



New York State Department of Labor
David A. Paterson, Governor
Colleen C. Gardner, Commissioner

June 1, 2010



Re: Request for Opinion
Article 8 Applicability
Privately Owned Property
RO-10-0071

Dear [REDACTED]:

This letter is written in response to your letter dated May 4, 2010, in which you request an opinion as to the applicability of Article 8 of the Labor Law to a proposed real estate development project. The project described in your letter involves the construction of a single story building on a parcel of land in the Town of Ogden. The developer, a private company specializing in commercial and industrial real estate development, has entered into a lease agreement with Monroe County for the use of the building by the Monroe County Sheriff's Department. The developer will retain ownership of the building, and the County will make no contribution toward the construction project. The initial term for the lease is 15 years, commencing shortly after the completion of the project, and the County will be responsible for monthly lease payments as well as for the payment of the building's real estate taxes, utilities, and maintenance. Your letter requests the Department's opinion as to whether the construction project constitutes "public work" and is, therefore, within the coverage of Article 8 of the Labor Law.

The test for determining whether Article 8 of the Labor Law applies to a particular public contract "focuses on the nature, or the direct or primary objective, purpose and function, of the work product of the contract," (*Erie County Industrial Dev. Agency v. Roberts*, 94 AD2d 532 (4th Dep't 1983), aff'd 63 NY2d 810.) With that in mind, a two-pronged test is generally used to determine whether a construction project is subject to Article 8 of the Labor Law: "(1) the public agency must be a party to a contract involving the employment of laborers, workmen or mechanics, and (2) the contract must concern a public works project." (*See, Sarkisian Brothers, Inc. v. Hartnett*, 172 A.D. 2d 895, (3d Dept., 1991); *New York Charter School Association v. Smith*, 61 A.D.3d 1091 (3d Dep't 2009).) [emphasis added] "Later, it was stated that contemporary definitions focus upon the public purpose or function of a particular project***. To be public work, the project's

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primary objective must be to benefit the public.” (citations omitted) (*Sarkisian Brothers, Inc. v. Hartnett*, 172 A.D. 2d 895, (3rd Dept., 1991).)

As to the first prong, whether a public agency has entered into a contract involving the employment of laborers, workmen and mechanics, the identity of the parties and the terms of the agreement to the present project are dispositive on that issue. Effective October 27, 2007, Section 220 (3) of the Labor Law reads as follows:

“Contract” now also includes “reconstruction and repair of any such public work, and any public work performed under a lease, permit, or other agreement pursuant to which the department of jurisdiction grants the responsibility of contracting for such public work to any third party proposing to perform such work to which the provisions of this article would apply had the department of jurisdiction contracted directly for its performance...” Labor Law §220 (3).

The lease agreement in the present case certainly meets the first prong of the public work test enunciated by the courts and now established by the statute. It matters not that the County is not directly contracting to have such work performed since the lease agreement requires that the Developer contract for such work to be performed, and the County will utilize the facility after such work is completed. Where a public agency contracts with third parties with the ultimate object of constructing facilities to be used by the public, that work meets the first test of the *Erie County* standard in the same manner as if the public agency had contracted directly with a private contractor. The County, through its third party contracts, is engaging contractors who will hire laborers, workmen, and mechanics to perform the work. Therefore, the first prong in the test for determining whether Article 8 applies has been satisfied.

As to the second prong of the test, i.e. whether the contract concerns a public works project, the primary consideration, as stated above, is whether the project's primary objective is to benefit the public. There are several cases that are helpful and relevant to the present situation in that regard, and the specific factual circumstances surrounding the holdings in those cases are helpful in rendering a determination.

In *Sarkisian Brothers*, a building on the grounds of SUNY Oswego was rehabilitated and turned into a hotel and convention center. (172 A.D. 2d 895.) The lease of that property provided that the lessee would be responsible for all costs associated with the rehabilitation and conversion of the building to the specified use. The State retained ownership of the property, with lessee having an option to purchase at the conclusion of the lease only upon the State's determination to sell to a non-governmental purchaser. The State retained the right to approve all renovations and design drawings through the Office of General Services and SUNY. Certain usages of the facilities were guaranteed to SUNY. The Court held that all of the above circumstances were sufficient indices of public use, ownership, and public enjoyment so as to support the Labor Department's determination that the project was one of public purpose sufficient to satisfy the second prong of the test for determining whether a particular project is subject to Article 8 of the Labor Law.

