OPINION NO. 87-028

Syllabus:

A private contractor who, pursuant to a contract with a municipality, undertakes the demolition of dilapidated or abandoned houses, the cost of which is paid for with federal funds provided under the Housing and Community Development Act of 1974, 42 U.S.C. §§5301-5320 (1983 and Supp. 1987), is required to comply with the provisions of the prevailing wage rate law set forth in R.C. 4115.03-.16, since such demolition work is a "public improvement," as defined in R.C. 4115.03(C), and the federal government has not prescribed predetermined minimum wages for such work. (1982 Op. Att'y Gen. No. 82-079, distinguished).

To: Lynn C. Slaby, Summit County Prosecuting Attorney, Akron, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, May 22, 1987

You have requested my opinion regarding the application of the Ohio prevailing wage rate law to a private contractor who performs demolition work for a municipality. Specifically, you wish to know whether a contractor who razes dilapidated houses pursuant to a contract with a municipality, the cost of which is paid for with federal funds exempted from the terms of the federal prevailing wage rate law, must comply with the prevailing wage rate provisions set forth in R.C. Chapter 4115. when the municipality does not intend to undertake new construction on the property following the demolition.

According to information furnished a member of my staff by the municipality in question, federal funding for the demolition of deteriorated and dilapidated housing within the city is provided pursuant to the Housing and Community Development Act of 1974, 42 U.S.C. §§5301-5320 (1983 and Supp. 1987), which states, in part, that federal assistance shall be provided to local governments for a wide variety of community development activities, including the "elimination of slums and blight and the prevention of blighting influences and the deterioration of property," 42 U.S.C. §5301(c)(1), and the "clearance, demolition, removal, and rehabilitation...of buildings and improvements," 42 U.S.C. §5305(a)(4). Demolition and rehabilitation of certain residential property under the Act is expressly exempted from federal prevailing wage rate requirements pursuant to 42 U.S.C. §5310.[1] In the present situation, the contractor is actually paid for his work with

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[1] 42 U.S.C. §5310 states, in pertinent part, as follows:

> All laborers and mechanics employed by contractors or subcontractors in the performance

funds belonging to, and originating with, the municipality. Thereafter, the municipality receives reimbursement for such payments directly from the Department of Housing and Urban Development pursuant to 42 U.S.C. §5306 (allocation and distribution of funds). The municipality has further indicated that, in some instances, the property upon which such demolition takes place is owned by private individuals, and in other instances it is owned by the city itself. In each instance, however, only the municipality and the private contractor are parties to the agreement pertaining to the demolition work.

R.C. 4115.10(A) prohibits the violation of the prevailing wage rate provisions of R.C. 4115.03-.16 by any "person, firm, corporation, or public authority that constructs a public improvement," the cost of which is fairly estimated to be more than four thousand dollars. See R.C. 4115.04 (Department of Industrial Relations shall determine the prevailing rate of wages for the class of work called for by the public improvement); R.C. 4115.05 ("[e]very contract for a public work shall contain a provision that each laborer, workman, or mechanic, employed by such contractor, subcontractor, or other person about or upon such public work, shall be paid the prevailing rate of wages provided in this section"). The terms, "construction" and "public improvement," as they are used in R.C. 4115.03-.16, are further defined in R.C. 4115.03(B) and (C) as follows:

> (B) "Construction" means any construction, reconstruction, improvement, enlargement, alteration, repair, painting, or decorating, of any public improvement the total overall project cost of which is fairly estimated to be more than four thousand dollars and performed by other than full-time employees who have completed their probationary periods in the classified service of a public authority.
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> (C) "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

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> 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 (40 U.S.C. 276a-276a-5): 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. (Emphasis added.)

The foregoing exemption from the federal prevailing wage rate provisions in the case of rehabilitation of residential property designed for use by fewer than eight families, however, does not extend to Ohio's prevailing wage rate law since R.C. 4115.04 expressly provides for an exemption from Ohio's law only if the work in question is, in fact, covered by prevailing wage rate requirements imposed by federal law. See 1982 Op. Att'y Gen. No. 82-079 at 2-223.

> 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. When a public authority rents or leases a newly constructed structure within six months after completion of such construction, all work performed on such structure to suit it for occupancy by a public authority, shall be a "public improvement" as defined herein.

