

Prevailing Wage Rate Update

In our April 28, 2009 issue of the [Reinhart Real Estate Report](#), we alerted you to recent decisions by the Labor Standards Bureau of Wisconsin's Department of Workforce Development. These decisions are viewed as expanding the reach of the Wisconsin law that requires prevailing wage rates to be paid on public works projects. The decisions extended prevailing wages to private development projects in which the developer constructs public infrastructure, such as roads, sewers or water mains, and then dedicates these improvements to the community.

Many of the questions raised in these prevailing wage rate decisions were addressed in statutory amendments contained within the most recent state budget bill. That bill contains significant revisions to Wisconsin's prevailing wage rate law.

Under the prior statute, prevailing wage rates were applicable only to public works projects for which the value of the work exceeded \$48,000 for single trade projects or \$234,000 for multi-trade projects. Beginning January 1, 2010, prevailing wage rates will apply to public works projects of \$25,000 or more.

The new statutory language also establishes that prevailing wage rates must be paid on the elements of a private development project that will be dedicated to or acquired by a county, city, village or town. The revised statute will cause prevailing wage projects to include "...a road, street, bridge, sanitary sewer, or water main project in which the completed road, street, bridge, sanitary sewer, or water main is acquired by, or dedicated to, a local governmental unit, including under §236.13(2), for ownership or maintenance by the local governmental unit." This provision means that when a private subdivision developer constructs public roads and utilities as part of their project, these elements of the project will be subject to the prevailing wage rate regulations.

Some will view this language as adding to or creating a new area of prevailing wage jurisdiction. However, language in the budget bill advises that this provision "...is intended to restate, clarify, and affirm the intent, interpretation, and enforcement..." of the prior statute. The bill goes on to state that "no expansion or other change in that intent, interpretation, or enforcement is intended by the treatment of those provisions."

The effect of this new language is to force an interpretation of the old statute so

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as to be consistent with the new statute. In other words, the governor and legislature have provided new wording by which the old law is to be interpreted. Thus, in spite of a January 1, 2010 effective date for most provisions of the new law, this apparent expansion of prevailing wage rates will apply to projects and cases which predate the adoption of the budget bill. The budget bill also created a new class of projects to which prevailing wage rates will apply. Publicly funded private construction projects are those involving the erection, construction, repair, remodeling or demolition of a private facility for which the developer, investor or owner of the project receives direct financial assistance from a county, city, village or town. Certain types of projects, including residential projects of four or fewer units or those supported by affordable housing grants, are exempt. But generally, any private project that receives \$1,000,000 or more in direct financial assistance will be required to comply with prevailing wage rates for that project.

Under this new provision, direct financial assistance is defined broadly to include moneys, made available through a grant or other agreement, that a local governmental unit directly provides or otherwise directly makes available to the developer. While this provision certainly applies to most grants or direct aid, it also includes financial assistance through blight clearance programs, tax incremental financing (TIF) and business improvement districts (BID).

Typically, violations of prevailing wage regulations are enforced when the Department of Workforce Development compels compliance by the local governmental unit. Because a project of public works is involved, albeit performed by a private developer, it is the local governmental unit who is directly responsible for ensuring prevailing wage compliance. However, the new publicly funded private construction project provisions can be enforced by the DWD or through a private right of action. The statutes authorize a \$200 per day fine, double damages (unpaid wages or overtime times two!) and an award of attorneys' fees and costs incurred in the enforcement efforts.

The provisions for publicly funded private construction projects go into effect for projects submitted for approval (such as a preliminary or final plat) after January 1, 2010. The language used to define the effective date of these provisions is somewhat ambiguous. It is possible that administrative rules may later offer better clarity as to the projects in which these provisions will actually apply.

The imposition of prevailing wage rates on private development projects has the potential to add substantial cost and administrative burden to projects previously thought to be outside the jurisdiction of these regulations. Private developers are



well advised to consult with members of [Reinhart's Real Estate Practice Area](#) for guidance.

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