRA's] (a) adjusted net income* and (b) operating cash," as those terms are defined in the Franchise Agreement. Ex 18, §2.4 (emphasis added). It appears that NYRA is essentially required to pay its net profit to the State as a franchise fee.

[17] NY Tax Law §1612

[18] Respondents contend that it had the discretionary right to improve and maintain the property, but no duty to do so. *See, Resp. William Shultz Counter-Proposed Findings*, p. 11 (NYRA is endowed with the right to maintain the racetracks, but had no *duty* to the State to maintain them).

[19] All improvements, unless covered by a pre-approved master plan or costing less than $100,000.00, which threshold this Project exceeded, require approval of the State through the FOB. Neither the required pre-approved five- year plan nor any other approval was introduced into the record by the parties.

[20] Shultz Construction was also provided specific assurances from NYRA that prevailing wages were not required to be paid as no public funds were involved (Exhibit 3).

[21] It is clear, based on the terms of the State Settlement Agreement and Franchise Agreement, that the State and NYRA understood and agreed that the State would be responsible for providing a public funding mechanism to finance racetrack capital expenditures (Exhibit 17, State Settlement Agreement, § 2.8 Capital Expenditures; Exhibit 18, Franchise Agreement, §§1.2, 2.2, 2.4, 2.9, 2.12 [b]).

protect NYRA if lottery funds were not provided by a date certain [22] or if the legislature subsequently reduced the state lottery revenue percentage provided for capital expenditures.[23] The foregoing arrangements demonstrate that the State, not NYRA, was effectively responsible for financing the maintenance and improvements of its racetrack facilities.

In the *Saratoga Harness Racing Association* case, the Court of Appeals upheld the constitutionality of similar statutory scheme, in which a statutorily created horse breeding fund derived its revenue from a portion of the pari-mutuel betting revenue, which was required by statute to be paid over by privately licensed racing associations to the fund for the general improvement of the sport and the facilities used. *Saratoga Harness Racing Assn. v. Agric and N.Y. State Horse Breeding Dev. Fund*, 22 NY2d 119 (1968). Article I, section 9, of the State Constitution created an exception from the general prohibition on gambling by permitting pari-mutuel betting on horse racing from which the State derives reasonable revenue in support of government. NY Const., art I, §9 (1). The Court held that it was constitutionally permissible, as a condition of granting the racing license to the private racing association, to require that a portion of the revenue derived from racing be set aside for the general improvement of the sport and facilities used, since there was nothing in the constitutional amendment that required *all* revenue in excess of expenses to be devoted to the direct support of government. *Id.* at 122-123 (emphasis supplies). In the *Town of Brookhaven* case, the State Supreme Court observed that the Court of Appeals in *Saratoga Harness* "… permitted in effect, payment of *State funds* outside the normal legislative process." *Town of Brookhaven v. Parr Co. of Suffolk,* 76 Misc2d 378 (Sup. Ct, Suffolk Co., 1973) (emphasis supplies). The Court clearly found that pari-mutuel betting revenues constituted State funds.

In *Dalton v. Pataki*, 5 NY3d 243 (2005), the Court similarly upheld the constitutionality of a statutory scheme that mandated the reinvestment of VLT revenue. Article I, section 9, of the State Constitution also creates an exception from the general prohibition on gambling by permitting the sale of lottery tickets the net proceeds of which are applied exclusively to or in the aid of education. NY Const., art I, §9 (1). The Court found video lottery to satisfy the definition

[22] Good faith negotiation for the State to provide NYRA with capital expenditure support payments/making New NYRA's obligation to perform major capital projects contingent on receipt of those lottery funds/ and providing for an alternate State financing mechanism to fund capital expenditures through Urban Development Corporation loans. ¶48, *supra*.

