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No. 99-CV-0184

Dept. No. 1

IN THE NINTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF DOUGLAS
BEFORE THE HONORABLE DISTRICT COURT JUDGE DAVID R. GAMBLE

-o0o-

GAIL MAXWELL, et al.,

Plaintiff,

-vs-

Writ of Mandamus or
Writ of Prohibition

DOUGLAS COUNTY REDEVELOPMENT.
AGENCY, et al.,
Defendant.

TRANSCRIPT OF PROCEEDINGS

September 8, 1999

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APPEARANCES:

For the Plaintiff: DIANNA D. HEGEDUIS,
Deputy Attorney General

For the Defense: THOMAS PERKINS.
Deputy District Attorney.

MARK A. WASSNER
Attorney at Law

SCOTT HEATON,
Attorney at Law.

TODD RUSSELL,
Attorney at Law.

Reported by JOAN WILDER, CSR 41.
Official Court Reporter

1 THE COURT: This is case number 99 - CV- 184, Gail
2 Maxwell, Acting Labor Commissioner on behalf of the office of
3 Labor Commissioner, versus Douglas County et al.. I take it
4 that we now have Mr. Johnson, is that correct?

5 MS. HEGEDUIS: That's correct, your Honor.

6 THE COURT: Show the appearance of Miss Hegenuis on
7 behalf of the State and Miss Maxwell we have here also.

8 MS. HEGEDUIS: Yes.

9 THE COURT: Mr. Perkins on behalf of Douglas County
10 and Mr. Wasser on behalf of the Redevelopment Agency.

11 Carefully placed in the second row Mr. Russell on behalf of
12 Target stores, is that correct?

13 MR. RUSSELL: That's correct.

14 THE COURT: Mr. Heaton on behalf of --

15 MR, HEATON: J.S. Devco, your Honor.

16 THE COURT: Why don't you gentlemen come up and have
17 a seat. The reason I ask you to do that because there are
18 various things pending before we get to the Petition of Writ of
19 Mandate or Writ of Prohibition in the alternative. I would
20 like to address those in the order in which they were filed.

21 If anyone needs time to organize after I tell you the
22 sequence of events, feel free to ask me. I would like to
23 address the two pending motions to strike and then the County's
24 motion to dismiss and then the petition for writ. So either
25 Mr. Heaton or Mr. Russell, are you prepared to argue your

1 motions?

2 MR, HEATON: Yes, your Honor.

3 THE COURT: Go ahead.

4 MR, HEATON: Your Honor, I represent J.S. Devco and
5 DGD Development. They have been named in this case as real
6 parties in interest. As we have indicated in our motion to
7 strike, your Honor, the relief being sought by the petitioners
8 is for mandamus or prohibition. We have simply looked at those
9 extraordinary reliefs and indicated to the Court in our motion
10 to strike that they are not appropriate in connection with the
11 action of J.S. Devco and DGD Development. Those types of
12 relief are sought in the case of prohibition for judicial
13 action. Clearly this doesn't apply to my client and mandamus,
14 again, is seeking to seek official action for an act that has
15 been left undone and not something that has already occurred,
16 which is the case here. So I don't see where the prayer for
17 relief as set forth in the petition could apply under any set
18 of circumstances to J.S. Devco or DGD.

19 THE COURT: If the writ were granted -- let's say the
20 writ of mandamus were granted, what would be the effect on
21 Devco?

22 MR. HEATON: I think that's where you get into a
23 fundamental problem, your Honor, because effectively what they
24 are seeking is to have the County or Redevelopment Agency enter
25 into an agreement with DGD and J.S. Devco, which would require

1 DGD and J.S. Devco to pay prevailing wage. What we have in the
2 petition are a number of unsupported allegations relative to
3 the status of the arrangement between the County, the
4 Redevelopment Agency and J.S. Devco and DGD Development. The
5 fact of the matter is that there is no agreement between the
6 parties. J.S. Devco and DGD have no right to tell the County
7 what improvements to put in, how much to spend on improvements
8 and when to put any improvements in. If the County chooses to
9 do something, we would have no ability to tell them otherwise.
10 We have no agreement.

