

OPINION NO. 87-070**Syllabus:**

Once the plans and specifications for a county road improvement project have been selected in accordance with the procedure established by R.C. 5555.06 and .07, and the board of county commissioners has entered into a contract for such improvement under R.C. 5555.61, the county engineer may neither direct the contractor to deviate from the plans and specifications for the project nor order work on the project to be stopped merely because the county engineer disagrees with the specifications selected in accordance with R.C. 5555.06 and .07 (1919 Op. Att'y Gen. No. 510, p. 862, overruled).

To: Lynn Alan Grimshaw, Scioto County Prosecuting Attorney, Portsmouth, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, September 25, 1987

I have before me your request for an opinion in which you ask "whether or not the county engineer can order a firm to stop paving various county roads when such firm has entered into a contract with the board of county commissioners for such work."¹ You explain further that "[t]he board wishes the work to continue since it is satisfied with the project. The engineer wishes the project to stop since he disagrees with the board's decision to use only two inches of asphalt instead of the three inches he believes is necessary."

The answer to your question turns upon the issue of whether the county engineer has the statutory authority to order a contractor to deviate from the plans and specifications of a county road improvement contract entered into by the board of county commissioners, or to order the contractor to cease performance of work on the contract if he fails to so deviate

¹ I assume for purposes of this opinion that the resurfacing project is not to be undertaken by force account as authorized by R.C. 5543.19, since, under R.C. 5543.19(C), the term "force account" refers to instances where the county engineer acts as the general contractor. See 1964 Op. Att'y Gen. No. 1183, p. 2-240 (if the estimated cost per mile of a resurfacing project does not exceed the minimum established in R.C. 5543.19(A) the board of county commissioners may, at their option, proceed under force account or a contract let under R.C. 5555.61). Since you indicate that the board of county commissioners has entered into a contract with a private firm, I assume that the board has decided not to proceed under force account.

on demand of the county engineer. In order to consider that question in its proper context, I first examine the manner in which the plans and specifications for county road repavement contracts are prepared, and the authority under which such contracts are awarded. Contracts for the repavement of county roads are governed by R.C. Chapter 5555.² The process is initiated by a finding of the county commissioners, made under R.C. 5555.06, that such work is necessary. R.C. 5555.06 provides:

The board of county commissioners may by resolution adopted by a unanimous vote find that the public convenience and welfare require the improving of any public road or part thereof by grading, draining, paving, straightening, or widening such road and constructing or reconstructing any bridges and culverts necessary for such improvement. The resolution shall fix the route and termini of such improvement, and shall apportion the cost thereof, which apportionment may be made upon different bases for various portions of any road to be improved. Such cost shall be apportioned and paid in any one of the methods provided by section 5555.41 of the Revised Code.

The board shall in said resolution order the county engineer to prepare the necessary surveys, plans, profiles, cross sections, estimates of cost, and specifications for the improvement, together with an estimated assessment, based upon the estimates of cost, upon the real estate to be charged therewith, of such part of the estimated damages and expenses of such improvement as are to be specifically assessed. Such estimated assessment shall be according to the benefits which will result to such real estate. In making such estimated assessment, the engineer may take into consideration any previous special assessment made upon such real estate for road improvements.

The board may order the engineer to make alternate surveys, plans, profiles, cross sections, estimates, and specifications, providing therein for different widths of roadway, different materials, or other similar variations. The engineer may, without instructions from the board, prepare and submit to the board alternate surveys, plans, profiles, cross

² I am mindful that R.C. Chapter 5553 also speaks to county road improvements. However, 5553.01 defines "improvement," for purposes of R.C. Chapter 5553, as "any location, establishment, alteration, widening, straightening, vacation, or change in direction of a public road." Although no similar definition exists in R.C. Chapter 5555, R.C. 5555.02 authorizes a board of county commissioners to, *inter alia*, repair and improve existing roads by resurfacing or macadamizing them. Similarly, R.C. 5555.06 authorizes a board of county commissioners to pave public roads. Since a repavement contract does not involve the "location, establishment, alteration, widening, straightening, vacation, or change in direction" of a county road, I do not find R.C. Chapter 5553 to be applicable, and I therefore limit my discussion to R.C. Chapter 5555.

sections, estimates, and specifications, providing therein for different widths of roadway, different materials, or other similar variations.

If alternate surveys, plans, profiles, cross sections, estimates, and specifications are approved by the board of county commissioners or submitted by the engineer on his own motion, the board of county commissioners and the engineer acting together shall constitute a board for the selection of the particular plan, profile, cross sections, estimate, and specifications to be used and shall, after the opening of bids, determine by a majority vote of such board which of said surveys, plans, profiles, cross sections, estimates, and specifications shall be finally adopted for the improvement.

After the passage of the resolution provided for in this section, all subsequent proceedings of the board of county commissioners with respect to said improvement may be had by a majority vote. (Emphasis added.)