[23] NYRA was provided the express right to sue the State (but not the VLT operator) for damages. ¶48, *supra*.

of the sale of lottery tickets (*Id.* at 264-265); that it was for the legislature to determine the necessary expenses incurred in the operation of a lottery, and thus what would constitute "net" proceeds (*Id.* at 267); and that structuring the mandatory reinvestment as an administrative expense, "…a part of the vendor fee itself – but a part whose use the State has decided to regulate, " it was making " a policy determination constitutionally within its purview." *Id.* at 268. "The legislature was entitled to determine first, that mandatory reinvestment of a certain percentage of the racetrack's profits in enhanced purses and breeding funds would improve the health of the racing industry, declining in recent years, and second, that a revitalized racing industry would attract more visitors to the racetracks—where VLTs were to be located—who would in turn participate in increased video lottery gaming, thus raising additional revenue for education." *Id.* As the Supreme Court in *Town of Brookhaven* found with pari-mutuel betting revenues, these mandatorily reinvested VLT revenues are State funds. In fact, the State Settlement Agreement specifically recited that the mandatory 4% lottery revenue contribution for racetrack capital expenditures was part of the State's consideration for the conveyance of the racetracks, and thus clearly characterized this revenue as public funds. Ex.17, § 2.4**.** Only the State can generate this revenue through the sale of lottery tickets. NY Const., art I, §9 (1).

The requirement to pay prevailing wages on public work projects is constitutionally mandated. NY Const, art I, § 17. "… Labor Law § 220 'is an attempt by the State to hold its territorial subdivisions to a standard of social justice in their dealings with laborers, workmen and mechanics. It is to be interpreted with the degree of liberality essential to the attainment of the end in view' *(Austin v City of New York*, 258 NY 113, 117, 179 NE2d 9 [1932]).' " *De La Cruz v. Caddell Dry Dock & Repair Co., Inc.*, 21 NY3d 530, 535. That Constitutional mandate, coupled with the Court's direction to liberally construe its implementing legislation, compels the conclusion that this State created, and highly regulated, lottery revenue stream is of sufficient public character to satisfy the newly articulated public funding test of *De La Cruz*, which the Court acknowledged would "have to be applied on a case-by-case basis in order for its contours to be fully explored." *De La Cruz v. Caddell Dry Dock & Repair Co., Inc.*, 21 NY3d 530, 538.[24]

Although VLT Operations had not commenced at the time the instant contract was performed, and no support payments or UDC loan proceeds were made available during that

[24] The existence of public funding was not an issue in the *De La Cruz* case, and thus the Court had no opportunity to explore its contours. *Cf., Town of Brookhaven v. Parr Co. of Suffolk,* 76 Misc2d 378 (racing revenue construed to be state funds).

timeframe, the state had paid old NYRA One Hundred Five Million Dollars ($105,000,000.00) for, among other things, services and expense related to payments for capital works and purposes, Five Million ($5,000,000.00) of which it is undisputed was transferred to NYRA in 2008. In view of the foregoing statutory and contractual scheme, wherein the state effectively assumed responsibility for financing capital expenditures, it is reasonable to assume those state funds were applied to finance this particular capital expenditure, rather than NYRA's general operating revenue, as Respondents urge. Nothing in the statutory or contractual scheme contemplated NYRA funding capital expenditures from operating revenue.

Must Be For Use or Benefit of General Public

The third prong of the *De La Cruz* test requires that the primary objective or function of the work product must be for the use or other benefit of the general public. *De La Cruz v. Caddell Dry Dock & Repair Co., Inc.*, 21 NY3d 530, 538. This is the same construct as that employed under the second prong of the *Erie County* test. *See*, *Matter of 60 Market Street Assocs. v. Hartnett*, 153 AD2d 205, 207(3d Dept 1990, *affd* 76 NY2d 993 (1990); *Sarkisian Bros. v. Harnett*, 172 AD2d 895 (3d Dept. 1991), *lv. denied*, 78 NY2d 859 (1991).[25] In *De La Cruz* the Court made clear that the work product does not need to be used by the public so long as its function is to serve the general public. *De La Cruz v. Caddell Dry Dock & Repair Co., Inc.*, 21 NY3d at 538. Nor is public access to the work product necessary. *Id*. at 539. The Court held that the dispositive question is whether the primary function is to serve the general public. *Id*.

