

The Commonwealth of Massachusetts
Department of Labor and Workforce Development
Division of Occupational Safety

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Director

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December 3, 1997

Michael Powers, Esq.
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SUBJECT: Summit Lock Industrial Park/Toys "R" Us Mass., Inc.

Dear Mr. Powers:

I have reviewed your letter dated November 19, 1997 concerning whether the Massachusetts prevailing wage law, as prescribed by M.G.L. c. 149, ss. 26 through 27D, is applicable to certain construction related work at the Summit Lock Industrial Park located in the City of Westfield (Westfield). According to your letter and our subsequent telephone conversation, my understanding of the facts are as follows:

1. Westfield and Toys "R" Us Mass., Inc. (TRU) have entered into a Tax Increment Financing Agreement whereby a certain parcel of property located in the Summit Lock Industrial Park will be developed to accommodate a new commercial warehouse and shipping facility.
2. Under the terms of the agreement, construction-related work can be divided into two distinct categories: 1) work performed by Westfield for all necessary infrastructure services, including a rail freight track extension, water, sewer and electrical services on public property, and 2) facility construction which will be exclusively financed by TRU using private funds on privately owned property. Other work to be privately financed by TRU includes a "railway spur" designed to feed into the main railway service currently owned by the Pioneer Valley Railway.
3. Work performed by TRU is considered private and held for the exclusive use and benefit of the same.
4. Infrastructure improvements performed by Westfield will be financed by Public Works Economic Development Funds which require payment of prevailing wages as prescribed by M.G.L. c. 149, ss. 26 and 27.

M.G.L. c. 149, s. 26 requires the Director of the Department of Labor and Workforce Development to set hourly wage rates which must be paid to "mechanics and apprentices, chauffeurs and laborers" who are employed "in the construction of public works." It is undisputable that any contractor chosen by either Westfield for infrastructure improvements or TRU for building and site development will employ "mechanics and apprentices, chauffeurs and laborers." Since it is agreed that the infrastructure-related work performed by Westfield will be subject to the prevailing wage law, the only issue is whether the building and site-related work performed by TRU can be considered "construction of public works."

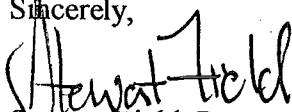
Section 27D of the above-referenced law defines "public works construction" and, consequently, confines the applicability of prevailing wage requirements to construction, additions and alterations of public buildings and public works. In this case, the building and site work performed by TRU is a private development in furtherance of private commercial pursuits. The only reference to the prevailing wage law applying to work conducted on private property is contained later in the same section where demolition of *any* structure is ordered by a public authority to preserve the public health. Such is not the case here.

Given the facts surrounding your inquiry, the construction of the private warehouse and shipping facility can not be construed as "public works construction" for the purpose of the prevailing wage law.

This determination is based on the facts contained in your November 19th letter, our subsequent conversation and is confined to this particular situation. If additional facts concerning the work in question come to your attention, please notify me immediately so that I may reassess this decision.

If you have any questions concerning this matter, do not hesitate to call me.

Sincerely,



Stewart Field, Program Manager
Mass. Div. of Occupational Safety

cc: Robert Prezioso, Deputy Director
Mass. Div. of Occupational Safety

Linda Hamel, General Counsel
Mass. Div. of Occupational Safety

Barbara Piselli, Acting, Division Chief
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