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1. IMPROVEMENT — COST ASSESSED — SHALL INCLUDE "THE EXPENSE OF THE PRELIMINARY AND OTHER SURVEYS" — ENGINEERING SERVICE TO SURVEYORS OR ENGINEERS—SPECIALLY EMPLOYED—NOTHING IN SECTION 727.54 RC PREVENTS PERFORMANCE OF SERVICES BY CITY ENGINEER AND HIS STAFF — ASSESSMENT OF ASCERTAINED COST.

2. GENERAL FUND OF MUNICIPALITY — MAY BE REIMBURSED FROM FUNDS REALIZED FROM SALE OF BONDS —COST OF SERVICES OF CITY ENGINEER AND STAFF— COST OF IMPROVEMENT — OAG 2165, 1928, PAGE 1278 OVERRULED.

SYLLABUS:

1. Section 727.54, Revised Code, 3896 G. C., in providing that the cost of an improvement that may be assessed shall include "the expense of the preliminary and other surveys," does not limit such engineering service to surveyors or engineers specially employed for such improvement, and nothing in said statute prevents the performance of such services by the city engineer and his staff, nor the inclusion in the assessment of the ascertained cost of such service in cases where it is possible to ascertain such cost.

2. The general fund of a municipality may legally be reimbursed from the funds realized from the sale of bonds issued in anticipation of collections of special assessments for an improvement, for the cost of the services of the city engineer and staff rendered in connection with such improvement, which cost is, under the provisions of Section 727.54, Revised Code, a proper element in the cost of the improvement. Opinion No. 2165, Opinions of the Attorney General for 1928, page 1278, overruled.

Columbus, Ohio, August 26, 1955

Bureau of Inspection and Supervision of Public Offices
Columbus, Ohio

Gentlemen:

I have before me your communication requesting my opinion and reading as follows:

> "I am enclosing a letter received from our Examiner in charge of the Cincinnati office, in which he asks the following question:

> 'Can the general fund be legally reimbursed each year by the special assessment and general bond improvement funds for the cost of engineering services rendered by the regular city engineering staff, who are carried on the general fund payroll and who are primarily paid from the general fund?'

"In this connection, we wish to refer you to Attorney General's Opinion No. 2165, 1928, in which he held that where the surveying and engineering of an improvement are performed by engineers appointed for a definite period and paid regular salaries by a city from appropriations made by council from the general fund, the cost of such services, although it may be definitely and accurately ascertained, cannot be included in the cost of the improvement and assessed against property owners thereby effecting a reimbursement of the general fund from which the salaries of such engineers are paid.

"This seems to apply to special assessment projects only. It is based upon the holding of the Supreme Court in the case of Longworth et al. vs. City of Cincinnati et al., 34 Ohio State, 101. This case was decided in 1877. At that time there was no law expressly authorizing the charge and assessment of such engineering expense, for the purpose of reimbursing the city for the amount so paid from the general fund.

"In his Opinion No. 2165, 1928, the then Attorney General does not appear to have given any consideration to the provisions of Section 280 of the General Code, now Section 115.45 of the Revised Code, which reads as follows:

> 'All service rendered and property transferred from one institution, department, improvement, or public service industry to another shall be paid for at its full value. No institution, department, improvement or public service industry shall receive financial benefit from an appropriation made or fund created for the support of another. * * *'

"Section 280 G. C. was passed in 1902, as part of the law, providing for the establishment and operation of the Bureau of Inspection and Supervision of Public Offices. When the General Code was revised, this section was relocated in the Revised Code as Section 115.45. It appears that this section, as originally enacted, was part of the law relating to the examination of local subdivisions, as well as the state offices. It has been somewhat overlooked during the last fifty years.

"In this connection we wish also to call attention to the provisions of Section 5705.10, R. C., which provides that money paid into any fund shall be used only for the purposes for which such fund is established.

