

order to make it suitable for use will make its total cost more than \$500.00 is not such a contract as was contemplated when the requirement for competitive bidding was made. This is for the reason that the statute should be strictly construed and cannot be extended by implication beyond its plain terms, especially since under such circumstances it is not necessary to do so in order to fairly and reasonably accomplish the purposes intended by the law, and no studied attempt appears to have been made to evade the law for the purpose of preventing the accomplishment of the objects sought by reason of its enactment.

The purchase about which you inquire is a completed purchase if and when made at the plant of the manufacturer. The cost of transportation is a separate item of expense and cannot be said to be a part of the article itself. The mere fact that an accountant might in furtherance of a strict system of cost accounting add the freight charges to the cost, and classify the total as a capital expenditure rather than classify the freight charges as an incidental expenditure, makes no difference.

In many cases where machinery is bought it is necessary to add something to the machine to make it available for use. A bare machine without power would be useless, yet the cost of the power or the means of transmitting power to the machine could not properly be said to be a part of the cost of the machine. An engine without fuel or oil is of no value, except what it would be worth in the market for scrap, or what its parts might be worth separately, yet in purchasing an engine, the fuel and oil to make it of some practical use cannot properly be said to be a part of the cost of the engine. If the commodity about which you inquire costs \$495.00 delivered at the depot in the municipality making the purchase, and it costs more than \$5.00 to move it from the depot to the place where it is to be used, no one would question the right of the Director of Public Service to make the purchase without first having the authorization of council and advertising for bids.

Of course if the purchase is made to be delivered, and the cost includes the sum of \$495.00 and freight charges of more than \$5.00 the purchase cannot be made without competitive bidding.

I am therefore of the opinion that by authority of Section 4328, General Code, a Director of Public Service in a city may incur an expenditure amounting to \$495.00 without the authorization of council or competitive bidding when such expenditure consists of the purchase of an article at the plant of the manufacturer, even though the cost of transportation of the article to the place where it is to be used will amount to more than \$5.00.

Respectfully,
EDWARD C. TURNER,
Attorney General.

2710.

BONDS—COUNTY MAY NOT ISSUE FOR PROTECTION OF PRIVATE PROPERTY—LIMITATION OF DRAINAGE BONDS—CONSTRUCTION OF PIERS AT RYE BEACH DISCUSSED.

SYLLABUS:

1. *Bonds may not be issued for an improvement under General Code Sections 6442 et seq. covering a period of more than five years.*

2. A county may not construct piers in the waters of Lake Erie for the protection of property and beach belonging to private owners, unless they are necessary for drainage or to prevent overflow on such lands.

COLUMBUS, OHIO, October 13, 1928.

HON. C. E. MOYER, *Prosecuting Attorney, Sandusky, Ohio.*

DEAR SIR:—This will acknowledge receipt of your letter of recent date, as follows:

“Certain property owners at Rye Beach Allotment, this county, have petitioned the board of county commissioners for an improvement, viz: the building of a number of concrete piers in the waters of Lake Erie for the protection of said property owners’ property and beach along the lake front. The property owners wish to assume and will agree to assume an assessment covering a period of ten years, for an estimated cost of \$7,100.00 for said improvement. Said property owners desire the county commissioners to issue bonds for said improvement and then assess the cost against the property.

The above stated project would be for the protection of private property and the point which is questioned by me is whether or not the county commissioners could legally issue county bonds for an improvement which is not for public benefit but for the benefit of private property.

I looked over the different classes of bonds covered by the Uniform Bond Act, as enacted by the 87th General Assembly, and it is my opinion that this nature of improvement would not come within any of the classes stated therein being Section 2293-9 of the General Code.

Would you kindly give me your opinion in regard to this matter?”

Article 8, Section 6, of the Ohio Constitution, provides as follows:

“No laws shall be passed authorizing any county, city, town or township, by vote of its citizens, or otherwise, to become a stockholder in any joint stock company, corporation, or association whatever; or to raise money for, or to loan its credit to, or in aid of, any such company, corporation or association; provided, that nothing in this section shall prevent the insuring of public buildings or property in mutual insurance associations or companies. Laws may be passed providing for the regulation of all rates charged or to be charged by any insurance company, corporation or association organized under the laws of this state or doing any insurance business in this state for profit.”

While your inquiry is confined to the authority of the county commissioners “to issue bonds for said improvement and then assess the cost against the property,” from the foregoing constitutional provision it is clear that the power to issue bonds must depend upon the authority of the commissioners to construct the improvement for which the bonds are to be issued.