See also R.C. 4115.03(A)(defining "[p]ublic authority," in part, as any "officer, board, or commission of the state, or any political subdivision of the state, authorized to enter into a contract for the construction of a public improvement...or any institution supported in whole or in part by public funds"). Thus, with respect to the question posed in your letter, I must determine whether the demolition of residential housing by a private contractor constitutes "construction" of a "public improvement," as those terms are defined in R.C. 4115.03. With respect to the latter term, such construction must be "pursuant to a contract with a public authority," and undertaken "for a public authority."

The term, "construction," as it is defined in R.C. 4115.03(B), encompasses several different types of activities that may be undertaken with respect to an existing or proposed public improvement. In this regard, R.C. 4115.03(B) includes within its definition not only the initial construction of a public improvement, but also any "reconstruction, improvement, enlargement, alteration, repair, painting, or decorating" thereof. Consonant therewith, it has been stated in prior Attorney General opinions that the language of R.C. 4115.03(B) contemplates any activity that results in a major change in the form or overall physical structure of a particular building, structure, or other property. See 1979 Op. Att'y Gen. No. 79-046 at 2-148; 1977 Op. Att'y Gen. No. 77-076 at 2-266; 1976 Op. Att'y Gen. No. 76-041 at 2-142; 1971 Op. Att'y Gen. No. 71-054 at 2-186. Thus, for example, the following activities have been found to fall within the purview of R.C. 4115.03(B): the reclamation of strip mines, Op. No. 79-046; the installation of computers, security systems, and similar equipment, Op. No. 77-076; the removal of turbo-generators and related equipment from a municipal building, Op. No. 76-041; and the trimming and removal of trees along the streets and highways of a city, Op. No. 71-054. Insofar as the demolition of a house results in a major change in both the physical structure itself and the property upon which it is situated, I conclude that such demolition is included within the scope of the term, "construction," as defined in R.C. 4115.03(B).

I must next determine whether the demolition of residential housing, as described in your letter, constitutes a "public improvement", as defined in R.C. 4115.03(C). In order for such demolition to come within the definition of a "public improvement" set forth in R.C. 4115.03(C), it must be undertaken "pursuant to a contract with a public authority." In this case, the demolition is, in fact, the subject of a contract entered into between the municipality and the private contractor. In addition, such demolition must also be undertaken "for a public authority." R.C. 4115.03(C). In 1987 Op. Att'y Gen. No. 87-007 I recently noted that the following factors have often been considered by the courts and prior Attorney General opinions in determining whether particular

construction is undertaken "for a public authority" under R.C. 4115.03(C): (1) whether public funds, or their equivalent, are made available, either directly or indirectly, by a public authority for the purpose of financing in whole or in part the cost of such construction; (2) whether a public authority owns or retains a possessory interest in the real property upon which the construction takes place at the time such construction commences; and (3) whether such construction is for the benefit of a public authority. Op. No. 87-007 elaborates upon these points at ____ as follows:

> In the case of public funds, the law implicitly recognizes that construction financed with funds generated through the auspices of a public authority is undertaken for that public authority. See Harris v. Bennett, No. CV83-2131 (Lucas County Ct. App. July 26, 1985) (unreported) ("[t]he enactment of R.C. 4115.04 ensures that employees on publicly funded projects are paid the prevailing rate of wages"); Evans v. MMT, Piqua, Ohio Venture Project, No. 83CA45 (Miami County Ct. App. March 1, 1984) (unreported) ("the prevailing wage law reflects a lawful exercise of the state's spending power"). See generally State ex rel. McClure v. Hagerman, 155 Ohio St. 320, 98 N.E.2d 835 (1951) (municipal funds may only be spent for municipal purposes). Thus, for example, the prevailing wage rate law is, in a variety of instances, made applicable to construction that is financed by the proceeds of bonds issued by or through a public authority, or loans therefrom. See, e.g., R.C. 122.452 (loans by the Department of Development to a political subdivision of the state for the construction of various public improvements may be made on the condition that prevailing wages are paid to laborers and workmen on such projects); R.C. 165.031 (prevailing wages shall be paid on projects funded by the issuance of industrial development bonds); R.C. 1551.13 (grants by the Department of Development for the construction of energy resource development facilities may be made on condition that prevailing wages are paid in connection with such construction). See also 1984 Op. Att'y Gen. No. 84-035 (a facility constructed for a county agricultural society, the purchase or lease price of which is paid wholly or partly with public funds, is a "public improvement" within the meaning of R.C. 4115.03(C)); 1984 Op. Att'y Gen. No. 84-010 (the provisions of the prevailing wage rate law apply to projects funded in whole or in part through the issuance of hospital revenue bonds pursuant to R.C. Chapter 140); 1982 Op. Att'y Gen. No. 82-096 (the provisions of the prevailing wage rate law apply to projects funded by the issuance of industrial development bonds pursuant to R.C. Chapter 165); 1981 Op. Att'y Gen. No. 81-076.
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> Construction undertaken upon land that a public authority owns or in which it has a possessory interest at the time such construction commences would also appear to indicate that, as a general matter, such construction is for the public authority. See Op. No. 84-035 at 2-106, n.1 ("the manner in which a county agricultural society controls property upon which the construction will be undertaken, whether by ownership [or] lease...does not affect this analysis

