

OPINION NO. 72-080**Syllabus:**

1. The board of county commissioners must obtain approval from the county engineer of bills to be paid for the purchase of material when a road project is to be accomplished by force account.
2. The board of county commissioners may order the county engineer to prepare the necessary plans, profiles, specifications, and estimates of cost on a road project not included in his recommendations for road work to be done in the current year.
3. Where the county commissioners have awarded a contract on a road project, the county engineer may refuse to approve the estimates of payment of the contract should he determine that the work contemplated has not been satisfactorily completed pursuant to the terms of the contract.
4. The county engineer may not proceed with any project of maintenance, repair, and improvement without the approval of the board of county commissioners, unless there has been a prior resolution of appropriation adopted by the county commissioners granting expenditure for labor and materials.

5. Where the board of county commissioners hires an engineering firm without the written request of the county engineer, as required under Section 305.15, Revised Code, the contract between the county and the engineering firm is void.

6. Where sufficient funds are available, the board of county commissioners must provide emergency funds to the county engineer and failure to make such appropriation may subject the board to an action in mandamus.

7. The board of county commissioners may make cash grants to assist repair and maintenance of township roads without the county engineer's approval, but may not make cash grants for construction, reconstruction, resurfacing, or improvement of such roads.

To: Joseph T. Ferguson, Auditor of State, Office of Auditor of State, Columbus, Ohio

By: William J. Brown, Attorney General, September 19, 1972

I am in receipt of your request for my opinion, which asks the following questions:

"1. If all preliminary procedures concerning plans, profiles, specifications and estimates of cost have been accomplished for a road project and the board of county commissioners by resolution, has ordered the engineer to proceed by Force Account and reserved the right to itself to purchase materials, is the approval of the bills for the materials by the county engineer a mandatory requirement before the county commissioners can approve and order such bills paid?

"2. If the county engineer has submitted his annual report of the condition of county roads, bridges and culverts pursuant to Section 5543.02, Revised Code, together with his recommendations as to the projects to be accomplished in the current year, may the board of County Commissioners order the engineer to prepare the necessary plans, profiles, specifications, and estimates of cost on a road project not included in his recommendations for road work to be done in the current year?

"3. In the case of the project outlined in Question No. 2, and the county commissioners have awarded a contract pursuant to the competitive bidding requirements of law, may the county engineer refuse to approve the estimate of the contract thereby prohibiting the contract estimates from being paid?

"4. May the County engineer proceed with any project of maintenance, repair and improvement without prior approval of the county commissioners beyond those of an emergency nature?

"5. If the board of county commissioners hires an engineering firm under Section 305.15 Revised Code, without the written request of the county engineer, is the contract between the county and the engineering firm a legally binding agreement?

"6. Must the county commissioners provide emergency funds to county engineers pursuant to the provisions of Section 315.13, Revised Code?

"One of your predecessors in Opinion No. 758 rendered in 1933, held that such an appropriation was mandatory insofar as there are available funds for such purposes. The specific question above covers an instance in which the county engineer is of the opinion that sufficient funds are available.

"7. May the county commissioners make a cash grant to assist township road programs under Section 5535.08, Revised Code, without such grants being approved by the county engineer?"

"Force account", mentioned in your questions, is defined in Section 5543.19 (C), Revised Code, as follows:

"'Force account', as used in this section means that the county engineer will act as contractor, using labor employed by him using material and equipment either owned by the county or leased or purchased in compliance with sections 307.86 to 307.92, inclusive, of the Revised Code and excludes subcontracting any part of such work unless done pursuant to sections 307.86 to 307.92, inclusive, of the Revised Code."

Sections 307.86 to 307.92, Revised Code, established the procedure for competitive bidding. The county engineer may proceed by force account whenever he is not required to use competitive bidding. Under Section 5543.19 (A), Revised Code, he may construct or reconstruct roads by force account if the total estimated cost of the work does not exceed \$10,000 per mile; under Section 5543.19 (C), relating to bridges, when the total estimated cost does not exceed \$40,000.