11 So I think the effect of the relief being sought is
12 to force the County to enter into an agreement with DGD and
13 J.S. Devco, which I don't think the Court can order. I don't
14 think the Court can ever order parties to enter into a
15 contract.

16 As I've indicated, your Honor, to the extent that
17 there is no underlying agreement to begin with, I think you
18 start off with an improper factual basis that they have
19 presented to the Court. We don't have an agreement that the
20 Court is attempting to reform to conform to the statute that
21 they believe to be applicable. There is no agreement.

22 THE COURT: If as a matter of fact in law, I guess,
23 you owe prevailing wage, what would be the typical process by
24 which you would be forced to pay prevailing wage?

25 MR, HEATON: As to work that has been already

1 completed, there is many hundreds of thousands of dollars worth
2 of work.

3 THE COURT: Let's say you paid the people that worked
4 on it too little because the prevailing wage is higher and the
5 State sought to force you to do that. What would be the normal
6 process by which that would be accomplished?

7 MR. HEATON: Beats me, your Honor. I think you would
8 have to go track down every person that worked on the job and
9 go ahead and up their wages to the prevailing wage rate.

10 THE COURT: I don't mean that. I realize that would
11 be the end result. Legally what is the process by which an
12 employer who has failed to pay prevailing wage is forced to pay
13 prevailing wage?

14 MR. HEATON: Again, I don't know.

15 THE COURT: Miss Hegeduis.

16 MS. HEGEDUIS: When a contractor --

17 THE COURT: You will get an opportunity to argue here
18 shortly.

19 MS. HEGEDUIS: I thought you wanted an answer to
20 that.

21 THE COURT: No, not from you. I'll ask you here in a
22 couple of minutes.

23 MR, HEATON: So I don't know the answer to that, your
24 Honor. I think typically when a contractor enters into an
25 agreement with the County and they bid on a project and one of

1 the requirements is to pay prevailing wage and if you don't,
2 you are in breach of the contract and the County can get you to
3 cease and desist work until you conform to the terms of the
4 agreement. I think the problem here is that there is no
5 agreement.

6 If we're ordered to pay prevailing wage, my counter
7 argument is what are our rights under this asserted contract?
8 Do we have the right to tell the Court they have to spend three
9 and a half million? No. No. We don't have an agreement. Do
10 we have the right to tell the County when they are to spend it
11 and when it has to be completed? No. What if in this case the
12 County had only decided to spend \$500,000 versus three and a
13 half million and by virtue of spending the \$500,000 the State
14 argues we have to pay prevailing wage on a large development
15 project that ends up costing the developer two million in
16 additional dollars. Would we want the County to spend the
17 \$500,000? Of course not. The bottom line here, your Honor, is
18 we have no rights under any agreement with the County or the
19 Redevelopment Agency to make them do anything.

20 THE COURT: Miss Hegeduis says that's a subterfuge
21 and you really have an agreement and that everybody was real
22 careful not to write it down because there's no way Target
23 would have built or Devco would have developed except for the
24 arrangement for the intersections and but for the access of 395
25 and access to Jack's Valley Road.

1 MR. HEATON: I say that's false. If we ever get into
2 setting forth the facts for this Court, what the Court will see
3 the developer spent in excess of \$700,000 in moving dirt on
4 this particular project before the County ever took any action
5 to determine whether they were going to put any improvements
6 in. We spent \$700,000 in moving dirt before there was ever any
7 agreement struck with Target stores and Home Depot. Basically
8 Mr. Serpa was going to develop his property. To the extent
9 that the County chose to put in some improvements, great. But
10 we have no ability to tell them what to do. We have no right
11 to tell them what to do. There is no contract. So, you know,
12 to assert that there were discussions, that certainly happened.
13 To assert that there's some tacit, implicit agreement I think
14 is false. It's completely false. If she suggests that that
15 would give us the right under her theory to proceed under the
16 development agreement that they have appended as one of the
17 exhibits and tell the County this is what you have to do, I
18 think you will hear from the County that the County does not
19 believe they have any obligation to John Serpa or DGD to put in
20 any improvements.