The *De La Cruz* case involved the repair and maintenance of municipal vessels performed by a privately owned floating dry docks operator pursuant to contracts with municipal agencies. *De La Cruz v. Caddell Dry Dock & Repair Co., Inc.*, 21 NY3d at 532-533. Among the vessels worked on were ferryboats, fireboats and garbage barges. *Id.* at 538. The Court found that although a ferryboat was of course made for the use of the general public, while a fireboat or barge is not, there is no doubt that the latter vessels function to serve the general public, as fireboats are used by firefighters for the benefit of the entire municipal public. *Id*. The Court concluded that no distinction should be made based upon whether the public had access. *Id*. In

[25] Respondent Shultz Construction suggests in its Supplemental Proposed Findings that the Court in *De La Cruz* adopted a new more restrictive approach here. *Resp. Shultz Constr. Supplemental Counter-Proposed Findings*, p. 16. The Court is actually adopting the same test applied since at least 1990. *Matter of 60 Market Street Assocs. v. Hartnett*, 153 AD2d 205, 207(3d Dept. 1990); *affd* 76 NY2d 993 (1990).

analyzing the "work product," in the context of repair and maintenance, the Court did not focus on the particular work performed; it focused on the property the work was performed on, the vessels, to ascertain whether the property on which the work was performed was used for the benefit of the general public. The dispositive issue was whether the vessels primary function was to serve the general public, which the Court found they did. *Id.*

The Court in *De La Cruz* noted that its holding is consistent "… with Appellate Division cases ruling that a work is not public when—although 'it serves a public function' such as 'the rehabilitation of neighborhoods' (*Vulcan Affordable Hous. Corp., 151 AD2d at 87*) and is paid for in large part by public funds—its objective is private residences (*see id*.), or it 'is used for a specific and narrowly defined group' of private citizens (*Cattaraugus Community Action v Harnett, 166 AD2d 891, 891, 560 NYS2d 550 [4th Dept 1990])*." *De La Cruz v. Caddell Dry Dock & Repair Co., Inc.*, 21 NY3d at 538.

The issue under the third prong of the *De La Cruz* test thus devolves to the whether the primary function or objective of the Saratoga Racecourse is for the benefit of the general public or "is used for a 'specific and narrowly defined group' of private citizens." *Id*. If it is to primarily benefit the general public, then the maintenance, repair, and improvement of the racetrack facilities would necessarily involve employment upon a "public work." *See, Matter of Bridgestone/Firestone v. Hartnett*, 175 AD2d 495, 497.

In *Sarkisian Bros. v. Harnett*, 172 AD2d 895 (3d Dept. 1991), *lv. denied*, 78 NY2d 859 (1991), the Appellate Division held that the conversion of a former State University of New York ("SUNY") classroom building into a hotel was public work. *Id*. SUNY had transferred the building to the State Office of General Services ("OGS"), which, after invited community and college proposals, decided its best use would be a hotel and convention center. *Id*. OGS then published invitations for proposals to lease the building for its reuse and/or rehabilitation, which resulted in the selection of Sarkisian's proposal, with the provision that all costs were to be borne by Sarkisian. *Id*. The Department determined that the renovation project was subject to Labor Law article 8. *Id*. Sarkisian appealed arguing that the renovation was not public work because it was a private venture for profit, privately financed, including all contracts for all architectural and professional engineering work, and subject to real property taxes payable by Sarkisian. *Id*. at 896.

The Court, in deciding whether the project was public work, stated that "'contemporary definitions focus upon the public purpose or function of the particular project … . To be public work the project's primary objective must be to benefit the public…' (citations omitted) (*Matter of 60 Market Street Assocs. v. Hartnett*, 153 AD2d 205, 207 lv granted 76 NY2d 703; see also, *Matter of Vulcan Affordable Hous. Corp. v Harnett, supra at 87*)." *Id.* The Court held that the project was intended to benefit the public since (1) the invitation for proposal specified the building was to be leased, not sold, as a hotel/conference center; (2) the proposal was awarded based on considerations of revenue to the State, restoration of the landmark site, compatibility with the community and campus, and accommodations provided to the public; (3) the lease and the agreement subjected all renovations, exterior alterations and design drawings to the approval of OGS and SUNY to ascertain that the needs of the public were met; (4) OGS had the option to purchase the leasehold interest for use other than a hotel within 15 years of the execution of the lease; and (5) there was a guarantee of public access at least one day a month and 75% of its rooms are to be reserved to SUNY, if not already committed, for certain events -- all of which evidenced the public use, public ownership, public access and public enjoyment characteristics sufficient to support a determination that the project was public work . *Id*.