In order to avoid confusion, your questions will be separately discussed in the order presented. Your first inquiry is substantially as follows:

Where the board of county commissioners has reserved the right to itself to purchase materials, is the approval of the bills for the

materials by the county engineer a mandatory requirement before the county commissioners can approve and order such bills paid?

Section 5543.02, Revised Code, reads, in part, as follows:

"The [county] engineer shall approve all estimates which are paid from county funds for the construction, improvement, maintenance, and repair of roads and bridges by the county."

One of my predecessors stated, in Opinion No. 4767, Opinions of the Attorney General for 1935, that "under section 7187, General Code [now Section 5543.02], all bills for labor or for material purchased by the board of county commissioners must be approved by the county surveyor * * *." The term county surveyor was changed to county engineer in 1935, and the terms as used herein are synonymous.

Opinion No. 4767, supra, was based, in part, on Opinion No. 34, Opinions of the Attorney General for 1933, which provides as follows:

"Bills or estimates of cost for materials furnished by a contractor pursuant to a contract with the county for the construction of a road, must be presented to and approved by the county surveyor as required by Section 7187, General Code, before the same may be paid by the county auditor."

In reaching this conclusion my predecessor stated:

"I am not unmindful of the fact that section 7203, General Code [Section 5549.03, Revised Code], authorizes, among other things, the purchase by the county commissioners from any public institution within the state of any road material, etc., quarried, mined, etc., by such institution. However, section 7187, General Code [Section 5543.02, supra], is clear in its import and before any estimate may be paid from county funds, the same must be approved by the county surveyor. Of course, if such consent is withheld capriciously, adequate legal remedy is afforded through sections 12283, et seq. [Sections 2731.01, Revised Code, et seq.] and section 2790, General Code [Section 315.06, Revised Code]."

Section 2731.01, Revised Code, defines mandamus; Section 315.06, Revised Code, provides for the removal of a county engineer by civil action.

The Opinions of my predecessors involved circumstances in which the engineer was proceeding by force account authority without reservations stipulated by the board. Your request concerns a similar situation where, in addition, the board has specifically reserved to itself the right to purchase materials. However, the language of Section 5543.02, can only be interpreted as making approval by the county engineer mandatory before the county commissioners may expend any county funds for the payment of such bills. The reser-

vation of power by the board cannot alter statutory requirements. These requirements aid in guaranteeing full performance on a contract for work or materials since the engineer may withhold payment to the contractor until the work has been adequately completed or the materials delivered according to the specifications. It must be emphasized, however, that the engineer's discretion regarding this matter must be exercised within principles of sound judgment and reason, with any unreasonable or capricious withholding of consent subjecting the engineer to legal sanctions under Sections 2731.01, et seq., and 315.06, Revised Code.

In conclusion, all bills for labor or materials must receive the county engineer's approval in order to comply with Section 5543.02.

Your second inquiry reads as follows:

"* * * [M]ay the board of county commissioners order the engineer to prepare the necessary plans, profiles, specifications and estimates of cost on a road project not included in his recommendations for road work to be done in the current year?"

Section 315.08, Revised Code, dealing with the duties of the county engineer, states, in part, as follows:

"The county engineer shall perform for the county all duties authorized or declared by law to be done by a civil engineer or surveyor. He shall prepare all plans, specifications, details, estimate of cost, and submit forms of contracts for the construction, maintenance and repair of all bridges, culverts, roads, drains, ditches, roads on county fairgrounds, and other public improvements, except buildings, constructed under the authority of any board within and for the county * * *."
(Emphasis added.)

"The word 'shall' is usually interpreted to make the provision in which it is contained mandatory * * *." 50 O. Jur. 2d Statutes, Section 19. See also, Opinion No. 72-027, Opinions of the Attorney General for 1972. As a result, the language "shall prepare", contained in Section 315.08, indicates that it is mandatory for the county engineer to prepare plans, specifications, and estimates when so ordered by the board of county commissioners. Since Section 315.08 provides that such plans must be prepared for "* * * the construction, maintenance, and repair of all bridges, culverts and roads * * *", it is of no consequence that such plans were not included in the original recommendations of the county engineer.