R.C. 5555.06 thus establishes a procedure for development and approval of the plans for a county road improvement project. Under R.C. 5555.06 the board of county commissioners may order the engineer to submit alternative plans to be reviewed in accordance with the procedure established by that statute. The county engineer may also submit alternatives on his own motion. Where more than one proposal is made, the county commissioners and the county engineer, sitting as a single board, select the plans and specifications to be used for the specific improvement project.

Once the resolution described in R.C. 5555.06 has been adopted, R.C. 5555.07 requires that the commissioners notify the public of the proposed improvement, and allow for a hearing so that objections may be voiced. R.C. 5555.07 provides:

The county engineer shall prepare and file with the board of county commissioners, by the time fixed therefor by the board, copies of the surveys, plans, profiles, cross sections, estimates of costs, and specifications for the improvement and estimated assessments upon lands benefited thereby. Thereupon such board shall file such copies in its office for the inspection and examination of all persons interested. The board shall publish in a newspaper published and of general circulation in the county, or if no newspaper is published in the county then in a newspaper having general circulation in the county, for the period of two weeks, notice that a resolution has been adopted providing for said improvement, and that copies of the surveys, plans, profiles, cross sections, estimates, and specifications, together with estimated assessments upon the lands benefited by such improvement for the proportion of the cost thereof to be assessed therefor, are on file in the office of the board for the inspection of persons interested therein. Such notice shall state the time and place for hearing objections to said improvement and to such estimated assessments.

At such hearing the board may order said surveys, plans, profiles, cross sections, estimates, and specifications to be changed or modified and shall make such adjustments of the estimated assessments as

seem just to it. Thereupon the board may approve such surveys, plans, profiles, cross sections, specifications, and estimates and approve and confirm estimated assessments as made by the engineer or as modified and changed by the board. Such assessments when so approved and confirmed shall be certified to the county auditor of the county and shall thereupon become a lien upon the land charged therewith. The board may declare against said improvement. (Emphasis added.)

Both 5555.06 and 5555.07 make it clear that the county engineer may submit alternate plans, profiles, cross-sections, estimates, and specifications for proposed improvements, either as directed by the board of county commissioners or on his own motion. However, it is equally clear that final authority to select the plans and specifications for the particular road improvement project does not rest exclusively with the county engineer, but ultimately with the board of county commissioners, or a board composed of the county engineer and the county commissioners.³

Once plans and specifications for the county road improvement are selected in accordance with R.C. 5555.06 and .07, and the county commissioners have decided to proceed with the improvement, a contract may be let in accordance with R.C. 5555.61. That section provides:

After the board of county commissioners decides to proceed with the improvement, it shall do so in accordance with [the competitive bidding requirements of] sections 307.86 to 307.92 of the Revised Code. No contract for any improvement shall be awarded at a price more than ten per cent in excess of the estimated cost.

Nothing in R.C. 5555.61 indicates that a county engineer is to be given contractual authority with regard to a repavement contract. To the contrary, R.C. 5555.61 limits the contractual authority to the board of county commissioners. Under that section, the board of county commissioners has the authority to decide whether or not to proceed with the improvement, and it is the board of county commissioners that is authorized to award the contract in accordance with R.C. 307.86-.92. The language of R.C. 5555.61 thus comports with the general rule that in the absence of specific authority to the contrary only the board of county commissioners has the authority to enter

³ In reaching this conclusion, I am mindful that in 1919 Op. Att'y Gen. No. 510, p. 862, one of my predecessors concluded that under G.C. 6911, the statutory predecessor to R.C. 5555.06, the concurrence of the county engineer was required in order to change the plans and specifications for a proposed road improvement from the plans and specifications originally prepared by the county engineer. That opinion was based upon the language of the statute as it then existed. In 1927 the statute was amended to include the present scheme whereby alterations to the original plan are reviewed by a single board comprised of the board of county commissioners and the county engineer. 112 Ohio Laws 430, 488 (H.B. 67, eff. May 24, 1927). Accordingly, 1919 Op. No. 510 is hereby overruled.

into contracts on behalf of the county. Burkholder v. Lauber, 6 Ohio Misc. 152, 154, 216 N.E.2d 909, 911 (Fulton County C.P. 1965)(holding that an employee of the county engineer could not bind the county with respect to a contract for the storage of construction materials since "it is the province of the board of county commissioners to make contracts for the county, and no other officer can bind the county by contract unless by reason of some specific provision of law").

Other sections within R.C. Chapter 5555 make it clear that the board of county commissioners, rather than the county engineer, has the contractual authority to act for the county with regard to a repavement contract let under R.C. 5555.61. For example, under R.C. 5555.67 it is the board of county commissioners that is authorized to grant an extension of time for completion of a contract. Similarly, R.C. 5555.69 confers authority upon the board of county commissioners to enter into a new contract for unforeseen work. R.C. 5555.69 provides in pertinent part:

In case of an unforeseen contingency not contemplated by the contract, allowances for extra work may be made by the board of county commissioners, but it must first enter into a new contract in writing for such extra work. In all cases in which the amount of the original contract price is less than ten thousand dollars, and the amount of the estimate for such extra work exceeds five hundred dollars, section 5555.61 of the Revised Code shall apply to the letting of contracts for such extra work...If there is any new class or kind of work, the board and contractor shall agree as to the price to be paid. The contractor shall submit his bid in writing, and if the board accepts such bid it shall immediately enter its acceptance on the journal. The costs of such extra work shall be paid by the board out of any funds available therefor, and shall be charged to the cost of construction of the improvement and apportioned as the original contract price for the improvement. (Emphasis added.)

