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LABOR:

Application of the Prevailing Wage Act and the Preference to Illinois Citizens Act to Projects Constructed Under The Industrial Revenue Bond Act

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Gentlemen:

I have your letter wherein you ask whether projects constructed under The Industrial Revenue Bond Act (Ill. Rev. Stat. 1977, ch. 24, par. 11-74-1 et seq.) are subject to the requirements set out in the Prevailing Wage Act (Ill. Rev. Stat. 1977, ch. 48, par. 39s-1 et seq.) and the Preference to Citizens on Public Works Projects Act (Ill. Rev. Stat. 1977, ch. 48, par. 269 et seq.).

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The Industrial Revenue Bond Act establishes a scheme whereby municipalities, through the issuance of bonds, may finance:

"(2) \* \* \* in whole or in part the cost of the acquisition, purchase, construction, reconstruction, improvement, betterment or extension of any industrial project. \* \* \*" (Ill. Rev. Stat. 1977, ch. 24, par. 11-74-4(2).)

Section 11-74-4(3) of the Act authorizes the municipality to lease the industrial project for an amount which will defray the costs of issuing the bonds and create a fund for redemption of the bonds. Title to the project remains in the municipality, which retains the power:

"(6) To sell and convey such industrial project, including without limitation the sale and conveyance thereof subject to a mortgage as provided in this Division 74, for such price and at such time as the governing body of the municipality may determine. \* \* \*" (Ill. Rev. Stat. 1977, ch. 24, par. 11-74-4(6).)

The industrial revenue bonds to be issued under the Act create no debt against the municipality (Ill. Rev. Stat. 1977, ch. 24, par. 11-74-10).

The Illinois Prevailing Wage Act (Ill. Rev. Stat. 1977, ch. 48, par. 39s-1 et seq.) requires the prevailing wage to be paid on all public works projects. Section 2 of the Act defines public works:

" \* \* \*

'Public works' means all fixed works constructed for public use by any public body, \* \* \*

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whether or not done under public supervision or direction, or paid for wholly or in part out of public funds.

\* \* \*

"

The Preference to Citizens on Public Works Act (Ill. Rev. Stat. 1977, ch. 48, par. 269 et seq.) provides in section 3 that only Illinois laborers be employed on public works projects or improvements.

The issue, as you have pointed out in your letter, is whether projects constructed under The Industrial Revenue Bond Act are public works. Since the resolution of that issue will answer your questions, it is not necessary to discuss the individual requirements of the Prevailing Wage Act and the Preference to Illinois Citizens Act in great detail.

Section 2 of the Prevailing Wage Act merely codifies the long-accepted definition of public works. (See, 1977 Ill. Att'y Gen. Op. 193.) While many public works cases have involved the expenditure of public funds, the definition provided in the Illinois Prevailing Wage Act makes it clear that the use of public funds is not a prerequisite for determining whether the Act applies. The United States Supreme Court has held that:

" \* \* \* Whether a work is public or not does not depend upon its being attached to the soil; if

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it belongs to the representative of the public it  
is public \* \* \*. (Emphasis added.)

\* \* \* " "  
(Title Guaranty & Trust Co. v. Crane Co. (1910),  
219 U.S. 24, 33.)

The ownership of a structure at the time of its construction has continued to be a significant factor in determining whether the structure is a public work. (United States v. Harrison and Grimshaw Construction Co. (1962), 305 F.2d 363.)

A municipality which is involved in an industrial development project is clearly much more than an interested bystander:

" \* \* \*  
\* \* \* The municipal authorities must enact the resolution and sign the documents to bring the project into existence \* \* \*.

\* \* \* " "  
(People ex rel. City of Salem v. McMackin (1972),  
53 Ill.2d 347, 360.)

If the Prevailing Wage Act is to have any meaning at all, the features which characterize a public work must be present from the outset, since the Prevailing Wage Act has no application to routine maintenance (Ill. Rev. Stat. 1977, ch. 48, par. 39s-2). In the situation you have described, the project is brought into existence by the municipality. It is public at its inception and the fact that the finished

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product will ultimately be operated or owned by a private enterprise has little bearing since the Prevailing Wage Act, by definition, only applies to projects which are being constructed. The project will retain its public nature as long as the municipality chooses to maintain ownership. As long as the municipality owns the project, the land remains tax exempt. (Ill. Rev. Stat. 1977, ch. 24, par. 11-74-4(7)).