In a similar circumstance, one of my predecessors, in Opinion No. 4767, supra, concluded as follows:

"The board of county commissioners may order plans and specifications for road improvements prepared by the county surveyor, to be

revised. The board of county commissioners' action in this respect is final and cannot be interfered with unless such action amounts to fraud or constitutes a gross abuse of discretion."

Therefore, in accordance with long standing precedent, I must conclude that the board of county commissioners may order the county engineer to prepare the necessary plans, profiles, specifications, and estimates of cost on a road project whether or not it was included in his recommendations for road work to be done in the current year, unless their action is fraudulent or an abuse of discretion. See Chapter 5541, Revised Code.

Your third inquiry is substantially as follows:

Where the county commissioners have awarded a contract pursuant to the competitive bidding requirements of law, may the county engineer refuse to approve the estimates of payment of the contract thereby prohibiting the contract estimates from being paid?

In Opinion No. 4767, supra, a distinction was drawn between the two meanings of "estimate", as used in Section 5543.02, which requires the approval of the county engineer of bills to be paid from county funds for a road project. Syllabus No. 11 of that Opinion reads as follows:

"In reference to proposed contracts, an 'estimate' has reference to an approximation of the amount of material for items that will be required in order to construct a given project and an approximation of cost thereof. On the other hand, the use of the word with reference to estimates made by the surveyor or engineer in charge of a project after the contract has been awarded, has reference to fixing as a mathematical certainty the amount due a contractor upon a given project in view of the contract price and the state of completion of the work."

Unlike the situation presented in your first inquiry, in this case, the board of county commissioners has already awarded the contract. Consequently, the word "estimate" in question three is used in the second sense as explained in the above syllabus. The duty of the county engineer in this situation is to ascertain whether the contractor has completed the work in accordance with the contract, and whether he should be paid the installment price as specified in the contract. If he concludes these are present, he must approve unless the work is unsatisfactory. 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 on good judgment and must not be unreasonable or capricious.

In response to your fourth question, a careful analysis of Sections 5543.02 and 315.08, and related Sections, indicates that the county engineer has no express authority to "proceed with any project of maintenance, repair and improvement without prior approval of the county commissioners." Moreover, Section 5555.71, Revised Code, makes it clear that the county commissioners cause estimates of work to be made by the county engineer before any maintenance, repair or improvement may begin. Although the general rule holds that the county engineer must obtain the approval of the commissioners before entering into any project, one instance does exist in which this prior approval is not required. Such was the holding of one of my predecessors in Opinion No. 768, Opinions of the Attorney General for 1951, which stated:

"Where cost estimates, plans and specifications of particular county road and bridge maintenance and repair projects have been prepared by the county engineer and submitted to the county commissioners pursuant to the provisions of Section 6498-1, General Code [Section 5555.71, Revised Code], and where such commissioners fail, within a reasonable time, to take any express action to decide whether such projects shall be undertaken by contract or by force account, but have, by specific appropriation to the county engineer of funds designated for expenditure for labor and materials, provided the engineer with funds sufficient to carry on and complete such projects by force account, the resolution of appropriation so adopted by the commissioners constitutes an implied authorization for that officer to proceed with such projects under the provisions of Section 7198, et seq., General Code [Section 543.19, et seq., Revised Code]."

Therefore, unless there has been a prior resolution of appropriation adopted by the county commissioners to the county engineer for expenditure for labor and materials, the county engineer may not proceed with any project of maintenance, repair, and improvement until such project has been approved by the county commissioners.

Your fifth inquiry is as follows:

"If the board of county commissioners hires an engineering firm under Section 305.15, Revised Code, without the written request of the county engineer, is the contract between the county and the engineering firm a legally binding agreement?"

Section 305.15, Revised Code, states, in part, as follows:

"When the services of an engineer are required with respect to roads, turnpikes, ditches, bridges, or any other matter, and when, on account of the amount of work to be performed, the board of county commissioners deems it necessary, upon the written request of the county engineer, the board may employ

a competent engineer and as many assistant engineers, rodmen, and inspectors as are needed, and may also enter into contracts with any person, firm, or partnership qualified to perform engineering services in the state for this purpose and fix the compensation therefor. * * *" (Emphasis added.)