"Also to the provisions of Section 133.36, R. C. (2293-29 G. C.) which provides that the money from the principal, on the

sale of bonds or notes, shall be credited to the fund on account of which the bonds and notes are issued and sold and used only for the purpose set out in the resolution or ordinance of the taxing authority.

"This raises the question as to whether the engineering cost on bond improvements, previously paid from the general fund, can be considered as a proper charge against the bond improvement funds, if proper time records have been kept and the actual cost of same can be accurately determined, for purposes of reimbursement of cost."

Section 727.54, Revised Code, 3896 G. C., appears to lay the foundation for the question presented. That section reads as follows:

"The cost of any improvement contemplated in sections 727.01 to 727.68, inclusive, 729.01 to 729.15, inclusive, 729.21, 729.22 and 729.31 to 729.52, inclusive, of the Revised Code, shall include the purchase money of real estate or any interest therein when acquired by purchase, or the value thereof when appropriated as found by the jury, the cost of the proceeding, the damages assessed in favor of any owner of adjoining lands and interest thereon, the cost of the assessment, *the expense of the preliminary and other surveys,* and of printing, publishing the notices and ordinances required, including notice of assessment, and serving notices on property owners, the cost of construction, interest on bonds where bonds have been issued in anticipation of the collection of assessments, *and any other necessary expenditure.*"

(Emphasis added.)

This section undertakes to enumerate the items which enter into the cost of an improvement contemplated by the municipal laws relating to assessments upon abutting or benefited property for public improvements.

I call particular attention to the inclusion of "the expense of the preliminary and other surveys." You have not indicated precisely what is included in the "engineering services" as this term is used in your inquiry, but for the purpose of this opinion I assume that you have in mind only such services as are rendered in preliminary or other surveys of a particular improvement, or which are calculated directly to advance the improvement project. The legislature manifestly had in mind that services of this character are necessary in any public improvement and that the expense of the same should be included in the aggregate cost to be assessed on the benefited property. It is significant that the statute does not say "the expense of hiring an independent engineer to make the surveys," nor does it by any word or implication forbid it being done by the city engineer,

Therefore, the inquiry at once arises why there should be any objection from the standpoint of the law, or on the part of the property owner, to having this engineering work done by the city engineer and his staff and the cost duly ascertained, where it is possible to do so, and added to the assessment. Since engineering services are manifestly necessary, why should it make any difference by whom they are performed? The law certainly contains no prohibition against this procedure. There is no reason to believe that the cost would be greater, if the service is performed by the regular city employees. On the contrary, it seems probable that it would be less.

As you have stated, one of my predecessors in Opinion No. 2165, Opinions of the Attorney General for 1928, page 1278, held:

> "Where the surveying and engineering of an improvement are performed by engineers appointed for a definite period and paid regular salaries by a city from appropriations made by council from the general fund, the cost of such services, although it may be definitely and accurately ascertained, cannot be included in the cost of the improvement and assessed against property owners, thereby effecting a reimbursement of the general fund from which the salaries of such engineers are paid."

An examination of that opinion shows that it is based entirely upon the decision of the Supreme Court in the case of Longworth v. Cincinnati, 34 Ohio St., 101. The second paragraph of the syllabus in that case reads as follows:

> "2. Where the surveying and engineering of such improvement were performed by the chief engineer of the city and his assistants, who were officers appointed for a definite period, at a fixed salary, which the law required to be paid out of the general fund of the city, the reasonable cost to the city, of such surveying and engineering, can not be ascertained and assessed upon the abutting property, as a necessary expenditure for the improvement."

That decision was rendered in 1877. At that time, a municipal corporation was regarded in Ohio, as it still is in most states, as merely the creature of the legislature. The legislature had power to create and destroy at will, and might grant to a municipality only such powers and privileges as it saw fit. And the general rule was well established that any power not expressly granted or necessarily implied was withheld. The same rule prevails as to counties and townships.

