OPINION NO. 82-079

Syllabus:

The rehabilitation of private residences under programs for which federal funds have been provided pursuant to the Housing and Community Development Act of 1974, 42 U.S.C. §§5301-5320 (1976 & Supp. 1980) (amended 1981) does not constitute "construction" of a "public improvement" within the meaning of R.C. 4115.03(B), (C), and, accordingly, wages paid to workmen, laborers and mechanics performing such work are not subject to the prevailing wage statutes of Ohio.

To: Roger L. Kline, Pickaway County Prosecuting Attorney, Circleville, Ohio
By: William J. Brown, Attorney General, October 26, 1982

I have before me your request for an opinion concerning the applicability of the prevailing wage statutes of Ohio. You have asked whether workmen, mechanics and laborers employed on private residential rehabilitation projects for which federal funds have been provided pursuant to the Housing and Community Development Act of 1974, 42 U.S.C. §§5301-5320 (1976 & Supp. 1980) (amended 1981), must be paid wages at prevailing rates for work performed.

The applicable federal legislation sets forth minimum wage requirements for construction work financed through loans and grants under these development programs. However, construction work for private residential rehabilitation under the Community Development Block Grant program is expressly exempted, in part, from federal prevailing wage requirements pursuant to 42 U.S.C. §5310 (1976 & Supp. 1980), as amended by Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, §309(j), 95 Stat. 397, which provides, in pertinent part:

> All laborers and mechanics employed by contractors or subcontractors in the performance of construction work financed in whole or in part with assistance received under this chapter shall be paid wages at rates not less than those prevailing on similar construction in the locality as determined by the Secretary of Labor in accordance with the Davis-Bacon Act, as amended: Provided, That this section shall apply to the rehabilitation of residential property only if such property is designed for residential use for eight or more families.

While it was clearly not the intention of the federal sponsors of this program that homeowners be required to pay wages at prevailing rates for rehabilitation of their dwellings, Ohio's prevailing wage rate statutes do not exempt federally funded construction of public improvements unless the federal government or one of its agencies prescribes minimum wage rates to be paid to laborers and mechanics constructing such public improvements. R.C. 4115.04. Thus, the prevailing wage rate requirements of Ohio do not apply to construction work on property that is designed for residential use by eight or more families, and financed through loans or grants under the Housing and Community Development Act of 1974, since 42 U.S.C. §5310 (amended 1981) subjects such work to the minimum wage standards of the Davis-Bacon Act. It is, however, necessary to examine the Ohio statutes in order to determine whether the legislature intended that they be applied to the private residential rehabilitation of property designed for residential use by seven or fewer families. See Batchelor v. Newness, 145 Ohio St. 115, 120, 60 N.E.2d 685, 687 (1945).

The prevailing wage rate statutes are set forth under R.C. Chapter 4115. R.C. 4115.10(A) prohibits payment of less than the locally prevailing wage rates by providing, in pertinent part:

> No person, firm, corporation, or public authority that constructs a public improvement with its own forces the total overall project

> cost of which is fairly estimated to be more than four thousand dollars shall violate the wage provisions of sections 4115.03 to 4115.16 of the Revised Code, or suffer, permit, or require any employee to work for less than the rate of wages so fixed, or violate the provisions of section 4115.07 of the Revised Code. (Emphasis added.)

The dispositive inquiry is, therefore, whether the residential rehabilitation in question constitutes "construction" of a "public improvement," and thereby falls within the scope of this provision. These critical terms are defined under R.C. 4115.03. " 'Construction' means any construction, reconstruction, improvement, enlargement, alteration, repair, painting, or decorating, of any public improvement. . . ." R.C. 4115.03(B). The latter term is defined under R.C. 4115.03(C) which provides, in pertinent part:

> "Public improvement" includes all buildings, roads, streets, alleys, sewers, ditches, sewage disposal plants, water works, and all other structures or works constructed by a public authority of the state or any political subdivision thereof or by any person who, pursuant to a contract with a public authority, constructs any structure for a public authority of the state or a political subdivision thereof. (Emphasis added.)

Thus, if a rehabilitated residence is to meet the definition of a "public improvement," it must be "constructed" by or for a public authority.

Pursuant to the Housing and Community Development Act of 1974, the federal government forwards funds to the political subdivision for purposes of the residential rehabilitation program. This money is to be maintained in an account separate from the general fund or other revenues of the political subdivision. The federal moneys are then disbursed to qualified homeowners in the form of loans or outright grants which are processed through the political subdivision.[1]

It is my understanding that the relevant political subdivision is involved in the administrative processing of the federal moneys, but exercises no discretion in the awarding of the construction or rehabilitation contracts. While the subdivision solicits competitive bids for the various types of work to be performed, these bids are merely points of reference. The homeowner may select any firm or person to perform the work. The contract is drawn between the homeowner and the firm or person of his choice. The political subdivision is not a party to the contract for the reconstruction, alteration, repair, etc. of the residence. Moreover, while public purposes are served by the rehabilitation of these structures, e.g., the prevention of urban blight,[2] the increased value of the residence inures to the benefit of the homeowner. Thus, the construction, reconstruction, alteration, repair, painting or decorating is done neither by nor for a public authority of the state or a political subdivision. In these circumstances, it cannot be said that the residential rehabilitation constitutes "construction" of a "public improvement" within the meaning of R.C. 4115.03(B), (C). I therefore conclude that the prevailing wage statutes set forth under R.C. Chapter 4115 do not apply to laborers, workmen, and mechanics engaged in private residential rehabilitation through programs funded pursuant to the Housing and Community Development Act of 1974.

Based on the foregoing, it is my opinion, and you are advised that, the rehabilitation of private residences under programs for which federal funds have

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[1]A thorough discussion of the administration of grant and loan programs for private residential rehabilitation under this Act is provided in 1977 Op. Att'y Gen. No. 77-049.

[2]The legislative history of recent amendments to the Community Development Block Grant program legislation includes this among a number of public objectives served by the residential rehabilitation program. S. Rep. No. 97-139, 97th Cong., 1st Sess. 227 (1981), reprinted in [1981] U.S. Code Cong. & Ad. News 396, 523. See also State ex rel. Bruestle v. Rich, 159 Ohio St. 13, 110 N.E.2d 778, 780 (1953) (syllabus, paragraph 1).

been provided pursuant to the Housing and Community Development Act of 1974, 42 U.S.C. §§5301-5320 (1976 & Supp. 1980) (amended 1981) does not constitute "construction" of a "public improvement" within the meaning of R.C. 4115.03(B), (C), and, accordingly, wages paid to workmen, laborers and mechanics performing such work are not subject to the prevailing wage statutes of Ohio.