21 I think the other thing that is clear as to the three
22 and a half million dollars the County has chosen to spend, they
23 have paid prevailing wage with respect to those expenditures.
24 None of that money has found its way into the developers
25 pocket. Not a nickle, not a dime. They have paid prevailing

1 wage on that portion of the project which is public
2 improvements on public land. The only agreement that the
3 developer has with the County here is to give to the County
4 access to its property in connection with putting in those
5 public improvements, not in developing the private property.

6 So, your Honor, I don't think that even if you try to
7 put these pleadings into a proper form, which I certainly don't
8 think prohibition and mandamus is, and certainly calling us
9 real parties in interest, again, I'm still unclear as to how
10 you say somebody is a real party in interest apparently in an
11 effort to bring us before the Court so any action that the
12 Court takes relative to the County is somehow binding on us.
13 That's just not properly the way that you plead these items.
14 That's not properly the way that you bring a party, such as the
15 developer, in. I mean we don't even have in this case, your
16 Honor, any proof other than unsupported allegations in the
17 petition that there's been any financial benefit to the
18 developer. There certainly hasn't been a direct benefit.
19 There's been no money into his pocket.

20 The only way you could prove indirect benefit is to
21 prove that the County improvements have benefitted that
22 property owner in some form or fashion. There is no allegation
23 that we were able to sell the property to Target and Home Depot
24 for more money than it previously could have been sold for had
25 the County not put in the improvements. In fact, if the

1 argument is that the value of the property goes up, what about
2 the guy across the highway that has nothing to do with this?
3 When he goes to develop his property is he obligated to pay
4 prevailing wage because of the improvements the County put in
5 to benefit that entire area?

6 THE COURT: The statute doesn't appear to require
7 money flowing into anybody's pocket because it talks in terms
8 of reduction in value of real property sold to you which
9 doesn't apply here. Then it also talks in terms of incentives.
10 Now, it seems to me it would be difficult to argue that the
11 incentives provided by the Redevelopment Agency or the County,
12 or whoever you want to point to, do not flow to the benefit of
13 Devco and or Target. Isn't that pretty difficult?

14 MR, HEATON: Your Honor, I'm not indicating that
15 those improvements do not have a benefit to the property. What
16 I'm suggesting is when you look at the statute, and it talks
17 about benefits in excess of a \$100,000, what is there before
18 this Court indicating that we have been benefitted in excess of
19 a \$100,000? In fact, what you will end up seeing, if we ever
20 get to the merits on the underlying basis, is the value of the
21 property sold to Target and Home Depot. They paid full value
22 but they didn't pay full value based on any increase in value
23 as a result of these increased improvements. As I already
24 indicated, Mr. Serpa started his improvements long before the
25 County took any action on this. He bet on the come basically

1 that when he started a large shopping center that, hopefully,
2 the County would see the benefit and put in some public
3 improvements. I would indicate, your Honor, that those public
4 improvements aren't just going to benefit this area. It's
5 going to benefit the entire County. I mean how far do you draw
6 the line? Do you go one mile down the road and if somebody's
7 property has increased in value because of increased traffic
8 does that person have to pay prevailing wage when they develop
9 their property? I think the point is, your Honor, is what they
10 are trying to get to in the statute is not to allow public
11 monies to be spent by a private developer and not pay
12 prevailing wage. That didn't happen here. The developer did
13 not spend public monies and not pay prevailing wage. The
14 County spent public monies and paid prevailing wage. I think
15 that's all the statute is attempting to accomplish.

16 THE COURT: Thank you. In order to avoid Miss
17 Hegeduis having to argue something twice, I'll let Mr. Russell
18 go. The two motions to strike are similar.

19 MR. RUSSELL: Thank you. Todd Russell for Target
20 Stores. Basically we would join in Mr. Heaton's argument with
21 reference to the fact that neither NRS 34.160 dealing with Writ
22 of Mandamus or 34.320, Writ of Prohibition, apply to us in this
23 particular case. We are not a governmental entity, nor by the
24 very terms are they appropriate to Target Stores.