It is very evident that the Supreme Court, in deciding the Longworth case, felt itself bound by the strict and narrow view which had from time immemorial been the rule for construction of municipal powers. In the course of the opinion the court said:

> "*Second.* Did the courts below err in holding that the charge for engineering was improperly included in the assessment, as assigned for error in the cross-petition? Notwithstanding section 544 does provide, that the costs of the improvement of a street, includes 'the expense of the preliminary and other surveys,' yet we think that this has reference only to cases in which the engineer doing the work was employed for that special purpose, and does not apply to work done by engineers appointed for a definite period of time, at fixed salaries, under the provisions of section 4 of the act of March 17, 1876 (73 Ohio Laws, 44). The finding of fact shows that the work was done by the chief engineer of the board of public works and his assistants, all of whom were in the employ of the city, at fixed salaries, and paid out of the general fund of the city; and also shows the manner of arriving at the amount that was charged and assessed for this improvement."

The real basis for that statement and for the decision is found in the next succeeding paragraph of the opinion, which reads:

> "It is sufficient to say, that when the salaries of these engineers were paid from the general funds of the city, as required by law, *that was the end of it, unless there was some law expressly authorizing the charge and assessment that was made in this case, for the purpose of reimbursing the city for the amount so paid; and, inasmuch as there is no such law, the courts did not err in holding that the charge was improperly included in the assessment.*" (Emphasis added.)

We may well ask why the court emphasized the fact that the salary of the engineer is paid out of the general fund. What possible difference could that make? The general fund is a flexible one and in no way sacred. Why should it not make advances and receive reimbursement?

Merely because the legislature had failed to say, in so many words, that the city could use its own engineer for the purpose of making the necessary surveys, and charge the cost to the improvement, therefore such procedure was wholly illegal, although nothing either in the facts presented or in the language of the court, seems to suggest that any evil or wrong could occur to the city or to the property owners in question, if that procedure were followed. On the theory that the municipality was the slave

of the legislature and could do nothing whatsoever without specific authorization, the court may have been right.

The rigidity of the rule referred to was emphasized by the Supreme Court ten years later in the case of Ravenna v. Pennsylvania Company, 45 Ohio St., 118. There the Village of Ravenna undertook by ordinance to require the railroad company to maintain a watchman at a dangerous grade crossing. The court held:

> "1. Municipal corporations, in their public capacity, possess such powers and such only, as are expressly granted by statute, and such as may be implied as essential to carry into effect those which are expressly granted."

At page 121 of the opinion it was said:

> "Except as to incidental powers, such as are essential to the very life of the corporation, the presumption is that the state has granted in clear and unmistakable terms all it has designed to grant at all. Doubtful claims to power are resolved against the corporation."

The adoption of the Eighteenth Amendment to the Constitution, in 1912, was intended to, and had the effect of completely reversing the situation as to the powers of municipalities. Instead of being denied every power not specifically granted, the municipality from that time on was endowed by Section 3 of that Article, with every power of local self-government, except as specifically withheld by the Constitution. In the multitude of cases that reached the courts since the adoption of Article XVIII, there has been uniform recognition that the doctrine of the Ravenna case was completely set aside.

When the Constitution, by the terms of Section 3, of Article XVIII, granted to municipal corporations "all powers of local self-government," can any reason be suggested why it would be exceeding its powers if it handled this engineering cost, connected with a public improvement, according to its own judgment, so long as it did not infringe upon the rights of the property owners?

I am impressed by the argument advanced by the attorneys for the city in the Longworth case, where it is said:

> "We say, under the course of proceedings adopted by the city, these engineers are not paid out of the general fund for all their time. For so much of their time as is spent on local improvements

> they are paid by assessment just as fully as though they had been hired for that particular improvement. True, their pay is advanced from the general fund, but it is paid back from the assessment. It can make no difference to the property-owner whether he pays for the engineering in this way, or for an engineer hired for the particular purpose."

