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Prevailing Wage Precedent Handed Down by Appellate Court: *What It Means for Your Community*

Over the last six months, I have written two prior *Alerts* on amendments to the Tax Increment Financing (“TIF”) Act that could be interpreted to require any project, including those by private developers, paid for in whole or in part with TIF funds to pay prevailing (“union”) wages to laborers. See: [May 2009 Alert](#) & [July 2009 Alert](#).

The amendment called into question whether private developers who received TIF funds would be considered an “*institution supported in whole or in part by public funds*.” If they would, then they would be subject to the requirements of the Prevailing Wage Act. In our [May 2009 Alert](#), I opined that the amendment to the TIF Act did not make private developers “*institutions supported in whole or in part by public funds*” and therefore they are not required to use Prevailing Wages when they receive TIF funds. I also indicated, however, that “[h]ow courts will decide the effect of this amendment on this issue is yet to be determined.” As of late November, we have one Court’s interpretation of these amendments.

Summary of *Town of Normal* case:

The Illinois 4th District Appellate Court handed down a decision in the *Town of Normal v. F.J. Hafner and Fred Hafner* case. In this not yet published case, the Court held that the Prevailing Wage Act was not applicable to a private developer receiving tax increment financing funding from a municipality for a redevelopment project involving the construction of three private multi-family residences. ([2009 WL 4263546](#) .)

Facts of *Town of Normal* case:

In 2004, the Town of Normal (“Town”) entered into a Redevelopment Agreement (“Agreement”) with a private developer (“the Hafners”) under which the Hafners would receive a portion of the tax increment generated by its redevelopment project within an established TIF district in the Town. The increment would be used to pay off a portion of the private loans the Hafners had secured to finance the project. In 2008, the Town learned that the Hafners had not complied with the Prevailing Wage Act, and it brought an action in circuit court seeking an order declaring that:

- 1.) The Hafners were required to comply with the Prevailing Wage Act;
- 2.) The Hafners were obligated to pay laborers hired for the project Prevailing Wages, and;
- 3.) The Hafners’ failure to have paid Prevailing Wages was a material breach of the Agreement which released the Town from its obligation to pay any of the increment to the Hafners.

The trial court found in favor of the Town and the Hafners filed an appeal.

Decision of *Town of Normal* case:

The 4th District Appellate Court disagreed with the lower court and reversed the decision. In doing so, the Appellate Court held that because “*the public funds the Hafners are entitled to under the agreement are generated by the increased property-tax dollars assessed to their private property, which is attributable to the improvements the Hafners made using a private mortgage loan,*” the project is not considered to be “public works,” and therefore, the Prevailing Wage Act is not applicable. In the explanation of its ruling, the court went on to note that similar redevelopment agreements are often used by municipalities to promote the local economy, and requiring private developers to comply with the Prevailing Wage Act in agreements for private redevelopment would only serve to impede economic development.

In support of its holding, the 4th District Appellate Court went on to point out that the legislature had an opportunity to amend the definition of “public works” under the Prevailing Wage Act to specifically include those projects funded in part by the TIF Act when House Bill 3399 proposing such language was drafted in 2003. However, that bill was ultimately rejected. The court noted that under the rules of statutory construction, it could not hold that projects which accept the benefits of the TIF Act automatically become “public works,” because that does not appear to be the legislature’s intent.

In its ruling, the Court also points to the fact that the language of the agreement itself refers to the developer as a “sole proprietor” and states that the specific purpose of the agreement was to “attract other *private* development.” (Emphasis added.) Based upon the facts of the case and these surrounding circumstances, the court refused to hold that private developers receiving funds under the TIF Act are automatically subject to the provisions of the Prevailing Wage Act.

Significance of *Town of Normal* case:

While this is certainly a significant ruling, it is not likely to be the final word on the issue. First, it is still too early to know whether the Town of Normal will appeal the holding to the Illinois Supreme Court. Until the Illinois Supreme Court rules on the issues it will not be the definitive law in the state. Further, while this 4th District decision is the law in that jurisdiction, it does not have to be followed by other Appellate Districts and as such, even if other Districts are presented with similar facts there is no guarantee that they will follow the decision in this case.

At this point, however, I believe this ruling will play a significant role in boosting private development in local communities. Local communities and private developers alike can continue to enjoy the mutual benefit of redevelopment agreements motivated by tax increment funding - an important economic development tool -with comfort in knowing that at least one Appellate court does not believe that the Prevailing Wage Act applies to private development. Local governments looking into these arrangements should make sure that their agreements with private developers are drafted with appropriate language to closely mirror the language in the Agreement discussed in this case. I believe that this will increase the likelihood of withstanding challenges to Redevelopment Agreements based on the Prevailing Wage Act.

We will continue to monitor these issues and keep you posted on any changing events.

Paul S. Nicolosi

This information is provided by Paul S. Nicolosi, JD. Mr. Nicolosi holds a degree in Political Science with an emphasis in business and economics from Loyola University of Chicago (1987) and a law degree from Northern Illinois University (1990). Upon graduation from law school, Mr. Nicolosi became partner at his family's sixty year old law firm, [Nicolosi & Associates, LLC](#), and a principal at the firm's affiliated consulting business, The Buckley Companies. Together, these two organizations provide comprehensive public finance planning under the name "[EDCon Services](#)".

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