IN THE SUPREME COURT OF OHIO

AUGLAIZE COUNTY BOARD OF COMMISSIONERS,	:	CASE NO. 2006-1033
Appellant	:	On Appeal from the Auglaize County Court of Appeals, Third Appellate District
vs.	:	
CITY OF ST. MARYS, OHIO,	:	
Appellee.	:	

REPLY BRIEF OF APPELLANT AUGLAIZE COUNTY BOARD OF COMMISSIONERS

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STATEMENT OF FACTS

The County's defense in this action is not opportunistic, as the City and Amicus Curiae imply. The County performed the obligations that were required of it by the terms of the Agreement during the full 12-year term. For twelve years, the City paid nothing toward the costs for monitoring at the City owned Landfill.

After St. Marys constructed and began operating its Landfill in the early 1960's, the City allowed residents of Auglaize County outside of St. Marys to use the Landfill, which enabled the City to maintain higher waste volumes and competitive gate fees to efficiently operate the Landfill.[1] See D. Gifford, *Federalism, Efficiency, the Commerce Clause, and the Sherman Act: Why We Should Follow A Consistent Free-Market Policy*, 44 Emory Law J. 1227, 1236 (1995) (explaining landfill economies of scale). The City charged nonresidents a gate fee that was greater than the amount charged to city residents (the City referred to this differential as a "surcharge"). (Ex. 75, Supp. 414.) This arrangement was continued in the 1988 Agreement between the County and St. Marys. (Agreement, ¶¶8(a) and 8(b), Supp. 275-276.)[2]

Because R.C. 3734.52 required the "maximum feasible utilization" of existing solid waste facilities, the Agreement achieved the City's goal of ensuring the Landfill would continue to receive the County residents' solid waste, so the City would have an adequate waste stream to efficiently operate the Landfill. The City's desire for the County's waste stream is why the City directed **the City's consultant** to prepare the Agreement and waiver documents that needed to

[1] During the four years before the Agreement went into effect, the City's Landfill received 35,000 to 40,000 tons of solid waste per year. (Ex. 103, Supp. 451; Ex. 235, Supp. 598.) Of this amount, nearly 20,000 tons/yr. came from City residents, with the remainder coming from County residents outside the City and non-County residents. (Ex. 235, Supp. 598.)

[2] While the initial draft of the Agreement did not specify whether the City could charge non-City residents a higher gate rate than City residents, the City insisted on a provision that "outside City customers will be surcharged," which resulted in Paragraph 8(b) of the final Agreement. (Ex. 75, Supp. 414.) The City used this authority to charge County residents $1.50/ton more than City residents (Ex. 203, Supp. 532). Paragraph 8(b) does not refer to fee levied by the District pursuant to R.C. 3734.57(B).

be submitted to Ohio EPA for the County to form a single-county solid waste management district. (Ex. 71, Supp. 384.) The City suggests the County wanted to form its own district to obtain the disposal and generation fees levied on solid waste pursuant to R.C. 3734.57 and 3734.573, but those fees were required to be placed "in a separate and distinct fund for the benefit of the district" and spent "exclusively" for the purposes provided in R.C. 3734.57(G). Thus, the formation of a single-county district, instead of joining a multi-county district, did not benefit the County financially or otherwise. The truth is that creating a single-county district was an accommodation and benefit to the City as much, if not more so, than to the County.

One of the main purposes of House Bill 592 was to force landfills to become more protective of the environment. The Director of Ohio EPA was required to promulgate new standards for landfill design, construction and operation (referred to as "Best Available Technology" or BAT). Older landfills that could not demonstrate compliance with the new rules were required to close. R.C. 3734.05(A)(4) and (6). The Landfill, which the City constructed next to the Auglaize River, was not constructed with a bottom liner to prevent waste contaminants from entering the groundwater or the river. (Davis dep. vol. I 151, Supp. 159.) At the time the Agreement was made, St. Marys knew its Landfill did not comply with BAT and would need to be upgraded or a new landfill unit constructed in order to meet BAT and provide disposal capacity throughout the term of the Agreement. (Davis dep. vol. I 72, Supp. 154; Hull dep. 147-149, Supp. 205-207.) By entering into the Agreement, the City was making a commitment to the County to provide these upgrades to enable the County to request a waiver from Ohio EPA to form a single-county solid waste district. (Hull dep. 54-59, Supp. 191-196.) The need to upgrade or establish a new landfill unit meant it was foreseeable that during the 12-year term of the Agreement, the City Site could contain both an older closed landfill area that

was subject to post-closure monitoring requirements, and a new BAT landfill area that was subject to the monitoring requirements for operating facilities. The Agreement clearly obligated the City to provide the County's residents with disposal capacity throughout the 12-year term of the Agreement, whether the City decided to upgrade and continue operating the existing landfill unit, or open a new landfill unit. (Agreement, ¶ 4(d), Supp. 272.)