The specific question was considered by one of my predecessors in Opinion No. 1647, Opinions of the Attorney General for 1924. That Opinion states that "before the county commissioners can legally employ an engineer, there must be on file therefor the written request of the surveyor." The phrase, "upon the written request of the surveyor [engineer]", is clear and unambiguous and must be given effect. According to my predecessor in Opinion No. 1647, supra, there is no legal employment and thus no legally binding contract without such written request. It is a long established rule that a contract which violates a statute is unlawful and void, and will not be enforced. 11 O. Jur. 2d, Contracts, Section 93. Cognizant of this, the Supreme Court, in the case of Buchanan Bridge Co. v. Campbell et al., 60 Ohio St. 406 (1899), held as follows:

"A contract made by county commissioners for the purchase and erection of a bridge in violation or disregard of the statutes on that subject, is void, and no recovery can be had against the county for the value of such bridge. Courts will leave the parties to such unlawful transaction where they have placed themselves, and will refuse to grant relief to either party."

This decision concerned a situation where the contract for the construction of a bridge was never submitted for the approval of the county commissioners, county auditor, and county surveyor as specifically required by statute.

Accordingly, if the board of county commissioners hires an engineering firm without the written request of the county engineer, as required under Section 305.15, the contract between the county and the engineering firm is void.

Your sixth inquiry may be stated as follows:

"Must the county commissioners provide emergency funds to county engineers pursuant to the provisions of Section 315.13, Revised Code, where the county engineer is of the opinion that sufficient funds are available?"

Section 315.13, Revised Code, authorizing emergency repair, designates the emergency repair fund as follows:

"The board of county commissioners may appropriate a sum of money each year sufficient to enable the county engineer to carry out this section. Such sum shall constitute the 'county engineer's emergency repair fund.' * * *" (Emphasis added.)

Although the language in Section 315.13 concerning the appropriation of said funds appears to be permissive, one of my predecessors, in Opinion No. 758, Opinions of the Attorney General for 1933, ruled that:

"The provision of section 2792-1, General Code [Section 315.13, Revised Code], authorizing the county commissioners to make an appropriation each year to carry out the purposes of said section, is mandatory insofar as there are available funds therefor."

Thus, it is apparent that the board of county commissioners must appropriate money for the emergency repair fund to enable the county engineer to carry out his responsibility under this Section. Such appropriation, however, is mandatory only to the extent that there are funds available for the purpose. See Opinion No. 3553, Opinions of the Attorney General for 1941. Since your question presents a situation in which the county engineer believes sufficient funds are available but the county commissioners refuse to grant such funds, it is necessary to discuss the legal remedies open to the county engineer upon refusal of his request for emergency funds.

Section 307.56, Revised Code, which provides the statutory method of appeal from action of the board of county commissioners, is not available since it applies only to private individuals seeking recourse and authorizes appeal only where a complaint arises from a decision by the board in its judicial function and not its ministerial capacity. Opinion No. 396, Opinions of the Attorney General for 1933; Commissioners v. Hunt, 33 Ohio St. 169, 176 (1877). In contrast, the present case deals with the county engineer who is a public official, and who would be appealing an adverse ministerial decision.

A proper remedy, therefore, would be mandamus to compel the county commissioners to make the necessary appropriation, if there are, in fact, available funds. The county engineer would have to prove, of course, both the clear legal duty, and the availability of funds. Section 2731.01, Revised Code, defines mandamus as follows:

"Mandamus is a writ, issued in the name of the state to an inferior tribunal, a corporation, board, or person, commanding the performance of an act which the law specifically enjoins as a duty resulting from an office, trust, or station."

The subject of mandamus is also defined in State ex rel. Pressley v. Industrial Commission, 11 Ohio St. 2d 141 (1967).

"Where a public officer or agency is under the clear legal duty to perform an official act, and where there is no plain and adequate remedy in the ordinary course of the law, an action in mandamus will lie in the supreme court or in the court of appeals."