I am not unmindful of the provisions of Article XIII, Section 6, of the Constitution, which reserves to the legislature the right to restrict municipalities in "their power of taxation, assessment and borrowing money." Certainly the restriction, if it be such, in Section 727.54 supra, was only as to the *amount* of the burden which could be placed by assessment on property owners. The procedure contemplated does not in the slightest degree infringe upon that restriction, but merely proposes to provide for one allowable expense in a manner which the municipality deems best, the law containing no restriction whatever as to such procedure. Your letter suggests the propriety of examining Section 5705.10 of the Revised Code, as bearing on the permitted uses of the "general fund." That section provides for the distribution of the taxes derived from tax levies. Its concluding paragraph reads:

> "Money paid into any fund shall be used only for the purposes for which it is established."

Let us see for what purposes the levy for general current expenses may be made. Section 5705.05 enumerates a wide variety of purposes for which it may be used, among others "to carry into effect *any of the general or special powers* granted by law to such subdivision, including the acquisition or *construction of public improvements.*" This certainly confers very broad discretion in the use of the general fund, and in my opinion the advance of money for the purpose suggested by your letter, would be well within its intended scope.

You further call attention to Section 133.36, Revised Code, which provides that money from the sale of bonds shall be "used only for the purpose set out in the resolution or ordinance." Bonds issued in anticipation of the collection of an assessment, would certainly be based on a resolution or ordinance declaring that purpose and none other, and so long as the proceeds are used to pay the assessable cost of an improvement, how could it be said that it was being illegally expended? I can see no possible infraction of that statute in the proposed procedure.

I would of course not feel privileged to announce a conclusion in answer to your question in direct conflict with a decision of the Supreme Court even though I felt it was not well grounded. We may concede that the Longworth decision was justified at the time it was rendered, in view of the state of the law as it then existed, but in view of the complete revolution in regard to the origin and extent of the powers of municipal governments, I do not feel in the least bound by that decision. I am forced to believe that my predecessor, in the 1928 opinion, did not realize the changes that had been made and therefore followed the Longworth case implicitly but without justification. I therefore consider it necessary to overrule that opinion.

I desire to direct attention to the statute which you mention in your letter, which I believe has a direct bearing, to wit, Section 115.45 of the Revised Code, 280 G. C. That section reads as follows:

> "*All service rendered* and property transferred from one institution, department, improvement, or public service industry to another *shall be paid* for *at its full value*. No institution, department, *improvement*, or public service industry shall receive financial benefit from an appropriation made *or fund created* for the support of another. When an appropriation account is closed, any unexpended balance shall revert to the fund from which the appropriation was made." (Emphasis added.)

I would call particular attention to the language of that section, in that it is not limited to accounting for service between the institutions and departments, but also includes *improvements*. Its over-all purpose seems to be to prevent one department of the government riding on another, but it does assume that one department may make advances of service or property to another, for which it must be reimbursed. It seems to me to afford direct authority for the reimbursement of any fund of a municipality for money advanced from that fund toward the expense of an improvement, and for such reimbursement from the moneys arising from the funds provided for the improvement.

Accordingly, it is my opinion:

1. Section 727.54, Revised Code, 3896 G. C., in providing that the cost of an improvement that may be assessed shall include "the expense of the preliminary and other surveys," does not limit such engineering service to surveyors or engineers specially employed for such improvement, and

nothing in said statute prevents the performance of such services by the city engineer and his staff, nor the inclusion in the assessment of the ascertained cost of such service in cases where it is possible to ascertain such cost.

2. The general fund of a municipality may legally be reimbursed from the funds realized from the sale of bonds issued in anticipation of collections of special assessments for an improvement, for the cost of the services of the city engineer and staff rendered in connection with such improvement, which cost is, under the provisions of Section 727.54, Revised Code, a proper element in the cost of the improvement. Opinion No. 2165, Opinions of the Attorney General for 1928, page 1278, overruled.

Respectfully,

C. WILLIAM O'NEILL
Attorney General