



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

September 28, 2010

[REDACTED]

Re: Griffiss Local Development Corp (GLDC)
Our File No. RO-10-0125

Dear [REDACTED]:

We are in receipt of your most recent letter dated September 13, 2010, in which you request the withdrawal of Counsel's opinion dated August 25, 2010 concerning the issue of the applicability of the prevailing wage law to the Assured Information Security Project at the former Griffiss Air Base. As you are well aware, Counsel opined that the project is subject to the prevailing wage law, for the reasons enunciated therein. Absent withdrawal of that opinion, you seek a "final determination from the DOL Commissioner."

Your letter suggests that Counsel's opinion is incorrect with regard to Counsel's finding that the GLDC is a public benefit corporation. We do not believe your reading of the law accurately reflects the intent of the Constitution or the prevailing wage law. The question for us is whether GLDC is a public benefit corporation as that term is used in Section 220 of the Labor Law. Our original opinion says it is, for a variety of reasons, and your response claims that a public benefit corporation can only be formed by a special act of the legislature, citing Article X, Section 5 of the State Constitution. The entire section of the constitution was not set forth in your letter, but Article X, Section 5 actually reads as follows:

"No public corporation (other than a county, city, town, village, school district or fire district or an improvement district established in a town or towns) possessing both the power to contract indebtedness and the power to collect rentals, charges, rates or fees for the services or facilities furnished or supplied by it shall hereinafter be created except by special act of the legislature." (Emphasis supplied)

Counsel believes that the proper interpretation of the entire section quoted above is that a special act of the legislature is required in those cases where the public corporation is given authority to *both* contract indebtedness and generally impose on the municipal entity as a whole,

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fees, rents or other charges. Examples of this latter function would be bridge and tunnel authorities, who are authorized to collect tolls, the Metropolitan Transit Authority, which is authorized to collect fees from the ridership, water authorities, and solid waste authorities. That is, legislative approval is required in those situations where the public corporation can impose financial obligations on the public and the municipality in which it operates. Such would be the case for most of the public authorities found in the Public Authorities Law. It is Counsel's position that while GLDC may have authority to contract indebtedness, it has been granted no general funding or taxing authority and, as a result, no legislative action is required.

Further, the question here does not involve the definition of a public benefit corporation in general, but specifically what that term means in the context of the prevailing wage law. The term is undefined in the prevailing wage law, which would ordinarily require reference to other sections of law. Our original opinion exhaustively reviews the definition of the term under the General Construction Law, the Public Authorities Law, the Not-for-Profit Corporation Law, and other legislation. Nothing contained in your letter contradicts our findings as set forth in the August 25, 2010 opinion. As noted in GLDC's letter, the General Construction Law defines a public benefit corporation as follows:

"4. A "public benefit corporation" is a corporation organized to construct or operate a public improvement wholly or partly within the state, the profits from which inure to the benefit of this or other states, or to the people thereof."

Such a definition clearly would apply to the GLDC. In fact, a local development corporation similar to GLDC has been found by the Court of Appeals to be a public agency for purposes of the Freedom of Information Law. Buffalo News, Inc. v Buffalo Enterprise Dev. Corp. (84 NY2d 488, 644 N.E.2d 277, 619 N.Y.S.2d 695). Similarly, in Reese v Daines, 20 Misc. 3d 1145, the Court held in part:

"Again, contrary to the contention of respondents, the fact that WNYHS is incorporated as a private, not-for-profit entity is far from determinative with respect to its obligations under FOIL (see Westchester-Rockland Newspapers v Kimball, 50 NY2d 575, 580-581, 408 N.E.2d 904, 430 N.Y.S.2d 574 [1980] [held: "voluntary organization" such as volunteer fire department or company that provides essential governmental service is nonetheless subject to FOIL]; Canandaigua Messenger, Inc. v Wharmby, 292 AD2d 835, 739 N.Y.S.2d 508 [4th Dept 2002] [respondent "Recreation Development Corporation" is "public body" as defined by OML]; see also Stoll ex rel Maas v New York Coll. of Veterinary Med. at Cornell Univ., 94 NY2d 162, 168, 723 N.E.2d 65, 701 N.Y.S.2d 316, [1999] ["more public aspects of the (private entities' affairs) may well be subject to FOIL"]). In Buffalo News, Inc. v Buffalo Enterprise Dev. Corp. (84 NY2d 488, 644 N.E.2d 277, 619 N.Y.S.2d 695, *supra*), the Court of Appeals held a nominally private, not-for-profit entity formed under the Not-For-Profit Corporation Law as a local development corporation to be an "agency" within the meaning of FOIL. In that case, the respondent agency was held to be "performing an essential governmental function" inasmuch as it was created "to lessen the burdens of government" and to "act in the public interest" by administering public

loan programs to encourage private business development and thereby reduce unemployment; was subject to extensive public regulation, funding and other review; had numerous public officials on its board of directors; and otherwise "enjoy[ed] many attributes of public entities" (*see id.* at 490-492; *see also Westchester-Rockland Newspapers*, 50 NY2d at 580-581)."