regarding the applicability of the prevailing wage laws"). See generally 1976 Op. Att'y Gen. No. 76-041. Finally, construction that inures to the benefit of a public authority would also appear to be for a public authority. See 1982 Op. Att'y Gen. No. 82-079.

Applying the foregoing factors, I conclude that the demolition of residential housing described in your letter is, in this instance, undertaken "for a public authority." According to your letter, municipal funds, although later reimbursed by the federal government, will be used by the municipality to pay for the cost of demolishing the dilapidated houses. Further, in certain instances, the municipality does own the land upon which those houses that are to be demolished are situated. With respect to the third factor, the municipality realizes a substantial benefit from the removal of houses that have become seriously deteriorated, or that have been abandoned by the owners thereof. Abandoned and deteriorated houses pose a significant threat to the health, safety, and general welfare of both the residents of the immediate neighborhood and the larger surrounding community. Such housing, for example, often constitutes a serious fire hazard and a public nuisance that endanger the lives and property of nearby residents, which may result in the expenditure of valuable municipal firefighting resources. In addition, abandoned and dilapidated housing is aesthetically displeasing, and often contributes to the lowering of overall neighborhood property values, which, in turn, may hasten the onset of urban blight and the deterioration of the entire neighborhood. Finally, in the absence of such demolition, the construction of new homes that are safe and sanitary will be delayed indefinitely. Thus, in this case, the timely removal of dilapidated and abandoned houses significantly benefits the municipality in a variety of ways.

In these circumstances, therefore, the demolition of dilapidated or abandoned houses constitutes a "public improvement," as defined in R.C. 4115.03(C), since it is undertaken "for a public authority." Thus, a private contractor who performs such demolition work for a municipality is required to comply with the provisions of the prevailing wage rate law set forth in R.C. 4115.03-.16.[2]

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[2] I further find that this conclusion is, upon the facts presented, compatible with the reasoning and result of 1982 Op. Att'y Gen. No. 82-079. In Op. No. 82-079 my predecessor concluded that the rehabilitation of private residences for which federal funds had been provided pursuant to the Housing and Community Development Act of 1974 did not constitute "construction" of a "public improvement" within the meaning of R.C. 4115.03(B) and R.C. 4115.03(C) respectively. In reaching this conclusion the opinion noted that the relevant political subdivision exercised no discretion in awarding the home rehabilitation contracts. Rather, the private homeowners were permitted to select any firm or person they desired to perform the required work. Op. No. 82-079 at 2-224. Further, the contract was drawn between the homeowner and the firm or person of his choice, and at no time was the political subdivision a party to the contract. Finally, the opinion found that the rehabilitation work in question inured to

Based upon the foregoing, it is my opinion, and you are advised that a private contractor who, pursuant to a contract with a municipality, undertakes the demolition of dilapidated or abandoned houses, the cost of which is paid for with federal funds provided under the Housing and Community Development Act of 1974, 42 U.S.C. §§5301-5320 (1983 and Supp. 1987), is required to comply with the provisions of the prevailing wage rate law set forth in R.C. 4115.03-.16, since such demolition work is a "public improvement," as defined in R.C. 4115.03(C), and the federal government has not prescribed predetermined minimum wages for such work. (1982 Op. Att'y Gen. No. 82-079, distinguished).

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the primary benefit of the private homeowner, whereas the incidental benefit to the political subdivision from such residential rehabilitation was deemed insufficient to conclude that the rehabilitation was being undertaken "for a public authority." Id.

Unlike the situation addressed in Op. No. 82-079, the contract for the demolition of houses is, in this case, drawn between the municipality and the private contractor, and they are the only parties to the contract. Further, the selection and hiring of the contractor to perform such work rests exclusively with the municipality. Finally, as I have already noted, the municipality realizes a substantial benefit when dilapidated and abandoned houses are demolished.