The City closed the existing Landfill in June 1998, without constructing the new BAT landfill unit, and collected and kept its gate fees from the Landfill without paying any portion of those gate fees into the monitoring Fund as required by the Agreement. The City also collected and remitted, as a trustee, the fees levied by the District pursuant to R.C. 3734.57(B). These fees were District funds, not County funds, and they were collected and turned over to the District by the City pursuant to statute, not pursuant to the Agreement. (R.C. 3734.57(E)). The City cannot explain why the County would ever agree to assume all of the City's liability to monitor the Landfill if the Agreement is interpreted as the City asserts, with the City paying nothing and being allowed to close the Landfill at any time, and the County being required to pay an indefinite sum of money for environmental monitoring for at least 30 years following the Landfill's closure. Simply put, the Board of Commissioners never agreed to pay for monitoring for as long as the Landfill was operating and for 30 years of post-closure monitoring.

Amicus Curiae claims the contracts of its members are at risk if the Court adopts Proposition of Law No. I, but fails to cite any examples where this would be the case. The Propositions of Law that Appellant is asking this Court to adopt would benefit counties, municipal corporations and private entities equally.

ARGUMENT

Proposition of Law No. I: A contract that specifies the period of its duration generally terminates on the expiration

of such period, and the mutual obligations of the parties to the contract terminate on that date, unless the parties otherwise expressly provide in the contract.

Appellant is not trying to change "traditional" Ohio contract law, as claimed by Appellee and the *Amicus Curiae*. Neither Appellee nor *Amicus Curiae* has cited a single Ohio case that would be overruled if this Court adopted Appellant's Proposition of Law No. I. The County is asking this Court to clarify existing Ohio contract law with respect to the duration of contractual obligations when a contract specifies a definite term. Nor is the County trying to escape from its contractual obligations on technical grounds. The County entered into a 12-year contract and performed all of its obligations. There is no claim the County failed to perform any of its obligations during the 12-year term. The County is seeking to prevent a multi-million dollar obligation being imposed on it -- an obligation that it never contracted for.

The Agreement provided in Paragraph 2: "The term of this Agreement shall be twelve (12) years . . ." It is arguably the clearest and most unambiguous provision in the entire Agreement. The City is asking this Court ignore this clear expression of the parties' intent as to the length of the Agreement and imply the parties intended the County's monitoring obligations should continue for decades. The parties addressed the length of their mutual contractual obligations in Paragraph 2, and there can be no implied term relating to a subject that is specifically addressed by the written terms of the contract itself. *Aultman Hosp. Ass'n. v. Community Mut. Ins. Co.* (1989), 46 Ohio St.3d 51, 53, 544 N.E.2d 920, 923.

The City refers to Paragraph 2 as merely an "introductory paragraph" and a paragraph that contains "general" language, thereby hoping to minimize the importance of Paragraph 2. The provision of a contract that sets forth the contract's duration is always one of the most important provisions of a contract and cannot be ignored or rendered inapplicable to a party's

obligations except by clear and explicit survival language. When there is clear and explicit survival language, there should be no need to resort to various rules of contract construction or extrinsic evidence to determine the intent of the parties. It is because of claims similar to that being made by the City that courts in other jurisdictions have adopted a rule similar to Appellant's Proposition of Law No. I. The City tries to distinguish the cases cited by the County, but the City cannot change the fact that all of these cases (Merit Brief of Appellant, pp. 13-17) adopted the same legal principle as is set forth in Proposition of Law No. I. Neither the City nor *Amicus Curiae* cites any case from Ohio or any other jurisdiction that disagrees with this rule. Adopting Proposition of Law No. I will honor the intent of the parties to the Agreement and will honor the intent of parties to existing and future contracts in Ohio. It will also require drafters of contracts to be clear as to the survival of contract obligations beyond a contract's termination date.

A. During The 12-Year Term Of The Agreement, The County Had Responsibility For Monitoring "Prior To And Subsequent To The Closure Of The Landfill."