The Prevailing Wage Act defines a public work as a work constructed for a public use. "Public use" as relevant to this discussion has acquired two different meanings. Public use has been taken to be synonymous with public access. If taken in this sense, it is clear that the project you have described would not be a public use. However, this meaning of that phrase could not have been intended since:

" \* \* \*

There are many State-owned facilities where the public, in the sense of the average citizen, has 'no right to enter' absent a special permission received from competent authority. \* \* \*

\* \* \*

"  
(City of Baltimore v. State Dept. of Health (1978),  
381 A.2d 1188, 1192.)

The phrase "public use" has also been employed to refer to a public purpose or public benefit. Thus, in Chicago Land Clearance Comm'n v. White (1952), 411 Ill. 310, 316, the court determined that an urban renewal plan which called

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for the sale of cleared land to private developers was proper and, quoting an earlier case, stated:

" \* \* \* 'The redevelopment of slum and blight areas, \* \* \* constitutes a public use and a public purpose, regardless of the use which may be made of the property after the redevelopment has been achieved.'

\* \* \*

"Public use" in the sense of public purpose is a prerequisite for the initiation of any governmentally sponsored project. The Illinois Supreme Court affirmed the constitutionality of The Industrial Revenue Bond Act in People ex rel. City of Salem v. McMackin (1972), 53 Ill.2d 347, where it was stated at page 355:

"

\* \* \*

\* \* \* While we acknowledge that there is a benefit to private interests in the financing of industrial projects under the Act, we hold that the principal purpose and objective of the Act is public in nature. \* \* \*

\* \* \*

"

While it is my opinion that the project such as you have described is within the plain meaning of the phrase "public work" as used in the Prevailing Wage Act, further support is found by examination of the policy for which the Prevailing Wage Act was passed:

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" \* \* \*

\* \* \* The object of the legislation in question is to insure that workmen on public projects receive the same economic benefits as workmen on projects of a similar nature by regulating the rate of pay they are to receive \* \* \*."

(City of Monmouth v. Lorenz (1963), 30 Ill.2d 60, 66.)

This consideration certainly applies in the situation you have presented. Even stronger policy considerations require application of the Preference to Illinois Citizens Act to this project, since The Industrial Development Act and the Preference to Illinois Citizens Act are directed at alleviating the same conditions:

"It is hereby determined and declared that the purpose of this Division 74 is to relieve conditions of unemployment, to aid in the rehabilitation of returning veterans, and to encourage the increase of industry within this State, thereby reducing the evils attendant upon unemployment." (Ill. Rev. Stat. 1977, ch. 24, par. 11-74-3.)

" \* \* \*

The purpose of the statute [Preference to Illinois Citizens Act] is to help Illinois residents find employment. As we noted, the possible alternative to employment on a public works project could be public welfare assistance. \* \* \*"  
(People ex rel. Holland v. Bleigh Const. Co. (1975), 61 Ill.2d 258, 272.)

I am aware that there are decisions in two States which take the position that projects such as the one you

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have described are not public works and are not subject to the prevailing wage laws. (Gregory v. City of Lewisport (Ky. 1963), 369 S.W.2d 133; Green v. City of Mt. Pleasant (Iowa 1964), 131 N.W. 2d 5.) In both of these cases, the courts only considered the intent of their legislatures with regard to industrial development acts. I believe these courts erred in failing to focus their attention on the legislative intent behind the prevailing wage law. In Illinois, it is clear that the prevailing wage law is to be applied in every situation where the project fits within the definition of a public work. There is nothing in The Industrial Revenue Bond Act which would indicate a legislative intent to exempt these projects from the requirements imposed on other public works.

In view of the preceding discussion, it is my opinion that projects constructed pursuant to The Industrial Revenue Bond Act are public works as described in the Prevailing Wage Act and the Preference to Citizens on Public Works Act. Therefore, such projects should conform to the requirements of those Acts.

Very truly yours,

A T T O R N E Y G E N E R A L