In *National R.R. Corp. v Hartnett*, 169 A.D.2d 127 (Third Dept., 1991), the Third Department stated that the inquiry must focus “on the nature, or the direct or primary objective, purpose and function of the work product of the contract.” In *National*, the question was whether the construction of a \$50 million rail line by Amtrak needed to transfer all Empire Corridor rail service to Pennsylvania Station from Grand Central Station was a public work project. The Court determined it was not, based upon the primary purpose and function of the project itself. While the Court conceded the overall public purpose of improving rail service as an overall benefit to the public, it noted that Amtrak was created to fulfill a function that was not historically that of government, but rather of private common railroad carriers. Following that line of logic, the Court determined that Amtrak’s purpose in entering into the contract with the State was to enhance its non-governmental function of providing efficient and, eventually, profitable rail service. Specifically the Court determined that Amtrak “retains ownership of the lines to be installed in the project, bears the risk of future financial losses or physical destruction, is entitled to all profits from its operations over the lines, and retains the authority to condition the public’s use and enjoyment of its facilities upon the purchase of a passenger ticket. These are factors that have repeatedly been held sufficient to preclude any determination that a given project constitutes a public works for purposes of applying Labor Law §220 (citing cases)”.

Conversely to the above two cases, the court in *60 Market Street v. Hartnet*, (153 A.D. 2d 205) held that a project for the construction of properties to be leased to a public entity was not a public work project. Rather, the Court pointed to the nature of the project, its use, and the relationship of the parties as factors in considering whether a project involving property leased to the state has as its primary function a private or a public purpose. The Court held that since the property was indistinguishable from a lease to any other (non-public) entity, the project was not within the coverage of Article 8.

The present project is being undertaken by a private developer whose (presumed) primary purpose for building the structure is to reap the financial benefits of leasing it to tenants. The project is private in nature as it is one which is easily converted for the uses of a private-sector tenant. The building schematics do not appear to be so distinctive as to prevent other non-public uses of the building at the end of the conclusion of the lease term, and the lease term is not sufficiently long (15 years) as to operate to render the County the constructive owners of the property. The present project does not satisfy the second prong of the test for determining the applicability of Article 8. Accordingly, it is the opinion of this Department that Article 8 of the Labor Law is inapplicable to the project in question.

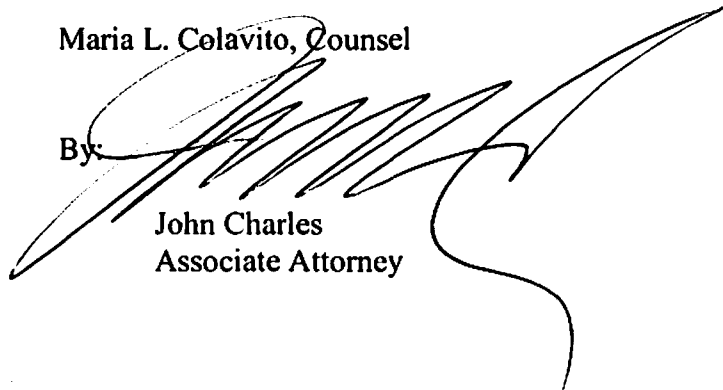
This opinion is based exclusively on the facts and circumstances described in your request and is given based on your representation, express or implied, that you have provided a full and fair description of all the facts and circumstances that would be pertinent to our consideration of the question presented. Existence of any other factual or historical background not contained in your letter might require a conclusion different from the one expressed herein. This opinion cannot be used in connection with any pending private litigation concerning the issue addressed herein, nor can it be used in connection

with an investigation or litigation between a client or firm and the Department of Labor. If you have any further questions, please do not hesitate to contact me.

Very truly yours,

Maria L. Colavito, Counsel

By:

A large, stylized handwritten signature in black ink, appearing to read 'John Charles', is written over the 'By:' label and extends to the right.

John Charles
Associate Attorney

CC: Pico Ben-Amotz
Christopher Alund
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