25 But more important, I think secondly, I think it's

1 important to remember what Target's position in this particular
2 matter is. We are a third party purchaser. We came into this
3 particular matter and bought a lot from the developer. I think
4 if you take a look at NRS 279.502 by its very terms it doesn't
5 apply to Target. It provides very clearly in there it applies
6 only to the project covered by an agreement between the agency
7 and developer. We are not a party to any agreement between the
8 agency and developer. We had nothing to do with that
9 agreement. We came in and bought a lot. Further, if you read
10 it very clearly, it provides that it does not apply to any
11 future development. It doesn't specify that a year later, a
12 week later, 5 days later. It provides -- by its very terms
13 indicates that it does not apply to future development within
14 that project.

15 What's really important to look at and go back and
16 read is the legislative history in regards to this particular
17 statute because the legislators were very clear they did not
18 want it to apply to provide to projects where private funds
19 were being used. Here Target isn't using any public funds,
20 never has the benefit of any public funds, bought a lot, came
21 in bought a lot separately, bought a lot and used its own money
22 to put a building up on that particular lot. Future
23 development means you have got to give it some meaning
24 otherwise the statute has no bearing. Future development
25 clearly by those terms applies to third party lot purchasers.

1 In fact, I think if you read it, it says very clearly in the
2 legislative history it makes refer to third party lot
3 purchasers at one point in time. Chris Guirlani indicates that
4 it's not intended to apply where private funding is used.

5 THE COURT: More amazingly Jack Severs said that.

6 MR. RUSSELL: Exactly. I think the intent really is,
7 if you think about it, is if you have a project and the project
8 is out there and certain public funds or benefit is going to
9 that project and there's an agreement, it's what's covered by
10 that agreement in regards to where the public funds are going
11 that specifically prevailing wage has to be paid. Here site
12 work or improvements to the intersection, or whatever else, is
13 what's deliniated in that agreement. It does not apply when
14 you're dealing with somebody who comes in and then builds a
15 building. It would have to be some kind of future
16 understanding to anybody that comes into that particular
17 development that says, wait a minute, before you build that
18 building or anything you're covered by a specific contract
19 agreement that you have to pay prevailing wage. That is what
20 future development, future language in that statute was
21 intended to preclude. It's not intended to apply there.

22 I think looking at that, we would request that our
23 motion to strike be granted obviously on two basis: One, I
24 don't think we are a proper party here to this action for Writ
25 of Mandamus or Prohibition. Furthermore, and even more

1 important, that statute, 279.502, is not intended to apply to a
2 project that comes in and is built in this project area with
3 private funds when it's a future development within that.

4 THE COURT: I am going to ask you the same question I
5 asked Mr. Heaton. If as a matter of fact and law Target is
6 required to pay prevailing wage, I don't mean in this action
7 but if it's true that Target has to pay prevailing wage because
8 of for whatever reason, what would be the normal method?

9 MR. RUSSELL: I think there's a claim filed and you
10 go through the administrative process. The State has
11 administrative procedures whereby they can go after the
12 contractors and indicate the contractors were required as a
13 matter of law. I think it's 338. They have to go through that
14 procedure.

15 THE COURT: The Labor Commissioner is authorized by
16 that statute to call those employers who have failed to pay the
17 appropriate wage to an administrative hearing. If that
18 administrative hearing results in an order to pay, then the
19 normal rights of appeal would apply whichever way that decision
20 went and then it would get to court if it needed to eventually
21 by virtue of review of an administrative order?

22 MR. RUSSELL: Exactly. That way from that
23 standpoint, at least from a practical standpoint, arguments can
24 be made as to the amounts and everything else which obviously
25 aren't before this Court or anything else. But that is the

1 correct procedure is to go through the administrative process
2 first.

3 THE COURT: Thank you, Mr. Russell. Miss Hegeduis.

4 MS. HEGEDUIS: Everybody is standing up saying
5 unsubstantiated, unsupported allegations. If you look at the
6 draft agreements they were in almost compliance with not only
7 the letter of the law but the spirit of the law.