In Cleveland Trinidad Paving Co. Inc. v. Board of County Commissioners of Cuyahoga County, 15 Ohio App. 3d 66, 472 N.E.2d 753 (Cuyahoga County 1984), the court concluded that by virtue of R.C. 5555.69, the county engineer lacked authority to bind the county for payment for additional work on a road improvement contract, even though engineer's employees were aware that the contractor performed extra work and implicitly authorized its performance. By analogy, since the county engineer lacks authority to alter a contract by adding extra work, it follows that he lacks authority to compel a contractor to deviate from the specifications of the contract itself, or to order the contractor to cease work altogether upon his failure to do so. A final section of R.C. Chapter 5555 which sheds light upon the issue raised by your question is R.C. 5555.68. That section provides, in pertinent part, as follows:

If, in the opinion of the board of county commissioners, the contractor has not commenced his work within a reasonable time, does not carry such work forward with reasonable progress, is improperly performing his work, or has abandoned or failed to complete a contract entered into, the board shall make a finding to that effect, enter such finding on its

journal, and so notify the contractor in writing, and the right of the contractor to control and supervise the work shall immediately cease.

While this section is primarily directed toward terminating a contract with a contractor who has failed to perform, it clarifies further that the General Assembly intended that the board of county commissioners, and not the county engineer, was to have the contractual authority to order a contractor to cease performance on a road improvement contract let under the authority of R.C. 5555.61.

I am aware of several statutes which confer generalized authority upon the county engineer to oversee county road improvements. See R.C. 315.08 ("[t]he county engineer...shall prepare plans, specifications...for the construction, maintenance, and repair of all...roads...constructed under the authority of any board for the county"); R.C. 5543.01(A)("[t]he county engineer shall have general charge of...[c]onstruction, reconstruction, improvement, maintenance, and repair of all highways within his county, under the jurisdiction of the board of county commissioners"); R.C. 5543.09 ("[t]he county engineer shall supervise the construction, reconstruction, improvement, maintenance, and repair of the highways...under the jurisdiction of the board of county commissioners"). In considering the authority conferred upon the county engineer under R.C. 315.08 in a situation in which the county commissioners had already awarded a road improvement contract pursuant to competitive bidding requirements, my predecessor concluded, in 1972 Op. Att'y Gen. No. 72-080, at p. 2-319, that:

Where the county commissioners have awarded a contract on a road project, the county engineer may refuse to approve the payment of the contract price should he determine that the work has not been satisfactorily completed. However, as I previously stated concerning the county engineer's refusal to approve bills to be paid for the purchase of road material from a force account, the refusal of the county engineer to approve payment for unsatisfactory work under the contract must be based upon good judgment and must not be unreasonable or capricious. (Emphasis added.)

While Op. No. 72-080 does not expressly refer to R.C. 5543.01(A) or R.C. 5543.09, I find nothing in either of those sections which leads me to conclude that the county engineer is authorized to unilaterally order a contractor to cease work on a project because of the county engineer's disagreement with the asphalt specifications selected under R.C. 5555.06 and .07. To be sure, once the contract has been awarded under R.C. 5555.61, the county engineer has authority to inspect the contractor's performance to insure compliance with the contract specifications. See Op. No. 72-080; R.C. 5555.67 (referring to "inspection" of the subcontractor's work as "engineering services" performed by the county engineer). However, in comparison to the very specific procedure established by R.C. 5555.06 and .07, under which the "surveys, plans, profiles, cross sections, estimates, and specifications" for the improvement project are selected, I do not find that the general supervisory authority conferred upon the county engineer elsewhere in the Revised Code authorizes the county engineer to order a contractor to stop work on a repaving project simply because the engineer believes that the asphalt

specification selected is too thin. See generally R.C. 1.51; Cincinnati v. Thomas Soft Ice Cream, Inc., 52 Ohio St. 76, 369 N.E.2d 778 (1979)(where there is no manifest legislative intent that a general provision of the Revised Code prevail over a special provision, the special provision takes precedence).

Therefore, it is my opinion, and you are so advised, that once the plans and specifications for a county road improvement project have been selected in accordance with the procedure established by R.C. 5555.06 and .07, and the board of county commissioners has entered into a contract for such improvement under R.C. 5555.61, the county engineer may neither direct the contractor to deviate from the plans and specifications for the project nor order work on the project to be stopped merely because the county engineer disagrees with the specifications selected in accordance with R.C. 5555.06 and .07 (1919 Op. Att'y Gen. No. 510, p. 862, overruled).