

[J-103-2001]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

PENNSYLVANIA STATE BUILDING AND : Nos. 59 & 60 MAP 2001
CONSTRUCTION TRADES COUNCIL, :
AFL-CIO, AND CENTRAL : Appeal from the Order of Commonwealth
PENNSYLVANIA BUILDING TRADES : Court entered January 11, 2001 at No.
COUNCIL, : 1079 CD 2000 reversing the Order of the
v. : Prevailing Wage Appeal Board at No.
: PWAB-1G01998
PREVAILING WAGE APPEALS BOARD, :
: 767 A.2d 605 (Pa. Cmwlth. 2001)
APPEALS OF: :
COMMONWEALTH OF PENNSYLVANIA, :
DEPARTMENT OF LABOR AND :
INDUSTRY, BUREAU OF LABOR LAW :
COMPLIANCE, INTERVENOR (At 59/01) :
and :
PENNSYLVANIA NATIONAL MUTUAL :
CASUALTY INSURANCE COMPANY, :
INTERVENOR (At 60/01) :
: ARGUED: September 11, 2001

DISSENTING OPINION

MR. JUSTICE SAYLOR

Decided: August 22, 2002

The central issue in this appeal can be framed as whether, in creating an indirect financing mechanism to encourage economic development and revitalization of urban communities, the General Assembly intended to convert otherwise private development projects into public ones for purposes of prevailing wage precepts. The administrative agencies charged with the implementation of both salient statutory schemes have concluded that the Legislature did not intend to temper the benefits of tax increment financing by implicating prevailing wage obligations that are imposed in connection with

public works. Since I believe that the agencies' interpretation, followed by the Prevailing Wage Board in this case, is a reasonable one that comports with a comprehensive assessment of the relevant enactments, I must respectfully dissent.

The core requirement of the Prevailing Wage Act, 43 P.S. §§165-1 - 165-17, is that all workers employed on "public works" must receive the prevailing wage as calculated pursuant to the enactment, see 43 P.S. §165-5; the salutary aim is to protect workers employed on public projects from substandard compensation. See generally Pennsylvania Nat'l Mut. Cas. Ins. Co. v. Commonwealth of Pa., Dep't. of Labor and Indus., Prevailing Wage Appeal Bd., 552 Pa. 385, 394, 715 A.2d 1068, 1072 (1998). As Appellant, Commonwealth, Department of Labor and Industry, Bureau of Labor Law Compliance (the "Bureau"), in particular emphasizes, the substantive requirements of the Prevailing Wage Act are directed to governmental and not private entities,¹ lending some support to Appellants' contention that the enactment simply was not intended, as a matter of general application, to govern private development projects.

Nevertheless, in alignment with the majority's analysis, it is also essential to consider, under the definition ascribed by the Legislature to the term "public work," which includes (with limitation) construction "done under contract and paid for in whole or in part

¹ See, e.g., 43 P.S. §165-3 (addressing the "specifications for every contract" to which any "public body is a party"); 43 P.S. §165-4 (describing the "duty of every public body which proposes the making of a contract for any project of public work"); 43 P.S. §165-6 (granting "the public body awarding the contract" the right to inspect the records of contractors and subcontractors); 43 P.S. §165-10(a), (b) (placing certain duties on public bodies and their officers with regard to requiring certifications of compliance with the Prevailing Wage Act); 43 P.S. §165-11(a), (c) (referring to "any public body having public work performed" and imposing certain notification duties on the "fiscal or financial officer" of "any public body"); 43 P.S. §165-12 (empowering the Secretary of Labor and Industry to direct the "public body" to terminate the contract of any person or firm found to have intentionally violated the Prevailing Wage Act).

out of the funds of a public body," 43 P.S. §165-2(5), whether tax increment financing in and of itself entails public funding for construction for purposes of the Prevailing Wage Act.