8 THE COURT: Miss Hegeduis, you spent many, many pages
9 talking about the agreements. Is there one?

10 MS. HEGEDUIS: Well, and that's our allegation, your
11 Honor. There was a draft agreement that was drafted between
12 the County -- the Redevelopment Agency I mean and the
13 developer. Once it was brought to their attention that
14 prevailing wage would be required, they rewrote everything.
15 They rewrote everything to circumvent the requirement of
16 prevailing wage.

17 THE COURT: What did they rewrite?

18 MS. HEGEDUIS: If you will look at the very first
19 section of my exhibit to the petition, it basically sets forth
20 their obligation which was they were going to build a
21 development and the County was going to provide the incentives,
22 as you stated the 3.5.

23 THE COURT: Miss Hegeduis, what was rewritten?
24 That's the first thing that was written. What was rewritten?

25 MS. HEGEDUIS: This actual tentative agreement.

1 THE COURT: What would contract law require for an
2 agreement to exist?

3 MS. HEGEDUIS: Say that again.

4 THE COURT: What would contract law require for an
5 agreement to exist?

6 MS. HEGEDUIS: For it to be signed.

7 THE COURT: Was it?

8 MS. HEGEDUIS: Not the tentative agreement.

9 THE COURT: Was anything signed?

10 MS. HEGEDUIS: Yes.

11 THE COURT: What?

12 MS. HEGEDUIS: In February. The Redevelopment Agency
13 entered into a contract with the County to reimburse the County
14 for certain improvements, that 3.5 million dollars.

15 THE COURT: We are on a motion to dismiss by Devco
16 and by Target. Is Target a party to any agreement?

17 MS. HEGEDUIS: No. Well, it is with Devco but all of
18 these agreements, your Honor, were written the way they were
19 written was to circumvent the requirement of prevailing wage on
20 that project.

21 THE COURT: Miss Hegeduis, throughout your points and
22 authorities in the petition and in the replies to these motions
23 to strike or responses to the motions to strike, you talk about
24 agreements being rewritten. I'm asking you for the nexus
25 between Target and Devco and either one of them, since they

1 both argued already, and the Redevelopment Agency and or the
2 County.

3 MS. HEGEDUIS: And, again, your Honor, if you will
4 just bear with me the original agreement was for everybody to
5 enter into the construction of that project. When it was
6 brought to their attention that prevailing wage would be
7 required, they then elaborated all of these other contracts to
8 put layers between the real contracting parties, which would be
9 the Redevelopment Agency and the developer.

10 THE COURT: All of what other layers? What are the
11 layers?

12 MS. HEGEDUIS: Such as the County contracting with
13 the Redevelopment Agency to pay for these certain improvements,
14 which would then pretend that the Redevelopment Agency isn't
15 paying for it but they are. That's a reimbursement agreement
16 as they classified it. In around about way the Redevelopment
17 Agency is paying incentives for that project.

18 THE COURT: What they are paying for is the
19 improvements that the County is doing, right?

20 MS. HEGEDUIS: Right, your Honor.

21 THE COURT: Those are made at prevailing wage, right?

22 MS. HEGEDUIS: The certain improvements with the road
23 construction yes.

24 THE COURT: Everything the County has done has been
25 paid at prevailing wage?

1 MS. HEGEDUIS: Yes, to my knowledge.

2 THE COURT: You talk about layers. The layers you
3 talk about is the agreement between the Redevelopment Agency
4 and the County. What other layers are you talking about?

5 MS. HEGEDUIS: The Redevelopment Agency then
6 contracted with the developer.

7 THE COURT: Where is that, ma'am?

8 MS. HEGEDUIS: Where is that? That was also attached
9 to one of the exhibits.

10 THE COURT: Is it signed or is it another proposed --

11 MS. HEGEDUIS: It was signed by the County. I don't
12 know if I have a copy signed by Mr. Serpa. They have alleged
13 in their own documents that the instrument that Devco and the
14 Redevelopment Agency only allowed them access --

15 THE COURT: The one signed last month or so, you
16 mean?

17 MS. HEGEDUIS: Yes.

18 THE COURT: Way after you filed this petition for
19 writ?

20 MS. HEGEDUIS: The copy that I have doesn't have
21 Mr. Serpa's signature on it, so I don't know when it was
22 signed.