It is not reaching to find that a local development corporation, which is clearly affiliated with governmental entities and, as here, works in close affiliation with municipal government, operates as a public benefit corporation as that term is used in the prevailing wage law. It should be noted that Article 8 of the Labor Law is to be liberally construed in order to effectuate its beneficent purposes, *see Matter of Telnap Constr. Corp. v Roberts*, 141 AD2d 81, 84 (2d Dept., 1988). Given the broad mandate contained in the prevailing wage law, it appears that the term public benefit corporation would include all local development corporations, and numerous other entities that provide services which historically would have been provided by governmental units directly, such as volunteer fire departments.

The second point in your September 13, 2010 letter relates to whether the project is a public work project under the second prong of the *Erie* test. Our original letter noted the ownership of the real property by GLDC, which we determined to be a public benefit corporation and therefore determined that the matter fell under the *Sarkesian* line of cases. You cite the *National Rail (Amtrak)* case for the opposite proposition, arguing that the purpose of the project, the creation of an office building, is not a public purpose and the general public purpose to be accomplished by the local development corporation in this matter is too general a proposition under *National Rail*. The parties have a difference of opinion as to the manner in which the law will be applied. The prior opinion states our position in the matter. This is an issue that may have to be decided by the courts, as we appear to be entering a stage where local development corporations are being utilized more extensively by public agencies to carry out their construction agendas. It is our position that the State Constitution and the prevailing wage law, as most recently amended to address third party contracts, clearly establish the proposition that the prevailing wage shall be paid on public construction projects, and that arrangements for procuring such construction through private third party entities should not thwart that public goal. It is our opinion that where a sufficient nexus between the public entity and the entity acting as the alter ego or the third party is established, as we believe has been established in this case, a public purpose to the project is clearly supported. Moreover, we also refer you to extensive discussion contained in our original opinion letter which establishes a strong public interest expressed by the County of Oneida, the City of Rome, the City of Utica and other public officials in the development of Griffiss Air Force Base, and their significant involvement in the operation of GLDC, EDGE, and CGR. These factors also strongly support our previous opinion that the project in question has a strong public purpose.

Based on the above, Counsel is not inclined to change its opinion in this matter. In response to your request for the Commissioner to issue an Order and Determination with regard to this issue, procedurally, a "final determination" can be rendered after a hearing conducted pursuant to Labor Law, Section 220(8). At the completion of that hearing, the Commissioner will issue an Order and Determination which may be appealed to the Appellate Division pursuant to CPLR Article 78 and Labor Law, Section 220 (8). While Labor Law, Section 220(8)

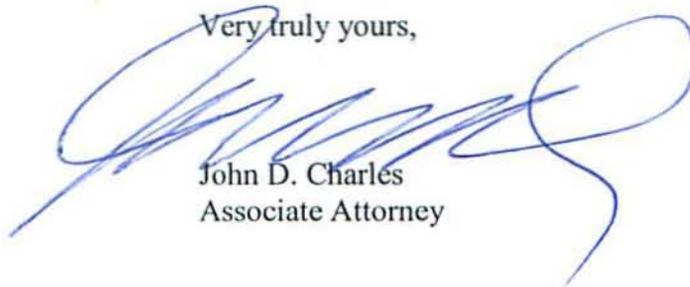
contemplates a full evidentiary hearing in which the Department produces audits indicating the amounts underpaid by any contractors who perform work on a given project, there are times when the issue sought to be determined is more a question of law, and in such cases the Commissioner has consented to a bifurcated hearing in which the parties present any facts or legal arguments to a Departmental Hearing Officer and the question of law is determined by the Commissioner after receipt of a Report and Recommendation from that Hearing Officer. In such cases, the factual issues concerning the amount of underpayments are reserved for a later determination once the question of law has been ultimately resolved. Please note, however, that any contractor who performs work on this project is required to pay prevailing wage during the pendency of any proceedings. Contractors who fail to do so proceed at their own risk and if they fail to pay prevailing wages, the Department will consider such failure to be a willful violation of the Labor Law. Under these circumstances, the contracting entity will frequently indemnify the contractors for such costs should the Department ultimately prevail on the issue of prevailing wage applicability.

Counsel believes that such a bifurcated hearing would be appropriate in this matter. In such a hearing, the Department would expect to provide notice to any contractors who are actually working on the project, so that they may raise any issues they consider relevant to the hearing. In that regard, we would appreciate a list of all contractors who have commenced working on the project.

Alternatively, the Department is willing to complete its investigation as to underpayments on the project and issue, if so found, Findings Notices against any and all contractors that are determined to have underpaid workers. In such a case, each contractor will be responsible for any underpayment found and will be responsible for interest and penalties as determined by the Hearing Officer. The Department is willing to proceed under either hearing procedure, and requests that your client indicate a preference as to what hearing mechanism it chooses to obtain an Order and Determination in this matter.

To summarize, Counsel will not withdraw or amend its opinion as to the applicability of the prevailing wage law in this matter. If your client wants a final determination in this matter from the Commissioner, the Commissioner must issue an Order and Determination after hearing as indicated above. Please advise as to whether you intend to proceed in this fashion, and, if so, which procedure you would prefer to use in this matter.

Very truly yours,



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