

The encumbrance estimate submitted with respect to the proposed purchase of this property is properly executed, and shows that there are unencumbered balances in the appropriation account sufficient to pay the purchase price of this property.

The files submitted to me likewise show that the purchase of this property has been approved by the Board of Control.

I am returning to you herewith said corrected abstract, deed and encumbrance estimate and other files pertaining to the purchase of this property.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1896.

COUNCIL OF VILLAGE—AUTHORITY TO ENTER INTO A CONTRACT WITH FIRM OF ENGINEERS FOR PERFORMANCE OF ENGINEERING SERVICES— PERIOD OF CONTRACT DISCUSSED.

SYLLABUS:

1. *The council of a village has, unless limited by charter, authority to enter into a contract with a firm of engineers for the performance of engineering services in connection with local improvements, compensation therefor to be made upon a percentage basis of the cost of the improvement.*
2. *Where a contract of this character covers a period beyond the term of those in office at the time it was entered into, the validity of the contract is dependent upon its reasonableness in view of all the circumstances.*

COLUMBUS, OHIO, March 26, 1928.

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

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

“ Section 4241, General Code, reads:

“The council shall not enter into any contract which is not to go into full operation during the term for which all members of such council are elected.”

QUESTION: May the council of a village legally enter into a contract with a firm of engineers for a period of six years, such contract providing for an annual diminishing rate of compensation for all services rendered during the life of the contract?

A copy of the contract in question is enclosed herewith.”

The copy of the contract which you enclose is too long to be quoted in full herein. Article I of the contract, however, is as follows:

“Article I. The engineers under the direction and to the satisfaction and approval of the village agree to furnish such professional services in

connection with the preparation of plans, specifications, supervision and inspection as may be required by said village for the improvement by paving or otherwise of various streets in the village of -----, and the preparation of plans, specifications and supervision as may be required by said village for the construction of extensions of the sanitary and storm water sewer system for said village and the preparation of plans, specifications, supervision and inspection as may be required by said village for the construction of extensions to the water distribution system of said village; it being understood that the services to be furnished are to include and consist of the following:"

Thereafter the services to be performed by the engineers are described in detail. Compensation for these services is specified on a percentage basis of the estimated cost and these percentages are somewhat reduced from time to time during the operation of the contract. The contract is to continue in force for six years subject to cancellation for cause. A reading of all of the terms raises some question as to whether the village is bound to employ the engineers on every improvement contemplated during the period covered by the contract or whether the agreement merely specifies the percentage of compensation in the event that the village sees fit to employ the engineers on any specific improvement. I shall assume, however, for the purposes of this opinion that the contract is binding upon the village to employ the engineers in every proceeding for the improvement or reimprovement of a street, the construction of sanitary or storm water sewer system of the village and the extension of the water distribution system.

From the fact that you quote Section 4241 of the General Code, I assume that you have doubt as to whether a contract covering a period of six years actually goes into full operation during the term for which all members of the council were elected, so as to be without the inhibition of the section mentioned. While the copy of the contract you have given me does not disclose the date on which it was executed, I am informed that it was actually entered into in the early part of the year 1925 and that the engineers performed services thereunder during that year. On these facts I feel that the inhibition of Section 4241 of the Code does not apply.

You will observe that the language of the section requires a contract to come into full operation during the incumbency of the council then in existence. This does not require that the contract shall be entirely completed within that time.

In Opinions of the Attorney General for 1924, at page 43, my predecessor in office had under consideration this section as applied to a contract for the employment of a village solicitor. The question was raised as to the authority of council to employ a solicitor for two years in view of the provisions of Section 4241 of the General Code. With reference to this, however, the opinion uses the following language:

"The only question presented, of course, is as to when a contract is in full operation within the meaning of said statute. It is believed to be apparent that a contract going into operation is to be distinguished from the completion of a contract. This must be the situation or else it would be beyond the power of council to enter into any contract which was to be completed or any part of which is to be executed after the personnel of the council has changed. It is evident that it was the intent of this section to prevent the council from tying the hands of future councils in the execution of contracts. However, it is not believed that it could possibly be construed to require a contract to be completed within the term of the present members of council. Undoubtedly the council under consideration

could not have legally provided for employment of the solicitor to begin at a future time after the expiration of the term of any of the members. However, the statute expressly authorizes the employment of a solicitor for the term of two years and in the case you mention the council exercised such power. The solicitor entered upon the contract and performed one year of service during the time of the members who executed the contract."

