

Thus it appears that the legislature has provided that some one of its subdivisions shall provide for residents of Ohio who are in need of temporary poor relief.

Respectfully,
JOHN W. BRICKER,
Attorney General.

425.

TRUSTEES OF PUBLIC AFFAIRS—AUTHORIZED TO ENTER INTO CONTRACT FOR CONSTRUCTION OF LIGHT PLANT WHERE SUM IS IN EXCESS OF \$500—TRUSTEES MUST COMPLY WITH ORDINANCE OF VILLAGE COUNCIL AUTHORIZING SUCH CONTRACT.

SYLLABUS:

1. *The board of trustees of public affairs has sole authority to enter into contracts involving more than five hundred dollars for the construction of a light plant when same has been authorized by a village council.*

2. *When a village council has passed an ordinance authorizing the construction of a light plant, it is mandatory that the board of trustees of public affairs of a village comply therewith.*

COLUMBUS, OHIO, March 31, 1933.

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

GENTLEMEN:—Your recent request for my opinion reads as follows:

“At the request of the solicitor for the village of Columbiana, Columbiana County, Ohio, we are submitting the following questions for your opinion, and are also inclosing the solicitor’s letter to this Department.

1. May a village council proceed to have plans, specifications, estimates and profiles prepared, advertise and let a contract for the installation of the necessary machinery and equipment for the manufacture of electric current, or is the council obliged to depend upon the board of trustees of public affairs to perform these services?

2. If council can not legally proceed in the above manner, but passes an ordinance directing the board of public affairs to proceed to prepare plans and construct a light plant, is it mandatory that the board comply with the provisions of such ordinance?

In connection with these questions, we call your attention to an opinion of your predecessor, No. 1323, found on page 2391 of the Opinions of the Attorney General for 1927.”

The right of a municipality to construct, own, lease and operate a light plant cannot be questioned for it is specifically provided for in Article XVIII, Section 4 of the Ohio Constitution. It has the power under Section 2618, General Code, to establish, maintain and operate municipal lighting, power and heating plants. Section 3990 of the General Code provides that “the council of a municipality may, when it is deemed expedient and for the public good, erect gas works or electric works at the expense of the corporation, * * *.”

The legislature has made a distinction between cities and villages. The procedure prescribed for a village council when it determines to erect a light plant is stated in Section 4357, General Code, as follows:

“In each village in which water works, an electric light plant, artificial or natural gas plant, or other similar public utility is situated, or when council orders water works, an electric light plant, natural or artificial gas plant, or other similar public utility, to be constructed, or to be leased or purchased from any individual, company or corporation, or when the council shall have determined to establish a schedule of rates or charges of rents for use of the sewerage system and sewage pumping, treatment and disposal works of the village, council shall establish at such time a board of trustees of public affairs for the village, which shall consist of three members, residents of the village, who shall be each elected for a term of two years.”

Section 4358 specifies how the board of trustees of public affairs shall be appointed and elected as follows:

“When the council, in accordance with the provisions of this chapter, establishes a board of trustees of public affairs, the mayor of the village shall appoint the members thereof, subject to the confirmation of the council. Such appointees shall hold their respective offices until their successors have been elected according to law and such successors shall be elected at the next regular election of municipal officers held in such village.”

It should be pointed out that Section 4357 requires the establishment of a board of trustees of public affairs *at the time* that the council orders the construction of the waterworks, light or gas plant. It is apparent from these sections that the construction of waterworks, light or gas plants was intended to be vested in the board of trustees of public affairs.

The powers of a board of trustees of public affairs are as follows:

“The board of trustees of public affairs shall manage, conduct and control the water works, electric light plants, artificial or natural gas plants, or other similar public utilities, furnish supplies of water, electricity or gas, collect all water, electrical and gas rents, and appoint necessary officers, employees and agents. The board of trustees of public affairs may make such by-laws and regulations as it may deem necessary for the safe, economical and efficient management and protection of such works, plants and public utilities. Such by-laws and regulations when not repugnant to the ordinances, to the constitution or to the laws of the state, shall have the same validity as ordinances. For the purpose of paying the expenses of conducting and managing such water works, plants and public utilities, of making necessary additions thereto and extensions thereof, and of making necessary repairs thereon, such trustees may assess a water, light, power, gas or utility rent, of sufficient amount, in such manner as they deem most equitable, upon all tenements and premises supplied with water, light, power, or gas, and, when such rents are not paid such trustees may certify the same over to the auditor of