It is obvious that the county engineer has no adequate remedy at law, and where it is apparent that the county

commissioners are under a legal duty to appropriate amounts for emergency repair, mandamus would lie. Furthermore, the Supreme Court has said that a public official within a political subdivision may obtain a writ of mandamus compelling another public official or officials within the same political subdivision may obtain a writ of mandamus compelling another public official or officials within the same political subdivision to perform some act that is required of the latter by law. Looker v. State ex rel. Dillian, 127 Ohio St. 413, 415 (1933).

To conclude, the board of county commissioners must provide emergency funds to county engineers where sufficient funds are available for such purpose, and a failure to make such an appropriation may subject the board to an action in mandamus.

Your final inquiry states:

"May the county commissioners make a cash grant to assist township road programs under Section 5535.08, R.C., without such grants being approved by the county engineer?"

Section 5535.01, Revised Code, provides, in part, as follows:

"The public highways of the state shall be divided into three classes: state roads, county roads, and township roads.

* * * * *

"(C) Township roads include all public highways other than state or county roads. The board of township trustees shall maintain all such roads within its township. The board of county commissioners may assist the board of township trustees in maintaining all such roads. * * *"

Regarding the cash grant to which you refer, Section 5535.08, Revised Code, states, in part, as follows:

"The state, county, and township shall each maintain its roads, as designated in section 5535.01 of the Revised Code; however, the county or township may, by agreement between the board of county commissioners and the board of township trustees, contribute to the repair and maintenance of the roads under the control of the other. * * *"

It is important to note that both Sections 5535.01 and 5535.08 refer only to the repair and maintenance of township roads. Conspicuously absent from those Sections are the words construction, reconstruction, resurfacing, and improvement. As to the omission of these words, Section 5543.01, Revised Code, which sets out the general powers and duties of the engineer, reads, in part, as follows:

"The county engineer shall have general charge of the following:

"(A) Construction, reconstruction,

improvement, maintenance, and repair of all bridges and highways within his county, under the jurisdiction of the board of county commissioners;

"(B) Construction, reconstruction, resurfacing, or improvement of roads by boards of township trustees * * *.

"The engineer may not perform any duties in connection with repair, maintenance, or dragging of roads by boards of township trustees. * * *" (Emphasis added.)

Section 5543.01, when read in conjunction with Sections 5535.01 and 5535.08, indicates that the county commissioners may make a cash grant to assist in the repair and maintenance of township roads without the approval of the county engineer. The express authorization for contributions provided in Section 5535.08, combined with the prohibitions spelled out in Section 5543.01, restricting the duties of the county engineer in the areas of repair and maintenance, support my conclusion that county commissioners may make cash grants to assist repair and maintenance of township roads without the county engineer's approval, except when such road program entails construction, reconstruction, resurfacing, or improvement. In these cases, they may not make any cash grant, with or without the engineer's approval.

In specific answer to your questions it is my opinion, and you are so advised, that:

1. The board of county commissioners must obtain approval from the county engineer of bills to be paid for the purchase of material when a road project is to be accomplished by force account.
2. The board of county commissioners may order the county engineer to prepare the necessary plans, profiles, specifications, and estimates of cost on a road project not included in his recommendations for road work to be done in the current year.
3. Where the county commissioners have awarded a contract on a road project, the county engineer may refuse to approve the estimates of payment of the contract should he determine that the work contemplated has not been satisfactorily completed pursuant to the terms of the contract.
4. The county engineer may not proceed with any project of maintenance, repair, and improvement without the approval of the board of county commissioners, unless there has been a prior resolution of appropriation adopted by the county commissioners granting expenditure for labor and materials.
5. Where the board of county commissioners hires an engineering firm without the written request of the county engineer, as required under Section 305.15, Revised Code, the contract between the county and the engineering firm is void.
6. Where sufficient funds are available, the board

of county commissioners must provide emergency funds to the county engineer and failure to make such appropriation may subject the board to an action in mandamus.

7. The board of county commissioners may make cash grants to assist repair and maintenance of township roads without the county engineer's approval, but may not make cash grants for construction, reconstruction, resurfacing, or improvement of such roads.