I believe the conclusion of my predecessor to be sound and that the contract here involved actually came into full operation during the year in which it was entered into and therefore Section 4241 has no application.

Your question, however, is broad in that you inquire as to the legality of a contract of this character, and it is therefore necessary for me to discuss whether or not, in any event, a village has power to enter into a contract for engineering services of this character.

It is perhaps pertinent to consider the sections of the General Code bearing upon the employment of an engineer.

Sections 4363, 4364 and 4365, General Code, are as follows:

"Section 4363: The street commissioner shall be appointed by the mayor and confirmed by council for a term of one year, and shall serve until his successor is appointed and qualified. He shall be an elector of the corporation. Vacancies in the office of street commissioner shall be filled by the mayor for the unexpired term. In any village the marshal shall be eligible to appointment as street commissioner."

"Section 4364: Under the direction of council, the street commissioner, or an engineer, when one is so provided by council, shall supervise the improvement and repair of streets, avenues, alleys, lands, lanes, squares, wards, landings, market houses, bridges, viaducts, sidewalks, sewers, drains, ditches, culverts, ship channels, streams, and water courses. Such commissioner or engineer shall also supervise the lighting, sprinkling and cleaning of all public places, and shall perform such other duties consistent with the nature of his office as council may require."

"Section 4365: Such street commissioner or engineer shall have such assistants as council may provide, who shall be employed by the street commissioner and shall serve for such time and for such compensation as is fixed by council."

You will observe that the first section quoted provides for the appointment of a street commissioner for a term of one year, whereas the succeeding section prescribes his duties and also states that these duties shall also be the duties of "an engineer when one is so provided by council". The last sentence of Section 4364 states that the engineer shall perform such other duties consistent with the nature of his office as council may require. This language, in my opinion, clearly implies that council may create the office of engineer and appoint some person to that office. This is an entirely different thing from the employment of a firm of engineers to perform like services. The duties prescribed by Section 4364 of the Code involve the supervision of the improvement of streets, alleys, etc., and I can see no distinction between the statutory duties and those assumed by the engineers in the contract in question.

The sections quoted are the only ones that I have been able to find authorizing the employment of an engineer by a village. If, therefore, these sections are to be treated as the sole authority for the employment of engineers, I should be compelled to the conclusion that there is no authority therein contained for the con-

tract in question. Section 4364 of the Code clearly implies that if council does not provide a street commissioner an engineer may be provided. The further implication is clear, however, that in that event the engineer is an employe and I have no hesitancy in saying that an employe should be a person and not a firm.

In view of these considerations, it is necessary to look farther and to inquire what if any authority exists for the contract in question by reason of the Home Rule Amendment of the Ohio Constitution.

Section 3 of Article XVIII of the Ohio Constitution is as follows:

“Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws.”

While at first there was some doubt as to the self executing character of this section, several more recent decisions of the Supreme Court make it clear that it is unnecessary that a municipality adopt a charter in order to make available to it the powers of home rule.

State ex rel. vs. Lynch, 88 O. S. 71.

Billings vs. Railway, 92 O. S. 478.

State ex rel. vs. French, 96 O. S. 172.

Perrysburg vs. Ridgway, 108 O. S. 245.

Many other cases along the same line might also be cited. Clearly the determination of what officers shall administer their government, how they shall be appointed or selected, and how the various functions of local government shall be provided for are clearly matters of local self government which are within the power of municipalities.

Fitzgerald vs. Cleveland, 88 O. S. 338.

State ex rel. vs. George, 92 O. S. 344.

In the case of *Perrysburg vs. Ridgway*, supra, the second branch of the syllabus is as follows:

“The power to establish, open, improve, maintain and repair public streets within the municipality, and fully control the use of them, is included within the term ‘power of local self government.’”

The reasoning and logic of the opinion in this case is in my opinion decisive of the question in this instance. Certainly the method of the improvement of streets is a matter of local self government and, if the municipality sees fit so to do, I think it well within the home rule power to provide for the supervision of its local improvements by contract instead of by the creation of an office and the appointment of an officer for this purpose. The right to contract, subject to certain limitations, is inherent in public as well as private corporations.

The village here involved has never adopted a charter and consequently no question of charter limitation is here involved. The legislative power of the village is by statute vested in the council and consequently I believe it within its authority, in the exercise of the home rule power of the village, to employ a firm of engineers by contract of the character here involved.

