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Client Alert: Ohio Supreme Court Upholds State Prohibition on Local Residency Requirements in Ohio Public Construction Projects

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In 2003, the Cleveland City Council sought to help alleviate local unemployment and poverty by ensuring that more of its capital expenditures on public projects went back into the pockets of its residents. Pursuant to the City's municipal home-rule authority under Article XVIII of the Ohio Constitution, the City enacted the Fannie M. Lewis Cleveland Resident Employment Law^[1], also known as the "Fannie Lewis Law." The Fannie Lewis Law requires public construction contracts in an amount of \$100,000 or more to include a provision mandating that city residents perform 20 percent of the total construction work hours under the contract and impose penalties if the residency requirement is not met, which can include the contractor forfeiting of up to 2.5 percent of the contract amount, the City withholding payments due the contractor, the City terminating the contract, or the City disqualifying the contractor from future bids.

In response to the Fannie Lewis Law, the Ohio General Assembly enacted Ohio Revised Code 9.75 in 2016, which prohibits a public authority from requiring a contractor for a public improvement to employ "a certain percentage of individuals who reside within the defined geographic area or service area of the public authority." The statute also prohibits bonuses or preferences to be given to contractors that meet or exceed so-called residency requirements.

The City of Cleveland challenged the statute on the grounds that the authority granted to the Ohio General Assembly did not allow it to infringe on the City's municipal home-rule authority. Both the trial court and the Eighth District Court of Appeals agreed with the City, granting and upholding, respectively, a permanent injunction on the enforcement of R.C. 9.75. The appellate court concluded that "R.C. 9.75 is no more than an attempt to preempt powers of local self-government and to restrict the contract terms between public authorities and contractors who choose to bid on local public improvement contracts."^[2]

In a 4–3 plurality decision^[3], the Ohio Supreme Court reversed the judgment of the Eighth District Court of Appeals and remanded the case to the trial court to dissolve the injunction. In the primary opinion joined by Justices French and Fischer, Justice Kennedy reasoned that “Article II, Section 34 of the Ohio Constitution is a broad grant of authority to the General Assembly to legislate for the welfare of the working people in Ohio” and that “R.C. 9.75 . . . protects all employees engaged in the construction trades from public-improvement contracts that impose conditions on employment favoring a public authority’s own residents to the detriment of other construction workers in the state.” The Kennedy opinion further concluded that “[p]rotectionist city-residency regulations affect all Ohio construction workers, because every resident of a political subdivision is disfavored by the residency restrictions imposed by another political subdivision. . . . By providing an equal opportunity for Ohioans to compete for work on public-improvement projects both inside and outside of the political subdivisions in which they reside, R.C. 9.75 provides for the comfort and general welfare of all citizens working in the construction trade.”^[4] Justice DeWine concurred in the result but disagreed with the reasoning, writing separately and noting that the legislative authority granted under Article II, Section 34 should be limited to “laws that regulate work hours, set a minimum wage, or regulate the workplace environment.” He nonetheless agreed with the result, finding that R.C. 9.75 was a lawful exercise of legislative authority and is a general law; and that the Cleveland Ordinance was an exercise of the police power, which is preempted by a general law. The dissent authored by Chief Justice O’Connor and joined by Justices Stewart and Donnelly agreed that the legislative authority granted in Article II Section 34 is limited to “laws that regulate work hours, set a minimum wage, or regulate the workplace environment,” but would hold that R.C. 9.75 is not a general law and therefore does not preempt the Cleveland Ordinance.

Contact your Vorys lawyer if you have questions about the effect this ruling may have on a project with which you are involved.

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[1] Cleveland Codified Ordinances Chapter 188.

[2] 2017-Ohio-8882, 90 N.E.3d 979, ¶24.

[3] *Cleveland v. State*, Slip Opinion No. 2019-Ohio-3820.

[4] *Id.* at ¶25.