The Ohio Supreme Court has repeatedly recognized that county commissioners have only such powers in matters of this kind as are specifically conferred upon them by statute. More specifically quoting from *County Commissioners vs. Gates*, 83 O. S. 19:

“Now a county is not a body corporate but rather a subordinate political division, an instrumentality of government clothed with such powers and such only as are given by statute, and liable to such extent and such only as the

statutes prescribe. The board of county commissioners acts in such matters as the construction of ditches in a political rather than a judicial capacity, and that body also in such action is clothed with such powers only as the statutes afford."

The only authority conferred upon county commissioners in respect to the subject matter of your letter, which I find, is in Chapter I of Title III of the Code, relating to "Single County Ditches." Section 6443 therein provides as follows:

"The board of county commissioners, at a regular or called session, upon the filing of a petition as provided in this chapter (G. C. Secs. 6442 to 6508) by any owner of any land, when the commissioners find that the granting of the petition *and the construction of the improvement is necessary to drain any land, or to prevent the overflow of any land in the county*, and further find that the construction of the improvement will be *conducive to the public welfare*, and further find that the cost of the proposed improvement* will be less than the benefits conferred by the construction of the proposed improvement, may cause to be located, constructed, reconstructed, straightened, deepened, widened, boxed, tiled, filled, walled, or arched, any ditch, drain, or watercourse, or construct any levee, or straighten, deepen, or widen any river, creek, or run, or vacate any ditch, by proceedings as provided in Chapters 1 and 2 of Title III of the General Code of Ohio." (Italics the writer's.)

Section 6442, defining certain terms used in the chapter, contains the following:

" * * *

The word 'improvement,' * * * shall include a levee, or any wall, embankment, jetty, breakwater, or other structure for the protection of lands from the overflow from any stream, lake, or pond, or for the protection of any outlet; and shall include the vacating of a ditch, or drain.

* * * ."

While the above definition is sufficiently broad to include the term "piers," which are the subject of your inquiry, the statement of facts in your letter precludes, in my opinion, any conclusion that they are either necessary to drain any land or prevent overflow, or that they will be conducive to the public welfare.

The proposal to issue bonds for *ten* years is further prohibited by General Code Section 6460, which provides that assessments for improvements in this chapter shall be "payable in not more than ten *semi-annual* installments;" and General Code Section 2293-24 which provides, in substance, that bonds issued in anticipation of assessments must be liquidated as the assessments are paid.

Your attention is further called to General Code Section 3699-a, which reads as follows:

"It is hereby declared that the waters of Lake Erie within the boundaries of the state together with the soil beneath and their contents do now and have always, since the organization of the State of Ohio, belonged to the State of Ohio as proprietor in trust for the people of the State of Ohio, subject to the powers of the United States government, the public rights of navigation and fishery and further subject only to the right of littoral owners while said waters remain in their natural state to make reasonable use of the waters in front of or flowing past their lands, and the rights and liabilities of littoral

owners while said waters remain in their natural state of accretion, erosion and avulsion. Any artificial encroachments by public or private littoral owners, whether in the form of wharves, piers, fills or otherwise beyond the natural shore line of said waters not expressly authorized by the General Assembly, acting within its powers, shall not be considered as having prejudiced the rights of the public in such domain. Nothing herein contained shall be held to limit the right of the state to control, improve or place aids to navigation in the other navigable waters of the state or the territory formerly covered thereby."

This section, at least, raises a very serious question as to the authority of a county to construct any improvements within the waters of Lake Erie, which, in view of my conclusions hereinabove set forth, it is unnecessary to discuss as applied to the facts in your case.

In specific answer to your letter, you are therefore advised that bonds of the county for such an improvement can in no event be issued covering a period of more than five years, and that in my opinion the building of concrete piers for the protection of the property described in your letter cannot be undertaken by the county under the guise of necessary drainage or prevention of overflow to land.

Respectfully,

EDWARD C. TURNER,
Attorney General.

2711.

SANITARY ENGINEERING SERVICES—CONTRACT FOR COMPENSATION OF SANITARY ENGINEERS—OPINION NO. 2426 FURTHER CONSIDERED.

SYLLABUS:

Contract under consideration in Opinion No. 2426, dated August 6, 1928, further considered and construed in the light of additional facts submitted.

COLUMBUS, OHIO, October 13, 1928.

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

GENTLEMEN:—This will acknowledge your recent communication, as follows:

"Under date of August 6, 1928, you rendered Opinion No. 2426 to this department, construing the terms of the contract made between the Sanitary Engineer and Assistant Sanitary Engineer and the Board of County Commissioners of Portage County. In this opinion you stated that these contracts provided for the compensation of the engineers only on the basis of the actual cost of the improvement or an estimate thereof. We are enclosing herewith letters written to this department and to our examiner, also statements of the county commissioners as to the intent of the parties to the contract with reference to this compensation.

Will you please advise this department whether in the light of the arguments presented in these letters, the county commissioners would be warranted in basing the compensation of the assistant sanitary engineer upon the total cost of the improvement, including interest on notes and bonds?"