By the provisions of Section 4215 of the General Code, the members of the council of a village are elected for the term of two years. The contract in question extends over a period of six years and therefore the question arises as to whether a contract of this kind, extending as it does beyond the term of the council authorizing it, is legal. As I have before stated, there is no statutory authority at all for the employment of a firm for the performance of engineering services on behalf of the village. Authority being embraced in the general authority under home rule, it is not subject to any specific limitation, since the statute is silent and the village has no charter.

It becomes necessary, therefore, to go into the general question of the authority of representatives of public corporations to enter into contracts of this character. A review of the decided cases on this question leads to the conclusion that contracts extending beyond the term of the incumbents in office are not necessarily illegal. Thus in *Page on Contracts*, paragraph 1901, the rule is stated as follows:

“Unless specifically restrained by statute a public corporation may make a contract which by its terms is to last for a long period of time. Contracts for water and lighting are the common examples of contracts of this sort. The time must, however, be reasonable.”

You will note, however, that the author states that the time must be reasonable. In the determination of this it is necessary to consider the subject matter of the contract, the advantages to be gained by the public therefrom, the good faith of those entering into the contract and any other matters legitimately bearing upon the question of reasonableness. As stated by the same author later in the paragraph just quoted:

“Unless in good faith, for a reasonable time, and for the public interest, a contract extending beyond the term of the officials making it, is void.”

Much the same rule is found in *Dillon on Municipal Corporations*, in paragraph 1307, as follows:

“When a city has statutory authority to enter into contracts for a supply of water and gas for its own use and for the use of its inhabitants, the manner in which its statutory power shall be exercised and the terms of any contract which it may enter into, including the number of years during which it is to continue, rest within the discretion of the municipal authorities; and the courts will not review it or set it aside in the absence of fraud or an abuse or excess of authority, or unless the contract is so unreasonable, inequitable, or unfair as to justify the interference of a court on the established principles of law or equity. In the absence of charter or statute provision there is no rule of law which requires the municipal authorities to confine the exercise of their discretion in contracting for water or light to the term of office of the council or other officers making the contract; or to a contract for a single fiscal or calendar year. It has been said that the courts look with disfavor upon contracts involving the payment of moneys extending over a long period of time as tending to create a monopoly and involving undue restraint of the legislative powers of the successors of municipal boards and officers. But the great weight of authority clearly recognizes the validity of such contracts when they are not *ultra vires*, and they will not be disturbed if it appears that at the time when the contract was entered into it was fair and reasonable and warranted by the necessities of the case, or was then advantageous to the municipality.”

You will, of course, realize that I have not sufficient facts before me to give you a categorical answer to your question. The contract in question appears to be reasonable upon its face, but there may be other aspects to the particular situation of which I am not advised, which might ultimately lead to the conclusion that a contract for such a length of time, for this particular kind of service, would be unreasonable. While ordinarily it would appear unnecessary to make a contract covering engineering services for local improvements for any considerable length of time, yet in this particular instance such a contract may have been advantageous to the village in question. Under the circumstances, it seems to me that the decision of the question is one ultimately for a court, to whom all the facts should be submitted.

Accordingly I do not feel justified in doing more than to express the rules governing the decision of questions of this character, as indicated above.

This discussion is limited to the question of the power of the municipality to enter into a contract of this character. There are other circumstances attendant upon the execution of the contract which might affect in one way or another its legality and concerning which I am expressing no opinion.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1897.

VILLAGE BOARD OF EDUCATION—AUTOMATICALLY CREATED UPON
INCORPORATION OF A NEW VILLAGE—CANNOT LAWFULLY AS-
SUME DEBTS OF OLD DISTRICT.

SYLLABUS:

There being no authority for a board of education in a village school district which is automatically created upon the incorporation of a new village, to assume or pay any of the debts of the school district of which its district had formerly been a part, it can not lawfully assume or pay any of such debts.

COLUMBUS, OHIO, March 26, 1928.

HON. CHAS. B. COOK, *Prosecuting Attorney, Jefferson, Ohio.*

DEAR SIR:—I am in receipt of your communication in which you enclose a letter from the clerk of the board of education of Geneva Rural School District, and request my opinion with reference thereto. The clerk's letter is as follows:

“Previous to the incorporation of the Village of Geneva on the Lake, the territory which was incorporated in said village was a part of the Geneva Rural School District. The said Geneva Rural School District previous to said incorporation were owing for back tuition for sending high school pupils to Geneva Village schools something between \$13,000 and \$14,000. After the incorporation of the Village of Geneva on the Lake, the territory included therein was formed into a Village School District known as the board of education of Geneva on the Lake Village and the question has arisen between the