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

September 3, 2010

[redacted]

[redacted]

Re: Eldridge Park Improvements
Our File No. RO-10-0131

Dear [redacted]:

The matter of construction projects in Eldridge Park in Elmira has once again been brought to our attention. I previously reviewed this matter and provided the Bureau of Public Work with an informal opinion regarding projects in Eldridge Park. From the documents I have been provided, it appears that both the Friends of the Chemung River Watershed, Inc. (Friends) and the Eldridge Park Carousel Preservation Society, Inc. (Society) have entered into agreements with the City of Elmira (City) which have resulted in the construction of various facilities in Eldridge Park. Eldridge Park is owned by the City of Elmira. The question that has been posed is whether such projects are subject to Labor Law Article 8, the prevailing wage law. Under the circumstances outlined in the project information provided to us, it is clear that the prevailing wage law does apply and that any laborers, workers, or mechanics performing work on such projects must be paid the prevailing wage as established by the Commissioner.

To summarize the nature of the parties involved and their contractual agreements, the City has entered into "License Agreements" with Friends and the Society. A resolution dated August 3, 2009, authorized the City to grant a revocable license to Friends for the installation of a pavilion at the City boat launch. That resolution was later amended on October 26, 2009, to include the construction of a kiosk at that location and to relieve Friends of the responsibility of providing a certificate of insurance for these properties. Those resolutions were followed with a license agreement between the City and Friends, whereby the City granted the license; declared that the license was not a lease; authorized the construction as set forth in the previous resolutions, and granted ingress and egress rights to Friends, its agents, servants, and invitees

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onto the property in question. Consideration for the license was that Friends would erect the pavilion and the kiosk at its own expense. Under the license, once construction of the structures is completed, Friends grants and donates all right, title, and ownership in the structures to the City.

A resolution dated February 2, 2009, also authorizes a license agreement to the Society for the restoration of the carousel, carousel building, and the former whip building, also located in Eldridge Park. The resolution also authorizes the entry into a Master License Agreement. That agreement was entered on March 5, 2009. It notes that the City owns Eldridge Park; that the restoration of the Park will enhance cultural, entertainment, and recreational opportunities for the residents of the City and the region; that further projects in the park by the Society are planned and that the City deems it advantageous to have certain Park buildings renovated. The license once again denies a landlord-tenant relationship but grants rights of ingress and egress to existing buildings and all new structures. Consideration is one dollar and the donation by the Society of work hours for the "restoration of the Park". The City retains the right to use such facilities for special events, not to exceed five days per year, and retains the right to use five-eighths of Building 1, and the corporate pavilion when it is completed. The City is responsible for the exterior maintenance of any building it owns within the park. The Society is responsible for the interiors of the City buildings on the site and the interior and exterior of all buildings that it constructs on the site. The City remains responsible for the removal of trash from the Park. Upon the termination of the agreement, the Society generally has between 60 and 120 days to remove its property, and a failure to do so results in the property becoming that of the City. The master agreement was in place when the Society decided to add a miniature golf course to the facilities at Eldridge Park.

We are all aware of the well settled law with regard to the applicability of the prevailing wage law. In determining whether a project is public work, two conditions must be fulfilled: "(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" *Matter of Erie County Indus. Dev. Agency v Roberts,* 94 AD 2d 532, 537 (4th Dept. 1983), *aff'd* 63 NY2d 810 (4th Dept. 1984), *see also, Matter of National R.R. Passenger Crop. v. Hartnett,* 69AD2d 127. "Later, it was stated that contemporary definitions focus upon the public purpose or function of a particular project***. To be public work, the projects primary objective must be to benefit the public" (citations omitted) *Sarkisian Brothers, Inc. v. Hartnett*, 172 A.D. 2d 895, (3rd Dept., 1991).

In addition, recent amendments to the prevailing wage law have further clarified the meaning of the word "contract" as used in Article 8 to include agreements with third parties for public work.

> "Contract, as used in this article also shall include 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, or, where there is no lease, permit or other agreement and ownership of a public work is intended to be assumed by such public entity at any time subsequent to the completion of the public work." Labor Law §220 (3) (effective October 27, 2007).

Both tests set forth in *Erie* are at issue in this fact situation. The first question - whether a contract exists in which a public agency is a party that will involve the employment of laborers - is clearly met here. The City has entered into agreements with both Friends and the Society whereby those two not-for-profit organizations have or will perform construction, reconstruction, repair, and/or maintenance work which will require the employment of laborers, workers, and or mechanics. Friends and the Society are third parties through which the City will obtain the work. As a result, the City is a party to a contract meeting the definition of Labor Law §220(3) that will ultimately result in the employment of workers. See *60 Market Street v. Hartnett*, 153 A.D. 2d 205 (3rd Dept., 1990).

As to the second prong of the test, the question is whether the construction of additional facilities in a public park, for use by the public, on property owned by a public entity, is public work. That question is rather handily answered by *Sarkisian Brothers, Inc. v. Hartnett, supra.* There, buildings on a State University campus, owned by the college, were restored and transformed into a privately operated hotel facility for use by the general public and secondarily for use by the school itself. Profits from that enterprise would inure to the benefit of the private party. That work, which was completely funded and performed by a private party as a profit-making venture, was found to be public work. Here, private entities are being utilized to perform and fund the work. But like *Sarkesian,* the projects overall objective is to rehabilitate and upgrade municipally owned property through the addition or renovation of structures that will be open to the public. There are few public purposes that are more clearly defined than the ownership, operation and maintenance of park facilities for the use and enjoyment of all members of the public. This project has a clear public purpose.

This office is of the opinion that work performed in Eldridge Park under the circumstances outlined above is public work as that term is set forth in the prevailing wage law and that all laborers, workers or mechanics that perform work on such projects are required by law to receive the prevailing wage as established by the Commissioner of Labor.

This opinion is based exclusively on the facts and circumstances revealed by the documents described above. The existence of any other factual or historical background not reviewed by counsel 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. If you have any further questions, please do not hesitate to contact me.

Very truly yours,

John D. Charles
Associate Attorney

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Opinion File
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