

3754.

MUNICIPALITY MAY DEMAND FEE FROM BOARD OF EDUCATION FOR PUBLICATION OF NOTICES IN CONNECTION WITH PROCEEDINGS TO VACATE A STREET OR ALLEY.

SYLLABUS:

A municipality may demand a fee from the board of education for the payment of publication of notices and the necessary engineering connected with the proceedings to vacate a street or alley in connection with the purchase of a school site and the board of education may legally pay such fee.

COLUMBUS, OHIO, October 27, 1926.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—I am in receipt of your communication as follows:

“The City of Dayton has an ordinance which requires persons petitioning for the vacation of streets or alleys to pay a fee of \$25.00 before the petition is filed.

Question: May such city legally demand this fee from the city board of education, which desires to have certain streets and alleys vacated in connection with their purchase of a school site; and may the board of education legally pay such fee?”

Section 3725 of the General Code provides as follows;

“On petition by a person owning a lot in the corporation praying that a street or alley in the immediate vicinity of such lot may be vacated or narrowed, or the name thereof changed, the council of such municipality, upon hearing, and upon being satisfied that there is good cause for such change of name, vacation or narrowing, that it will not be detrimental to the general interest, and that it should be made, may declare by ordinance such street or alley vacated, narrowed, or the name thereof changed. And council may include in one ordinance the change of name, or the vacation or narrowing, of more than one street, avenue or alley.”

It will be noted that by this section power is given to council to vacate streets and alleys within the municipality but that no duty is placed upon the council to vacate streets or alleys. This is shown by the use of the word “may”.

Section 3728 of the General Code provides as follows:

“No street or alley shall be vacated or narrowed, unless notice of the pendency and prayer of the petition be given by publishing in a newspaper published or of general circulation in such municipality, for six consecutive weeks preceding action on such petition, or, where no newspaper is published in the corporation, by posting the notice in three public places therein six weeks preceding such action. Action thereon shall take place within three months after the completion of the notice.”

By this section notice shall be given of the pendency and prayer of the petition by publication, in a newspaper of general circulation for six consecutive weeks, if there is a newspaper published within the corporation. Action is taken by the council on such petition within three months after the completion of such notice.

Section 3730 of the General Code, provides for the vacation of a street or alley by the common pleas court, and Section 3731 provides that notice shall be served upon a municipality in the manner provided by law for service of summons and also for publication in a newspaper of general circulation in the county for four consecutive weeks. This manner of vacation of streets and alleys is in addition to the remedy provided by Section 3735 et seq.

Section 2 of the Ordinance No. 12335 of the city of Dayton provides as follows:

"That before filing a petition as described in Section 1 hereof, the petitioner or petitioners shall first pay to the city accountant of the city of Dayton a fee of twenty-five (\$25.00) dollars for which said accountant shall issue his receipt and note upon the petition that such fee has been paid, whereupon the petition may be filed with the clerk of the commission."

The object of Section 2 of this ordinance is to provide a manner for paying for the publication of the notice and for any engineering which is necessary for such vacation.

Nowhere in the sections of the General Code relating to the vacating of streets and alleys is any provision made for the payment of a fee to the municipality for the vacation of streets or alleys. Nor is any other manner prescribed for the payment of the necessary expenses of such vacation.

In the case of *Neihaus vs. State*, 111 Ohio St. 47, it was held that the city of Dayton could not by ordinance require the payment of a fee from the board of education for the approval of plans for the construction of school buildings and the issuing of a permit therefor. However, it will be noted that the approval of plans by the building inspection department of a municipality is required by the General Code, and the power to approve the plans is a power granted by the legislature. In the matter of the vacation of streets and alleys no duty is placed upon the municipality to vacate streets or alleys but power is granted them to vacate streets and alleys within their discretion.

It is believed that if a school board may pay for the necessary proceedings for a vacation of a street or alley that a municipality may make a charge equal to the costs of the proceedings to vacate.

Section 7620 of the General Code provides in substance that the board of education may build the necessary school houses, purchase or lease sites therefor, and make all necessary provisions for the schools under its control. The latter part of said section provides as follows:

"* * * make all other provisions necessary for the convenience and prosperity of the schools within the sub-district."

If the board of education in purchasing real estate for the erection of a school building considers that it is to the best interest of such school district to have streets and alleys upon which such property abuts vacated, it is believed that they are by this section authorized to pay the expenses of such vacation.

If the municipality did not see fit to start proceedings to vacate streets and alleys at the request of the school board it would be necessary for the school board to then make application to the common pleas court and certainly it could not be maintained that the costs of such proceedings in the common pleas court could not be collected from the school board.

As the board of education gains additional land by the vacation of the streets and alleys the board in this instance is only providing for the expenses which are necessary to secure such additional real estate.

It is believed that for this reason a charge in this instance can be distinguished from a charge such as was attempted for the approval of the plans of a school building. In that instance there was no gain to the board of education by reason of the approval of such plans by the municipality.

Certainly if the board of education attempted or sought to purchase from the municipality lands which are not owned by it for the purpose of a school building there could be no contention that the city could not make a charge for the real estate transferred. The streets and alleys of a municipality are dedicated to the public and as such are under the control of the municipality and it would seem only equitable that in relinquishing their control in lands in such streets and alleys that the board of education or other persons who gain additional real estate by such vacation should pay the costs of such proceedings.

You are therefore advised that a municipality may demand a fee from the board of education for the payment of publication of notices and the necessary engineering connected with the proceedings to vacate a street or alley in connection with the purchase of a school site and the board of education may legally pay such fee.

Respectfully,

C. C. CRABBE,

Attorney-General.

3755.

CLERK HIRE FOR UNOFFICIAL AND OFFICIAL COUNT OF AUGUST
PRIMARIES DISCUSSED.

SYLLABUS:

Clerk hire for unofficial and official count of August primaries in Montgomery County discussed. Opinion of City Solicitor of Dayton concurred in.

COLUMBUS, OHIO, October 27, 1926.

HON. ALBERT H. SCHARRER, *Prosecuting Attorney, Dayton, Ohio.*

DEAR SIR:—In your recent communication you present the following inquiry:

“The deputy state supervisors and inspectors of elections for Montgomery county have requested an opinion as to how to pay the necessary expense of clerk hire in conducting the unofficial and official count of the August primaries of this year.

They prepared vouchers for one-half of the necessary clerk hire, as provided by section 4821 of the General Code, and submitted same to the city of Dayton for payment, submitting the other half to the county commissioners. The county commissioners allowed the amount submitted to them but the city of Dayton has refused to honor the vouchers, based upon an opinion of the city solicitor, a copy of which we submit to you herewith, and which copy we request you return to our office when you will have finished with same.

Should the board of elections submit the vouchers under section 4877 or section 4821?

A perusal of the opinion of the city solicitor will give you the questions which have been raised.”

The opinion of the solicitor, a copy of which you enclosed, contains a comprehensive discussion of the law relating to the subject of your inquiry, and is as follows:

“The following is in response to your verbal request for advice concerning certain questions pertaining to payment by the city of expense of the board of elections as hereinafter indicated.

We understand from your inquiry the board of elections has prepared and submitted a number of vouchers in favor of various persons who rendered services in various