

OPINION NO. 67-115**Syllabus:**

1. A city with a statutory form of government cannot appoint a non-resident attorney as city solicitor.
2. A city may enter into a contract for legal services, approved by ordinance, with either a resident or non-resident attorney, when there is no city solicitor available or qualified to represent the interests of the city.
3. The contract between the city and attorney should provide a definite fee for ordinary services, and any additional compensation for extraordinary services should be agreed upon at that time.

To: Dominick Olivito, Jefferson County Pros. Atty., Steubenville, Ohio
By: William B. Saxbe, Attorney General, December 7, 1967

I have before me your request for my opinion on the following matter:

"In the November 7, 1967, Municipal Elections, the City of Toronto (Statutory form of Government) will have no candidate for the Office of City Solicitor. It further appears that there is no attorney who is a resident or elector of the City of Toronto who is eligible for appointment to this position. In light of the above circumstances, I am respectfully submitting the following questions for your opinion:

1. Can a city with a statutory form of government appoint a non-resident attorney to serve as City Solicitor?

2. Must said non-resident appointee serve in said capacity for the existing salary set by ordinance for an elected City Solicitor?
3. Can the city, under such circumstances, enter into a contract, approved by ordinance, with an attorney (resident or non-resident) providing for a definite salary for ordinary services and further provision for extra allowances, in sums to be fixed by Council, for extra-ordinary services?"

The city solicitor is made one of the executive officers of a city organized under the general statutory plan of government by Section 733.01, Revised Code. His general qualifications are set forth in Section 733.50, Revised Code, which reads as follows:

"No person shall be eligible to the office of city solicitor who is not an attorney at law, admitted to practice in this state."

However, it is also necessary to read Section 733.49, Revised Code, which provides as follows:

"The city solicitor shall be elected for a term of four years, commencing on the first day of January next after his election. He shall be an elector of such city."

It becomes apparent that two qualifications are necessary to become city solicitor: first, that the person be an attorney and second, that he be an elector of the city.

The requirement that one appointed an officer of a municipal corporation be an elector of the municipal corporation is established in Section 733.68, Revised Code, which reads in pertinent part as follows:

"Except as otherwise provided by the Revised Code each officer of a municipal corporation or any department or board thereof, whether elected or appointed as a substitute for a regular officer, shall be an elector of the municipal corporation, * * *"

(Emphasis added)

In State ex rel Shank v. Gard, 8 O.C.C. NS 599, 29 O.C.C. 426, Aff. 75 Ohio St. 606, 80 NE 1133, it was held that the election or appointment of a person to the office of councilman who was ineligible for such office was a nullity. In Opinion No. 138, Opinions of the Attorney General for 1966, page 66-138, I stated that where no persons possessed the qualifications for county court judge then no appointment could properly be made. Based upon the foregoing it is my opinion that a city with a statutory form of government cannot appoint a non-resident attorney to serve as city solicitor.

Inasmuch as my answer to your first question is negative, it is not necessary to determine whether a non-resident appointee must serve for the same salary as an elected city solicitor.

A careful reading of the Revised Code discloses that it is

silent on whether a city can provide legal counsel. Section 733.48, Revised Code, reads as follows:

"When it deems it necessary, the legislative authority of a village may provide legal counsel for the village, or for any department or official thereof, for a period not to exceed two years, and provide compensation for such counsel."

The difficulty with your suggestion is that there is no analogous section involving cities. The general assembly has determined that the legal problems of a city organized under the general plan of government shall be vested in a duly elected city solicitor.

The alternative you suggest was discussed in Opinion No. 1658, Opinions of the Attorney General for 1928, page 262. Although this opinion involved employment of legal counsel in villages, I see no reason it could not equally apply to cities under appropriate circumstances. In giving this authority to villages the general assembly undoubtedly contemplated circumstances such as are involved here. Section 731.05, Revised Code, prohibits the legislative authority of a city from appointing or confirming any officer or employee of the city government except those of its own body unless otherwise provided in Title VII, Revised Code. This section, however, does not preclude employment of legal counsel since he would not be a public officer or employee of the city. Nor would he be required by law to exercise any of the duties devolving upon a city solicitor. The relationship would be purely contractual between the legislative authority and the attorney.

The right to employ legal counsel in certain limited areas can be seen in Peterman v. Tepe, 87 Ohio App. 487, which held the municipal council had authority to fix the compensation of an attorney retained to perform certain legal services. In Zanesville v. Wilson, 51 Ohio App. 433, Affd. 130 Ohio St. 286, overruled on other grounds in Cincinnati v. Correll, 141 Ohio St. 535, it was held a municipality or its solicitor may be represented by special counsel under certain circumstances. Of course, the city council has no authority to create new or additional officers nor to abolish or change any existing offices when they are organized under the statutory form of government. However, the employment of legal counsel, under circumstances such as these, would not subvert the expressed desires of the general assembly.

A municipal corporation is given authority to make contracts, to own property, and to incur liabilities and surely this must include the authority to employ legal counsel to conduct and defend suits in which the city has an interest. In the absence of an express or implied restriction, a city has the authority to employ legal counsel whenever and wherever it is necessary to be represented for the preservation and protection of its interests. The city not only has authority but it has a duty to do so in carrying out the trust committed to it. The employment of a non-resident will present no difficulty so long as there is no attempt to designate him city solicitor or to impose upon him the legal duties of that office.

In contracting with an attorney for legal services the city may provide for a definite fee to be paid for ordinary services. This is made binding when approved by ordinance and accepted by

the attorney and such sum would be paid in the manner agreed upon. Concerning the provision for extra allowances, this would have to be determined by the council when the extraordinary services are performed and the parties would then contract for a definite amount. This procedure was suggested by the then Attorney General, in Opinion No. 1658, Opinions of the Attorney General for 1928, page 262, 267 and I approve.

It is, therefore, my opinion and you are advised that:

1. A city with a statutory form of government cannot appoint a non-resident attorney as city solicitor.
2. A city may enter into a contract for legal services, approved by ordinance, with either a resident or non-resident attorney, when there is no city solicitor available or qualified to represent the interests of the city.
3. The contract between the city and attorney should provide a definite fee for ordinary services, and any additional compensation for extraordinary services should be agreed upon at that time.