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

March 26, 2010

[redacted]

Re: Request for Opinion
Article 8 Applicability - Parking Lot
Our File No. RO-10-0021

Dear [redacted]:

This letter is written in response to your letter dated February 4, 2010, in which you request an opinion as to the applicability of Article 8 of the Labor Law to a project involving the construction of a parking lot on property owned by Dutchess County (County). Your letter states that the County and a private citizen own adjoining pieces of vacant property in the Town of Poughkeepsie. The County owns and operates its Department of Mental Hygiene facility on property that is near the vacant property. The private citizen, [redacted], owns and operates a health and fitness center on the other side of the vacant property. [redacted] is considering paying for all of the costs associated with the construction of a parking lot on both the County's and his vacant land. The County will not have an oversight role in the construction of the parking lot, nor will it be contributing any funds toward its cost. Your letter asks whether the construction project is within the coverage of Article 8 of the Labor Law thereby subjecting it to the prevailing wage requirements contained therein.

In general, a two-pronged test is used to determine whether a construction project is subject to Article 8 of the Labor Law (the prevailing wage provisions): "(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); *Matter of Erie County Indus. Dev. Agency v. Roberts*, 94 AD2d 532, 537, aff'd 63 NY2d 810 (1983); *New York Charter School Association v. Smith*, 61 A.D.3d 1091 (3d Dep't 2009).)

The first prong of the two-pronged test is whether the work is being performed pursuant to a contract for the employment of laborers, workers or mechanics to which a public entity is a party. (*see*, cases cited above, *supra.*) In 2007, Section 220(3) of the Labor Law was amended to provide as follows:

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> "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..." (effective October 27, 2007).

It is clear, under that amendment, that the situation described in your letter satisfies the first prong of the test for determining whether Article 8 applies. Dutchess County, in permitting the construction of the parking lot on County-owned land, will be either granting a permit or entering into another agreement within the meaning of that amendment. Accordingly, the first prong of the test is satisfied.

The second prong of the two-pronged test is whether the contract concerns a public works project. (*See*, cases cited above.) The Third Department in *Sarkisian Brothers, Inc. v. Hartnett*, 172 A.D. 2d 895 (1991) explained that "[t]o be public work, the project's primary objective must be to benefit the public." In the present case, the project is being undertaken by [redacted] for the primary, but not exclusive, use by the health and fitness center's staff.

However, we do not have sufficient information at this time to make a determination as to whether this is a public work project. We are requesting copies of any materials (e.g., agreements, leases, etc.) by which the County will grant use of this property to [redacted]. County Law, Section 215 (4) provides that upon determination by the Board of Supervisors that county real property is not required for public use, such property may be leased for a term not exceeding five years upon such terms and conditions as may be prescribed by the Board in the same manner and with the same rights and privileges as if owned by the individual. Further, Section 215(6) provides that such property may be leased only to the highest responsible bidder after public advertisement. Since the Board of Supervisors has the general care and control of the corporate real and personal property of the County pursuant to Section 215(1), we presume that the County must follow the procedures set forth therein and could not just make a gift of the use of this property to a private citizen.

Accordingly, once you have provided us with all information and materials regarding the County granting use of this property to [redacted], we will be able to make a determination as to the primary objective of the project and advise you as to the applicability of Article 8 of the Labor Law.

Very truly yours,

Maria L. Colavito, Counsel

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Opinion File
Dayfile