

"The board of county commissioners may appoint the county surveyor, * * * ."

The reasoning and holding of said opinion is adhered to.

The earlier section, in substance, made provision, where the commissioners were authorized, within their discretion, to appoint the county surveyor as a county tax map draftsman; the later section provides that the county surveyor shall be the county tax map draftsman. To this extent, under the rules of construction hereinbefore referred to, the earlier section is, by the later enactment, repealed by implication. It follows that, in answer to your second question, it is not necessary that the board of county commissioners appoint the county surveyor as county tax map draftsman, for the reason that by the above provision of section 7181 of the General Code the county surveyor is specifically made the county tax map draftsman.

Respectfully,
C. C. CRABBE,
Attorney General.

230.

APPROVAL, BONDS OF CITY OF BARBERTON, SUMMIT COUNTY,
\$4,200.00, TO PAY PROPERTY OWNERS' PORTION OF STREET IMPROVEMENT.

COLUMBUS, OHIO, April 12, 1923.

Department of Industrial Relations, Industrial Commission of Ohio, Columbus, Ohio.

231.

VILLAGE—BOARD OF TRUSTEES OF PUBLIC AFFAIRS NOT AUTHORIZED TO ENTER INTO CONTRACT FOR MORE THAN \$500.00 WITHOUT ACTION OF COUNCIL—MANAGEMENT OF WATER WORKS—BONDS ISSUED UNDER SECTION 1259 G. C. REQUIRE AFFIRMATIVE VOTE OF MAJORITY OF COUNCIL.

SYLLABUS:

1. *The Board of Trustees of Public Affairs of a village are not authorized to enter into a contract involving an expenditure of more than \$500.00 without the action of the council authorizing such expenditures. It follows that the preparation of plans, employment of engineers, adoption of plans and acquirement of lands for water works purposes would necessarily be under the control of council.*

2. *The management and control of such water works after established is in the hands of the Board of Trustees of Public Affairs, subject to the limitations of section 4328 with reference to contracts involving more than \$500.00.*

3. *Bonds issued under the provisions of section 1259 of the General Code are not subject to requirements of section 3939 of the General Code and require only an affirmative vote of a majority of the members of council.*

COLUMBUS, OHIO, April 12, 1923.

MR. JOHN E. MONGER, *Director of Health, Department of Health, Columbus, Ohio.*

DEAR SIR:—In your recent communication you request my written opinion upon inquiries submitted to my predecessor by Hon. Harry H. Snively, the then acting Director of Health. Eliminating the introductory and supplementary matters submitted your inquiries are as follows:

“1st. What are the respective powers and duties of a council and a board of trustees of public affairs of a village with respect to the following matters relating to the provision of a public water supply improvement?

A. Preparation of plans, specifications and estimates of cost; employment of an engineer for such purposes; acceptance and adoption of plans; acquirement of land; and decision (subject to approval of the State Department of Health) as to source of water supply and method of developing the same for use.

B. After funds are provided, acceptance of competitive bids and awarding of contracts for construction work; payment of funds for completion of such works; maintenance and operation of the system after completion and expenditure of funds, derived from income, for repairs, replacements and extensions.

2nd. What affirmative vote of council is necessary to authorize bonds in accordance with section 1259 General Code.”

The sections of the General Code relating to the powers and duties of the Board of Trustees of Public Affairs are found in Chapter 8, entitled “Public Service”, and are a part of the subdivision of said chapter relating to villages.

Section 4357 G. C. provides that there shall be a board of trustees of public affairs to consist of three members in each village in which a water works plant is situated.

Sections 4358 to 4360 inclusive, relate to the initial appointment of members until a regular election is held, vacancies and the organization of such board.

Section 4361, which is material in connection with your inquiries, provides:

“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, employes 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 collect 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."

In analyzing the provisions of this section it will be observed that said section adopts by reference the sections therein enumerated relating to the powers and duties of the Director of Public Service. In fact the statute says that the Board of Trustees of Public Affairs shall have the same powers and perform the same duties as the Director of Public Service. Therefore, it will be necessary to refer to these sections in order to determine the powers and duties of such board.

It will be observed that in the enumeration of the sections relating to the duties of such service director, section 3955 of the General Code is mentioned, which provides:

"It is clear section 4328 of the General Code is applicable to boards of trustees of public affairs in villages; that contracts for supplies, material or provisions for labor for any work under the supervision of that department involving more than five hundred dollars, cannot be made except in the manner therein provided."