The Tax Increment Financing Act, 53 P.S. §§6930.1 - 6930.13, permits a private developer, with the cooperation of involved taxing bodies, to apply increases in real estate tax value of a qualified project site (tax increments) toward development costs, see 53 P.S. §§6930.5, 6930.6, 6930.7. By consenting to participate in a tax increment financing district, the taxing bodies agree to temporarily forego revenue increments that would otherwise result from improvements to the property. See 53 P.S. §§6930.7, 6930.9(d). The method by which the tax increments are applied to construction costs is described in the testimony as a financing "loop." A local government authority may issue tax increment bonds, the proceeds of which can be used to pay development costs, see 53 P.S. §6930.9(2); in the present case, this occurred via a loan to the project owner (a PNI subsidiary). As work progresses, the project owner must tender to the taxing bodies both the base real estate tax (the predevelopment amount), as well as the tax increment resulting from improvements. The taxing entities retain the base tax as revenues but are required to allocate and furnish the increments to the issuing authority, see 53 P.S. §6930.7, which monies can be disbursed for payment of the debt service for the bonds, see 53 P.S. §6930.9(h), thereby completing the loop. In the present case, this is essentially what occurred (albeit through the involvement of the PNI subsidiary and various trustees).

Appellants point to several features of this scheme that are markedly different from public appropriation. First, direct payment of development costs is accomplished by the project owner (as occurred here), such that, to the extent that the taxing bodies' agreement to forego potential tax increments can be viewed as public financing, this occurs in the project background. The taxing bodies' statutorily prescribed role in terms of calculation,

collection, temporary retention, and disbursement of increments is ministerial.² In conditioning prevailing wage obligations upon the payment of construction costs from public funds, Appellants argue, persuasively, that the General Assembly contemplated more direct and substantial involvement of a public body. Significantly, the financing arrangements were not structured in an effort to avoid prevailing wage obligations on an otherwise public project, cf. Lycoming County Nursing Home Ass'n, Inc. v. Department of Labor and Industry, 156 Pa. Cmwlth. 280, 289-91, 627 A.2d 238, 243-44 (1993), but as a consequence of utilization of a statutorily approved and endorsed method of facilitating private development and revitalization projects.

Further, as Appellants also emphasize, not only is the public aspect of funding indirect, but also, the source of the funds is unique and conditional. In these regards, as noted, tax increment revenues are treated separately from general revenues in that they

² As framed by the Prevailing Wage Appeals Board:

The TIF statute specifically states that taxing bodies are not entitled to funds collected under the TIF statute. Rather, the taxing bodies are entitled to receive the established base tax only for the period that the district is in existence. The TIF Act establishes that taxing authorities must pledge TIF funds to the payment of the project only or payment of the TIF bonds. The TIF funds paid by the property owner (PNRT)[, Pennsylvania National Realty Trust, the PNI subsidiary,] when taxes are paid by PNRT, are forwarded directly from the taxing body to the TIF fund trustee

. . . The taxing bodies never receive title to the TIF funds, only retaining the base tax amounts. Thus, the TIF funds used for financing the construction project never actually enter public coffers since the taxing authorities have pledged these funds elsewhere.

Pennsylvania Nat'l Mut. Cas. Ins. Co. v. Pennsylvania State Bldg. and Constr. Trades Council, AFL-CIO, PWAB-1G-1998, at 24 (April 11, 2000) (citations omitted).