To determine the intent of the parties regarding the length of the County's monitoring obligations, the Court must look at the entire Agreement, not just Paragraph 5(a). The City offers no explanation as to why the parties would expressly agree that the "Agreement" was to last for 12 years when they really intended that it would continue for decades, *i.e.*, as long as the Landfill was operating and for whatever period of time Ohio law may require an owner to conduct post-closure monitoring. Nor does the City offer any plausible explanation of why the County would agree to pay the City's monitoring liability after the City was no longer obligated to provide County residents with disposal capacity at the Landfill.

The parties' intent in using the words "prior to and subsequent to the closure of the site" in Paragraph 5(a) can be easily explained, however, by the fact the parties recognized the possibility that all or a portion of the Landfill could close before the end of the 12-year term. The City concedes this fact. (Merit Brief of Appellee, p. 27.) This is also consistent with the language in the last clause of Paragraph 9(a). If the Landfill closed before the end of the 12-year term, the City would not be collecting its gate rate and there could be a shortfall in the monitoring fund that was intended to be funded from the City's gate rate. In that instance, the County was a backstop for the remainder of the term. The Agreement can be given a definite legal meaning by interpreting it to require that during the 12-year term, the County was to have monitoring responsibilities, both prior to and subsequent to the closure of the Landfill and in fulfilling this obligation, was required to comply with applicable statutes and regulations regarding the monitoring activities that had to be performed. Such an interpretation gives legal meaning to all of the language in Paragraph 2 and all of the language in Paragraph 5(a). The City's brief provides no response to the County's argument on this point. "[W]hen the language of a written contract is clear, a court may look no further than the writing itself to find the intent of the parties. As a matter of law, a contract is unambiguous if it can be given a definite legal meaning." *Westfield Ins. Co. v. Galatis* (2003), 100 Ohio St.3d 216, 219, 797 N.E.2d 1256, 1261. The City's reliance on the word "all" in Paragraph 5(a) is unpersuasive. "All" modifies the words that follow it, i.e. "environmental monitoring." It does not modify any temporal or durational component.

B. Paragraph 5(a) Does Not Contain Explicit Survival Language.

Paragraph 5(a) does not contain any language referring to the term of the contract or the length of the County's monitoring obligations. To adopt the City's interpretation, it is necessary

to imply (even though it is not stated) the parties intended: (1) that Paragraph 2 should have no application whatsoever to the County's monitoring obligations; and (2) the words "applicable statutes and regulations" was to determine the length of the County's monitoring obligations as opposed to the scope of monitoring obligations. Such unstated implications cannot prevail over the stated language of the Agreement. The intent of the parties to a contract is presumed to reside in the language they chose to employ in the contract. *Kelly v. Med. Life Ins. Co.* (1987), 31 Ohio St. 3d 130, 509 N.E.2d 411, paragraph one of the syllabus. If the parties had intended that the County's monitoring obligations were to extend beyond the 12-year term, it would have been very easy to insert language in Paragraph 2 or Paragraph 5(a) clarifying this point. For instance, Paragraph 2 could have contained the words "except for the County's monitoring obligations set forth in Paragraph 5(a)" or Paragraph 5(a) could have contained the words "notwithstanding the provisions in Paragraph 2." Neither of these options was chosen by the parties. Thus the Agreement lacks the express survival language required to extend the County's monitoring obligations beyond Agreement's expiration date.

Even if the Court does not adopt Proposition of Law No. I, the County should still prevail on the issue of whether the County's obligations survived the expiration of the Agreement. The record clearly demonstrates the City drafted the Agreement. The City does not contest this fact. (Merit Brief of Appellee, p. 15.) Once the City drafted the language in Paragraph 2 stating the term of the Agreement shall be for 12 years, it was the responsibility of the City, as the drafter of the Agreement, to set forth in clear and unambiguous language that Paragraph 2 did not apply to the County's monitoring obligations in Paragraph 5(a). This, the City did not do. Where there is doubt or ambiguity in the language of a contract, it will be construed strictly against the party who prepared it. *McKay Machine Co. v. Rodman* (1967), 11 Ohio St.2d 77, 228 N.E.2d 304. In

Rodman, this Court stated: "In other words, he who speaks must speak plainly or the other party may explain to his own advantage." 11 Ohio St.2d at 80.