23 THE COURT: Can someone tell me?

24 MR, HEATON: It was signed after the petition was
25 filed by Mr. Serpa.

1 THE COURT: When?

2 MR. HEATON: I think on April 3.

3 THE COURT: That's the agreement that you talk about
4 -- wait a minute. That's the agreement that you talk about as
5 allowing access?

6 MR. HEATON: Right, your Honor.

7 THE COURT: Would you tell me where that is please
8 somebody?

9 MR. HEATON: An Improvement Agreement that is
10 appended to the original petition.

11 THE COURT: I'm sorry, I have it.

12 MR. HEATON: Dated February 11, 1999. I don't have
13 the exact date that Mr. Serpa filed but it was after the
14 petition in this case was filed and shortly before I filed my
15 reply on the motion to strike.

16 MS. HEGEDUIS: But it was dated February 11 on the
17 top line, the improvement agreement.

18 THE COURT: What does that do, Miss Hegeduis?

19 MS. HEGEDUIS: Again, it shows that they are
20 redrafting their agreements to prevent the requirement of
21 prevailing wage.

22 THE COURT: This a prior draft of this.

23 MS. HEGEDUIS: You look at attached Exhibit A to the
24 petition. It is in essence the same agreement but not divided
25 up and we have that one statute that says that you cannot

1 divide up contracts to prevent the necessity of paying
2 prevailing wage. That in essence is what they have done. They
3 have all these different layers of contracts in an attempt to
4 show that no incentives were ever paid but there was.

5 THE COURT: Do any of them call for payment or
6 improvement of less than \$100,000?

7 MS. HEGEDUIS: Well, the improvement agreement I
8 don't think has any dollar amount. It's just access to the --

9 THE COURT: The argument dividing up the contract is
10 depending on 279.500, which says that they are not allowed to
11 circumvent the statute by dividing up the contract into amounts
12 of less than \$100,000 in order to avoid the prevailing wage
13 requirement?

14 MS. HEGEDUIS: Right.

15 THE COURT: Can you tell me where \$100,000 or
16 something was divided out that cost somebody \$100,000 or less?

17 MS. HEGEDUIS: It was since that contract is now
18 between the Redevelopment Agency and the County is for certain
19 improvements.

20 THE COURT: That is what you talked about first.
21 That's 3.7.

22 MS. HEGEDUIS: 3.5.

23 THE COURT: That's more than a \$100,000?

24 MS. HEGEDUIS: Right.

25 THE COURT: That doesn't avoid prevailing wage and in

1 fact it has been paid on that amount?

2 MS. HEGEDUIS: Only certain road improvements, that's
3 correct.

4 THE COURT: Is there another piece of money of less
5 than one hundred -- you have alleged in very strong language in
6 your petition things like malevolence. Show me a \$100,000 or
7 less that the County has divvied out.

8 MS. HEGEDUIS: That's it, your Honor, they
9 purposefully did not do that to defeat the statute. If you
10 will look at the original draft that they have and the agendas
11 that I have attached where they are now saying before you that
12 Devco was already spending all this money, the Douglas County
13 Redevelopment Agency agenda sheet shows that Mr. Serpa was
14 there requesting the agency to assist with these public
15 improvements and they are working with Mr. Serpa to do this.

16 Just because they did the contracts the way they did
17 doesn't excuse them. I mean they intentionally rewrote them in
18 an effort to defeat the statute. From all indications it looks
19 like they are going to be allowed to do that. The intent of
20 the statute is to assure prevailing wage of the people of this
21 County.

22 THE COURT: How does the Labor Commission collect
23 prevailing wage from those who fail to pay?

24 MS. HEGEDUIS: You take a licensed contractor to a
25 hearing. We have no statute that brings in a public body or

1 entity.

2 THE COURT: Wait. Where does it say that?

3 MS. HEGEDUIS: 338 provides --

4 THE COURT: Where? Try 090, I think.

5 MS. HEGEDUIS: A combination of 338 and 607 and 608.

6 THE COURT: What I'm looking for is language that you
7 just used about a licensed contractor. Is that contained
8 somewhere?