Thus, it would seem that regardless of the powers that have been conferred upon such a board, they are limited in entering into contracts, when the amount involved is more than \$500.00, by the action of the council. While it has been held that "the manner in which the Director of Public Service exercises his authority is not subject to the control of council." (*Hutchins v. Cleveland*, 9 C. C. N. S. 226). This of course must refer to those powers and authorities which are expressly conferred upon such officers. While the Director of Public Service is charged with the management and control of the water works, the collection of the water rents and empowered to make rules and regulations as he deems necessary for the safe and economical management of the water works, and authorized to make assessments of such water rents, it would seem clear that such powers are subject to the limitations of council with reference to the appropriation of the necessary fund for those contracts which exceed \$500.00 in amount.

Section 4328 G. C. provides:

"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."

From the foregoing it would seem that inasmuch as council must make the appropriation for the necessary fund it will be within the power of such council to attach such conditions to the expenditure of the same as in its judgment is necessary and proper.

Section 4221, G. C., authorizes the council of villages to make contracts which are to be signed by the mayor of the village and the clerk. This section is to be distinguished from section 4211 G. C., which relates to the powers of a city council and provides that its powers shall be legislative only and further restricts it from entering into contracts.

Attention is directed to an opinion issued by the Attorney General in 1912, and reported on page 1997 of the Reports for said year, in which a very similar question was presented and considered. The following is quoted from the syllabus:

"In case of dispute between the council and the board as to the location of the plant in the making of the contract, the council is superior authority."

It will be noted, however, that section 4361 G. C. has been amended since the rendering of this opinion. It originally provided, as pointed out in this opinion, that the board of trustees of public affairs should have all the powers of the trustees of water works. Whereas, now it provides that such board shall have the same power as the director of public service in cities. However, as pointed out in this opinion the same attorney general had previously held that section 4361 G. C., as it existed at that time, must be construed to refer to the same powers as those exercised by director of public service. In other words, he held that inasmuch as there were no such officials or officers as trustees of water works, that this reference in the statute must be construed to mean the director of public service. If this conclusion is correct then it follows that what was said in this opinion would apply to the question before us in reference to the law as it exists.

It was further pointed out in said opinion that all contracts were authorized by the village council and that such council could authorize the board of trustees of public affairs to enter into a contract which action would clothe them with power. However, as above pointed out, the conclusion was that in case of disputes council was superior.

In an Opinion found in the Reports of the Attorney General, 1917, page 308, it was held that a village council could require the board of trustees of public affairs to furnish current for street lighting without charge.

In another opinion for the same year, found on page 898, it was held that where bonds had been issued for the extension of a public utility owned by the village and only a portion of the proceeds thereof expended council in its discretion was empowered to discontinue the improvement and transfer the balance of the proceeds of said bond to the sinking fund, notwithstanding the board of trustees of public affairs considered the further extension necessary.

From the foregoing it must be concluded that the powers of council are practically unlimited in reference to the dictation of the terms of the contract for the improvement of the water works system.

It would follow that if council appropriates a certain sum for the employment of an engineer to prepare plans undoubtedly it would be authorized to designate what engineer or firm of engineers should be employed. It would further appear that the

adoption of any plans which would involve an expenditure of money would be a proper matter upon which council should act. Likewise, the selection of a site and the purchase of land would be a matter which the council undoubtedly should control in its action authorizing such purchase, and it would further appear that in its action providing for such improvement, subject to the approval of the board of health, such council could determine the source from which such water supply should be taken.

However, it would further appear that if the water works department has been established the management of such water works, including the amount of rents and the collection thereof, is exclusively under the control of the board of trustees of public affairs.

It is believed the foregoing will dispose of both branches of your first inquiry.

In determining your further inquiry with reference to what affirmative vote of council is necessary to authorize bonds, it will be necessary to consider section 1259, which provides:

“Each municipal council, department or officer having jurisdiction to provide for the raising of revenues by tax levies, sale of bonds, or otherwise shall take all steps necessary to secure the funds for any such purpose or purposes. When the funds are so secured, or the bonds therefor have been authorized by the proper municipal authority, such funds shall be considered as in the treasury and appropriated for such particular purpose or purposes, and shall not be used for any other purpose. The bonds authorized to be issued for any such purpose or purposes shall not exceed three per cent of the total value of all property in any city or village, as listed and assessed for taxation, and may be in addition to the total bonded indebtedness of such city or village otherwise permitted by law. The question of the issuance of such bonds shall not be required to be submitted to a vote of the electors.”

The “purposes” referred to in said section of course have reference to the steps taken in order to comply with the department of health’s order relative to the improvement of a water supply.

This section was considered by the court in the case of *State ex rel. v. Dean, Auditor*, 95 O. S., 108. The court held in substance that sections 1259 and 1259-1, G. C., were sufficient in themselves, and the legislature in such enactment abrogated the Longworth Act, the Burns Law and the Smith One Per Cent Law. Applying the principle announced in this case, to the case under consideration the conclusion is irresistible that a majority of council is all that is required in order to authorize an issue of bonds under section 1259 G. C.

Respectfully,

C. C. CRABBE,

Attorney General.