Here the racetrack is also state-owned and leased, and the lease vests ultimate ownership of improvements in the State; the franchise agreement generates substantial revenue for the State, and specifically requires that the lessee maintain the properties in a condition such that they will not detract from the community; all substantial improvements and alterations must be approved by the State acting through the FOB; the lease is of limited duration (25 years) and the failure of the lessee to comply with performance standards that include facilities maintenance can result in the early termination of the lease; in which event, in order to assure continuation of racing and betting operations, the FOB is required to engage directly in pari-mutuel thoroughbred racetrack operations (Racing Law §§210, 212 [8] [a][x]); and the public has regular access to and

enjoyment of the facilities.[26] These are the very same or similar characteristics to what the Appellate Division in *Sarkisian* relied upon to find that the state's leased hotel property was meant for the benefit of the general public.

Furthermore, the State Constitution and implementing legislation make clear that, in addition to revenue generation in support of government and education promoted through racetrack operations and development, the promotion of high-quality thoroughbred racing, and the general improvement of the sport and the facilities used, and the promotion of agriculture generally, and horse breeding in particular, are all public policy goals. NY State Constitution, Art I, §9; NY Racing Law §§ 231, 212 (8)(a)(i), 210; Assembly Memorandum, 1 2008 *McKinney's Session Law News* at A-19; *see, Saratoga Harness Racing Assn v. Agric and N.Y. State Horse Breeding Dev. Fund*, 22 NY2d 119, 122-123. Moreover, this particular project, involving environmental remediation, obviously inures to the benefit of the property owner – the People of the State of New York. The conclusion is inescapable that these state-owned thoroughbred racetracks are primarily operated for the benefit the general public, not some specific narrowly defined group of citizens. Those employed in their repair, maintenance and improvement are employed upon a "public work." New York Constitution, article 1, § 17; *Matter of Bridgestone/Firestone v. Hartnett*, 175 AD2d 495, 497

Conclusion

As each of the requirements of the *De La Cruz* test has been satisfied, article 8 of the Labor Law applies, and prevailing wages and supplements were therefore required to be paid on the Project. *Labor Law § 220 (2)*; *De La Cruz v. Caddell Dry Dock & Repair Co., Inc.,* 21 NY3d 530.

[26] Respondents note that in the *National R.R. Passenger* case, the Court found that access conditioned upon the purchase of a ticket was evidence of private benefit. *Resp. Shultz Constr. Supplemental Counter-Proposed Findings*, p. 17-18. I assume the room reservation policy referred to by the *Sarkisian* Court, as a factor showing public benefit, nevertheless required that set aside rooms be paid for. As far as public benefit is concerned, paying for admission to the track would appear indistinguishable from paying for access to a hotel room. In any event, I note that admission to the track is not conditioned solely upon the purchase of an admission ticket to the races, as it is common knowledge that the Saratoga racetrack is open free of charge to the public during the summer meet for, *inter alia*, watching the horses' morning workouts and breakfast service.

RECOMMENDATIONS

I RECOMMEND that the Commissioner of Labor adopt the within findings of fact and conclusions of law as the Commissioner's determination of the issues raised in this case, and based on those findings and conclusions, the Commissioner should:

DETERMINE that the Contract entered into between the New NYRA and Shultz Construction to provide labor, material and equipment necessary for the Project was covered by article 8 of the Labor Law; and

ORDER that this matter continue to hearing on the remaining issues raised by the Department's investigation of this matter.

Dated: March 3, 2016
Albany, New York

Respectfully submitted,

Gary P. Troue
Hearing Officer