9 MS. HEGEDUIS: I think it's going to dove-tail into
10 607 and 608, your Honor, where we have the right to conduct a
11 hearing.

12 THE COURT: Well, 015 says the Labor Commissioner
13 shall enforce the provisions of 338.010 to 338.130 inclusive. ,
14 "When informed of violations thereof," which happened in this
15 case according to your petition,, "The Labor Commissioner may
16 hold hearings on and assess fines for violations of those
17 provisions and shall report those violations to the District
18 Attorney of the County in which the violations occurred."

19 Does that address who maybe brought in? Maybe
20 Mr. Johnson or Miss Maxwell can help. Is there some statute
21 that limits your power to collect fees or collect prevailing
22 wage or fine? Is it limited to licensed contractors some
23 place?

24 MS. MAXWELL: It would have been someone who is doing
25 a payroll, the contractor, the people that are putting the

1 employees out on the site.

2 THE COURT: Miss Hegeduis says licensed contractors.
3 Does that appear in the statute?

4 MS. MAXWELL: I don't recall.

5 THE COURT: Does anything in the statute prohibit --
6 Miss Hegeduis, does anything in the statute prohibit the Labor
7 Commissioner from holding hearings and determining whether
8 Douglas County or the Redevelopment Agency should or Target or
9 Devco should pay prevailing wage on a particular job?

10 MS. HEGEDUIS: I don't know what remedy we would
11 have. If we found a valid way to find that a worker is not
12 receiving prevailing wage, we can require the awarding body to
13 withhold money from that contractor for the payment of that
14 worker. If we are upheld that we did find a contractor in
15 violation, then the penalty is he barred from getting or
16 awarding or receiving I mean, excuse me, a Public Works
17 project. How would that apply to any kind of lawsuit against
18 Devco or the County? How can you debar them or how can you
19 have them retain money against themselves? My penalties don't
20 really address an award in body. It's more towards the
21 contractor.

22 THE COURT: Right. In this case that would be Serpa,
23 right?

24 MS. HEGEDUIS: Or Target.

25 THE COURT: Has that happened?

1 MS. HEGEDUIS: Well, right now we don't have a clear
2 -- they are saying prevailing wage is not required. We are
3 waiting for a determination whether or not the contract should
4 have required prevailing wage to be entered.

5 THE COURT: Whose decision is that in the first
6 instance?

7 MS. HEGEDUIS: Well, as of the time being it's not
8 considered a public works project, so we went to you. It would
9 seem sort of unnecessary to do an administrative hearing right
10 at the moment because it would be just a judicial waste of time
11 and energy to go through that. We don't have a statute.
12 There's nothing in here that says I can bring an awarding body
13 before an administrative body.

14 THE COURT: What do you mean awarding body?

15 MS. HEGEDUIS: Such as a County or a School District.

16 THE COURT: What do they award?

17 MS. HEGEDUIS: What are they awarding? The
18 construction for the projects.

19 THE COURT: What awards did the County make; to whom?

20 MS. HEGEDUIS: To Granite, I believe, is one of the
21 contractors out there.

22 THE COURT: They are being paid prevailing wage.

23 MS. HEGEDUIS: The only ones at issue is Target and I
24 guess the Home Depot store. They are not future projects.
25 They are right now projects.

1 THE COURT: Before we get to the future projects
2 issue, I'm looking to see whether -- one of the claims of the
3 other folks in this case is that the administrative remedies
4 were not complied with before bringing the Writ. Right now at
5 the moment I am addressing directly whether the Writ is proper
6 as it has been filed against these people that you call real
7 parties in interest. My question to you is the same one I
8 asked these two. What would be the normal process if in fact
9 Target or Devco or DGD or Serpa owe prevailing wage? What
10 would be the process by which the Labor Commissioner is
11 empowered to collect that? There is one, isn't that correct?

12 MS. HEGEDUIS: If are you a contractor and you are
13 not paying prevailing wage, yes, we go to administrative
14 hearing. I don't believe Target is the contractor. They have
15 actually hired a construction company to be the contractor.