the county in which such village is located to be placed on the duplicate and collected as other village taxes or may collect the same by actions at law in the name of the village. The board of trustees of public affairs shall have the same powers and perform the same duties as are possessed by and are incumbent upon, the director of public service as provided in sections 3955, 3959, 3960, 3961, 3964, 3965, 3974, 3981, 4328, 4329, 4330, 4331, 4332, 4333 and 4334 of the General Code, and all powers and duties relating to water works in any of these sections shall extend to and include electric light, power and gas plants and such other similar public utilities, and such boards shall have such other duties as may be prescribed by law or ordinance not inconsistent herewith." (Section 4361.)

In cities the legislature has provided for a director of public service. Among the powers of such director, and thus given by reference to the board of trustees of public affairs in the construction or management of an electric light plant, are the following:

"Subject to the provisions of this title, the director of public service may make contracts for the building of machinery, water works buildings, reservoirs and the enlargement and repair thereof, the manufacture and laying down of pipe, the furnishing and supplying with connections all necessary fire hydrants for fire department purposes, keeping them in repair, and for all other purposes necessary to the full and efficient management and construction of water works." (Section 3961.)

Inasmuch as Section 4361 gives the board of trustees of public affairs of a village the same powers in regard to a light plant as the director of public service of a city has in reference to waterworks, it follows that under Section 3961 the board would have authority to make contracts for building machinery and buildings for a light plant. This, however, is subject to the provisions of Section 4328, General Code, which reads as follows:

"The director of public service may make any contract or purchase supplies or material or provide labor for any work under the supervision of that department not involving more than five hundred dollars. When an expenditure within the department, other than the compensation of persons employed therein, exceeds five hundred dollars, such expenditure shall first be authorized and directed by ordinance of council. When so authorized and directed, the director of public service shall make a written contract with the lowest and best bidder after advertisement for not less than two nor more than four consecutive weeks in a newspaper of general circulation within the city."

In cities the council has only legislative duties as provided in Section 4211 and its only function is to authorize contracts and make appropriations. The making and carrying out of contracts then vests in the proper board or agency. The village councils, however, are given certain administrative duties and Section 4221 authorizes them to contract in the following language:

"All contracts made by the council of a village shall be executed in the name of the village and signed on behalf of the village by the mayor and clerk. When any expenditure other than the compensation of persons

employed therein, exceeds five hundred dollars, such contracts shall be in writing and made with the lowest and best bidder after advertising for not less than two nor more than four consecutive weeks in a newspaper of general circulation within the village. The bids shall be opened at twelve o'clock noon on the last day for filing them, by the clerk of the village and publicly read by him."

It is contended that as a result of Section 4221, the village councils are to make contracts relative to the planning and construction of light plants and that the only function of the board of trustees of public affairs is to manage and control them after completion. There can be no doubt but that the powers of a village council to enter into contracts are much greater than those of a city council. However, by express provision, the power to construct, control and manage waterworks, light and gas plants is given to the village board of trustees of public affairs and a village council cannot make contracts in regard to matters which have been vested in some other agency.

Since the board is given powers similar to the director of public service by Section 4361, it would appear that the limitations of city councils would also be applied to village councils in reference to the construction and management of waterworks, light and gas plants. This limitation is stated in Section 4211 as follows:

"The powers of council shall be legislative only, and it shall perform no administrative duties whatever and it shall neither appoint nor confirm any officer or employe in the city government except those of its own body, except as is otherwise provided in this title. All contracts requiring the authority of council for their execution shall be entered into and conducted to performance by the board or officers having charge of the matters to which they relate, and after authority to make such contracts has been given and the necessary appropriation made, council shall take no further action thereon."

The council of a village, though having wider power and discretion than a city council, cannot make contracts for the construction of a light plant. The village council may pass an ordinance authorizing the construction of such plant and make appropriations for same. A board of trustees of public affairs must forthwith be appointed in accordance with Section 4358, which has the duty of proceeding with the construction of such plant. There have been a number of opinions of my predecessors to the effect that when a village council authorizes the construction of a waterworks, all administrative functions thereafter vest in the board of trustees. In an opinion of 1927, the Attorney General at p. 2394 states:

"1. When the council of a village determines to construct municipal waterworks it shall at such time establish a board of trustees of public affairs for said village, and thereafter all administrative duties with respect to the construction and operation of such waterworks vests in said board of trustees of public affairs. This includes the employment of engineers, the adoption of plans and specifications, and the advertising for and the letting of contracts for the construction of such waterworks. Inasmuch as the employment of engineers, adopting of plans and letting of contracts for municipal waterworks could not be done before council

determines to construct said waterworks, and inasmuch as council must establish the board of trustees of public affairs for the village at the same time that it determines to construct the waterworks, the council of a village could not employ engineers, adopt plans and let contracts for such construction before it had established such a board, and the mayor and clerk of the village under no circumstances would have authority to execute contracts on behalf of the village for such construction.