are specifically allocated to debt service on tax increment financing bonds. See 53 P.S. §6930.7(a); supra note 2. Moreover, their use is distinct from a present expenditure of public monies, since the increments would not likely exist but for the agreement of the taxing bodies to temporarily forego their prospective entitlement. See 53 P.S. §6930.7(a), (b). The taxing entities receive and retain their base revenues, since the project owner remains responsible for the real estate taxes for the property as assessed prior to redevelopment. See id.³ Tax increment monies therefore may be truly sole-purpose funds, as the record bears out in this case. See, e.g., Pennsylvania Nat'l Mut. Cas. Ins., PWAB-1G-1998, FOF ¶7 (finding that "[w]ithout tax increment financing, PNI would not have remained in the city and would have relocated to a suburban location"). Additionally, as is apparent from the TIF Act, the opinion of the Prevailing Wage Appeals Board, and the testimony of record, the transaction imposes no risk to the taxing entities or any other public body. See, e.g., 53 P.S. §6930.9(h) (providing that, inter alia, "each bond or note shall contain recitals as are necessary to show that it is only so payable and that it does not constitute an indebtedness of any municipality or school district or a charge against the general taxing power thereof").⁴

³ It should be noted that taxing bodies do forego the opportunity for increased revenues in the event that the district were to be developed by others without the benefit of tax increment financing. The likelihood of such alternative development, however, is obviously part of the calculus which the taxing bodies must make in determining whether or not to cooperate in the affordance of the incentive. Moreover, this factor, in my view, is too speculative to serve as the basis for designating a project a public work.

⁴ This also is reflected in the findings of the Prevailing Wage Appeals Board:

37. No public body guaranteed is otherwise at risk should a default on the bonds occur; the sole party at risk is PNI as holder of the bonds.

38. No public body or authority guaranteed the bonds. The TIF financing statute prevents [the local government authority]

(continued...)

The substantial differences between funding via general public appropriations and tax increment financing persuade me that development accomplished by means of the latter should not be regarded as having been paid for from the funds of a public body and therefore as a "public work" for purposes of the prevailing wage enactment. Rather, in light of the unique, conditional, and directed character of the funding and the separate, salutary, incentive-based purposes involved, I believe that, had the General Assembly intended to implicate prevailing wage obligations in making tax increment financing available, it would have expressly so provided.⁵ Accord Foundation for Fair Contracting v. New Jersey State Dep't. of Labor--Wage and Hour Compliance Div., 720 A.2d 619, 625 (N.J. Super. 1998) (explaining, in light of legislative silence concerning prevailing wage obligations connected with certain remedial legislation aimed at economic revitalization: "The Legislature has apparently concluded that the goals expressed in the Fair Housing Act and the Long Term Tax Exemption Law, that is, to provide incentives to bring private developers into partnership with the government to create affordable housing in communities around the state; to improve conditions in certain run-down urban areas; and to maintain strict cost controls over such projects, take precedence over the goals of the Prevailing Wage Act.").

(...continued)

from pledging its own assets or otherwise guaranteeing such financing.

39. PNI bears the risk of taxes being lowered to the point that [its subsidiary's] tax increment payments are insufficient to cover debt service on the bonds.

Pennsylvania Nat'l Mut. Cas. Ins., PWAB-1G-1998, FOF ¶¶37-39 (citations omitted).

⁵ In this regard, in other instances in which the General Assembly has undertaken to enlarge prevailing wage coverage, it has done so by express language. See, e.g., 24 P.S. §17-1715-A(10)(iii) (requiring the boards of trustees and contractors of charter schools to abide by the Prevailing Wage Act).

Finally, it bears on my assessment that this interpretation is in alignment with the reasonable administrative judgment of the Bureau, which is charged with enforcing the Prevailing Wage Act, and the Department of Community and Economic Development, which is charged with the carrying out of the Tax Increment Financing Act.⁶ See, e.g., 34 PA. CODE §9.101(a). See generally 1 Pa.C.S. §1921(c)(8) (identifying administrative interpretations as a viable tool in ascertaining legislative intent); accord Cherry v. Pennsylvania Higher Educ. Assistance Agency, 537 Pa. 186, 188, 642 A.2d 463, 464 (1994) ("An interpretation by an agency charged with a statute's implementation is accorded great weight and will be overturned only if such a construction is clearly erroneous").

Mr. Justice Castille joins this dissenting opinion.

⁶ The agencies' positions are reflected in briefs filed in this Court and in the Commonwealth Court.