16 THE COURT: Are they paying prevailing wage?

17 MS. HEGEDUIS: They have not.

18 THE COURT: Have you called them in for
19 administrative hearing?

20 MS. HEGEDUIS: No, we have not.

21 THE COURT: Why not?

22 MS. HEGEDUIS: Because they are not a contractor.
23 Number 1, we don't have a determination by you, your Honor,
24 that it is a public works project.

25 THE COURT: Miss Maxwell, I can't let you do that,

1 I'm sorry. You only get to talk when I say you get to talk. I
2 realize that doesn't seem very fair.

3 MS. HEGEDUIS: We just don't have a power. None of
4 our penalties address anything to do with a Target type store
5 or a developer. It's the contractor.

6 THE COURT: Let me go to the issue of the
7 extraordinary remedies of Writ of Mandamus and Writ of
8 Prohibition. Can you point me to a case where Writ of Mandamus
9 was sought and granted either at the trial court level or at
10 the appellate level against a private party, non public entity?

11 MS. HEGEDUIS: No. Because it does pertain to an
12 office, station or trust. That's why I didn't name them as a
13 respondent. I named them as real parties of interest because
14 the original contracts required them to have certain remedies
15 and rights.

16 THE COURT: The original unsigned contract?

17 MS. HEGEDUIS: The original draft.

18 THE COURT: Okay. Let's go to the Writ of
19 Prohibition for a minute. Can you point me to a petition for
20 Writ of Prohibition that has been granted either at the trial
21 court level or on appeal against a private entity?

22 MS. HEGEDUIS: No, I cannot, your Honor.

23 THE COURT: Let me ask you where you got -- how it
24 came to be that you decided to name them as something called
25 real parties in interest?

1 MS. HEGEDUIS: Because they were parties to the
2 original agreement, Devco was.

3 THE COURT: Miss Hegeduis, what original agreement?

4 MS. HEGEDUIS: The draft agreement, if you would like
5 for me to refer to it that way.

6 THE COURT: How can you be a party to an agreement
7 that is not signed?

8 MS. HEGEDUIS: Your Honor, we have alleged that shows
9 their true intent. As I pointed out in my paperwork, they have
10 never denied that was what their true intent was to in exchange
11 for these incentives to build a shopping center there. They
12 have never denied that, your Honor. They have skirted the
13 issue but they have never denied that. The way they are trying
14 to get away from paying that prevailing wage is, again, the
15 different layers of the agreements.

16 THE COURT: The things we put in pleadings and
17 documents we file with the Court have specific meaning. Would
18 you agree with me about that?

19 MS. HEGEDUIS: That's correct.

20 THE COURT: In your points and authorities, you
21 allege that rule 17 of the NRCP is the basis for which you
22 named something called real parties in interest. Do you have
23 that rule there with you?

24 MS. HEGEDUIS: I don't, your Honor.

25 THE COURT: That rules says in pertinent part that

1 lawsuits and petitions for writ or filings with the Court maybe
2 -- must be prosecuted in the name of the real party in
3 interest. Can you point me to any authority in that rule or
4 anywhere else where anybody has ever been named as a party
5 defendant or respondent or the other end of any lawsuit that
6 was called a real party in interest?

7 MS. HEGEDUIS: Then if they are not real parties of
8 interest in this case, which they are because they would be the
9 ones effected by any ultimate decision, then the proper
10 classification should be third party defendants. Nobody would
11 have brought them in -- I could have added them as respondents
12 but I realize the Writ will not be addressed to them. The Writ
13 will be addressed to the County and the Redevelopment Agency.
14 But they are the real parties of interest because they will be
15 effected.

16 THE COURT: Your remedy against them is what?

17 MS. HEGEDUIS: The remedy I am seeking is if the
18 County or the Redevelopment Agency requires prevailing wage,
19 then they will be required to pay prevailing wage on this first
20 wave of construction out there.

21 THE COURT: How does the County do that?

22 MS. HEGEDUIS: How does the County do that?

23 THE COURT: Let's say I grant the petition for writ
24 and I say County I require Devco, Target and Serpa and DGD to
25 pay prevailing wage on the entire building of the store or