2. If the contracts involve the expenditure of more than \$500.00, the board of trustees of public affairs in a village has the sole authority to enter into contracts for the construction of municipal waterworks in said village, after such waterworks have been authorized by the council of said village."

Inasmuch as waterworks, gas and electric light plants have the same classification, all opinions relative to waterworks will also apply to light plants.

Since the power to make contracts relative to light plants is vested in the board of trustees of public affairs of a village and not in the village council, it follows from the statutes that the duty of making such contracts is a mandatory one. The Attorney General in an opinion of 1915, states on p. 2470:

"It will be observed that under the language of Section 4361 of the General Code, above quoted, the board of trustees of public affairs is given the same powers and duties relative to the making of contracts as are conferred upon the director of public service in cities by virtue of Sections 3961, 4328, 4329, and 4334. Under these last sections it is clear that it is not only the right but also the duty of the director of public service in cities to contract for the erection of a waterworks plant and to manage and control such plant after its construction. Since the board of trustees of public affairs is by direct reference given the same power relative to making contracts as the director of public service in cities, it follows that the board of trustees should contract for and supervise the erection of a waterworks plant whenever the village council orders such waterworks to be constructed, and by ordinance directs such expenditure of money."

Section 4328 states that the director of public service *shall* do certain acts when authorized by the council and uses no words from which it might be inferred that he has any discretion as to whether or not he will comply therewith. The board of trustees of public affairs was provided for in Section 4357 and was given certain powers and duties. These powers and duties of the board cannot, by any statutory construction, be considered discretionary. The statutes give a municipality the right to build waterworks, light and gas plants and authorize them to pass ordinances and make appropriations for same. They then provide for the appointment of a board of trustees of public affairs to carry out the duties imposed upon them.

Section 12283 General 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 specially enjoins as a duty resulting from an office, trust, or station."

In 25 O. Jur., the author states at p. 990 that:

"The writ is most frequently used to compel a public officer to perform a duty arising out of his office, and specifically enjoined by law. In fact, it has been declared that the object of the remedy by mandamus is to compel public officers and private individuals, in matters relating to the public, to perform their public duties. And, if any board or officer fails to discharge a lawful requirement, the action to secure such performance is mandamus."

Tiedeman on "Municipal Corporations," Section 360 reads as follows:

"If a corporation or its officials refuses or unreasonably neglect to perform a duty obligatory upon it or them, either by its charter or by the general law, and there is no adequate remedy by which a prompt and satisfactory performance can be enforced, the law is clear that a mandamus will be granted.

Where the official is deprived of all discretion as to performance or non-performance of the act; and the only discretion which he may exercise is as to the details of its execution, a mandamus will be granted to compel him to exercise his power for the accomplishment of the substantial result, which is required of him by law."

The board of trustees of public affairs, as has been seen, has certain duties imposed on it. It has no discretion as to whether or not it will carry out those duties. It is, therefore, my opinion in specific answer to your questions:

1. A village council may not proceed with plans and letting of contracts for the construction of a light plant, but must leave such functions to the board of trustees of public affairs.

2. When the council passes an ordinance authorizing the construction of a light plant, it is mandatory that the board of trustees of public affairs of a village comply with the ordinance.

Respectfully,

JOHN W. BRICKER,

Attorney General.

426.

TRACKLESS TROLLEY CAR—OPERATING ON PUBLIC STREETS—
SUBJECT TO MOTOR VEHICLE LICENSE TAX.

SYLLABUS:

1. *A vehicle constructed in a manner similar to the ordinary motor bus operating over public streets or highways, although limited in its sphere of travel by reason of the fact that it obtains its motive power from overhead trolley wires, by means of a trolley pole, is a "motor vehicle" within the meaning of Sections 6290 et seq. General Code, and is subject to the "license tax" therein imposed.*