Even though the City claims the Agreement is not ambiguous, it feels the need to resort to extrinsic evidence and misstates the record by claiming the County acknowledged in its C-2 exemption request that its monitoring obligations would continue for longer that 12-years. This is not true. The City cites a cost study that was prepared for the City by Hull, the City's consultant, in December 1988 to demonstrate the City's commitment to upgrade the Landfill to BAT standards. The City is well aware that Mr. Hull testified it was not his intent in listing the various costs associated with the Landfill to indicate whose obligation it was to pay the estimated post-closure costs under the terms of the Agreement. (Hull dep 168-169.)[3]

> **Proposition of Law No. II: A public contract cannot not be interpreted according to the practical construction placed upon the contract by the successors of those who made it, or by other public officers or consultants, in a manner that varies from the express language contained in the contract.**

A. The Rule Of Practical Construction Was Incorrectly Applied By The Appellate Court.

There was no need for the Court of Appeals to apply the rule of practical construction to interpret the provisions of Paragraphs 8 and 9 of the Agreement because the language in these paragraphs is not ambiguous and even when application of the rule is appropriate, the acts and conduct of successor individuals, including public officials, who are not the individuals who entered into the contract, cannot be used to demonstrate the intent of the parties who made the contract or written instrument. *Cincinnati v. Gas Light & Coke Co.* (1895), 53 Ohio St. 278, 284, 287 41 N.E. 239, 241. The County is not proposing a rule of law that would bar all

[3] These pages of Hull's deposition were not included in the Supplement because Appellant did not anticipate that there would be an issue regarding this testimony. However, in light of the inaccurate claim by the City in its merit brief, Appellant must cite this testimony to clarify the actual record before this Court.

evidence of construction placed on a contract by public officials, as the City incorrectly states. (Merit Brief of Appellee, p. 17.)

The trial court, in awarding summary judgment in favor of the County, found the language of Paragraphs 8 and 9 to be clear and unambiguous. The City was required to set aside and pay over a portion of the City's disposal rate to the environmental monitoring fund. The undisputed facts showed that the City never paid any funds from the City's disposal rate into the monitoring fund. The City tries to excuse its total failure to perform by arguing that it collected and paid over to the District the surcharge levied by the District. In doing so, the City was merely performing its statutory duty and was not performing its contractual obligations pursuant to the Agreement. The Agreement required the City to allocate and pay over a portion of the *"rate"* that was established and set by the City, not a portion of the fees levied by the District.

The Court of Appeals erroneously concluded that the term *"rate"* was ambiguous and then erroneously looked at the conduct of District (who was not a party to the Agreement) in using some of its fees to pay for environmental monitoring at the Landfill and concluded that term *"rate"* included the District's fees. This led the Court of Appeals to find the City fulfilled its contractual obligations by collecting the District's fees. There is no justification for such a finding based on the language of the Agreement. The Agreement makes no mention of District fees. It only refers to the *"rate"* established and set by the City. Mr. Hull, the City's agent who drafted the Agreement and Mr. Brookhart, the person who signed the Agreement on behalf of the City, both acknowledged under oath that the "*rate*" referenced in Paragraph 8 is the City's disposal rate. (Hull dep., 205-206, Supp. 216-217; Brookhart dep. 140, Supp. 141.) Once it is established that the term *"rate"* means the City's disposal rate, the City's obligations under Paragraphs 8 and 9 are clear and unambiguous as found by the trial court.

Even though the City agrees the language in the Agreement is not ambiguous (Merit Brief of Appellee, p. 19.), it needed to substitute the words "disposal fees" for the word "rate" to make its argument regarding the language in Paragraph 9 that requires the City to set aside monies for the creation and maintenance of a fund. (Merit Brief of Appellee, p. 18.) Paragraphs 8 and 9 consistently use the term *"rate."* Neither paragraph uses the term disposal fees.

The City correctly states the City was to establish a rate using an objective third party who was to conduct a rate study. (Merit Brief of Appellee, p. 18.) The undisputed facts show that the City hired Hull to conduct this rate study in March 1989. However, the City misrepresents the findings of Hull's rate study by stating: *"Hull's rate study specifically concluded that a portion of the surcharge should be set aside for environmental monitoring . . ."* (Merit Brief of Appellee, p. 19.) Not surprisingly, the City's merit brief fails to make any citation to the record for this claim. Hull's rate study, dated March 13, 1989, only refers to the City's gate fee. (Ex. 76, Supp. 426.) The rate study recommended the City's gate fee be increased from $6.94 to $34.95. The City fails to cite or make any reference to the actual rate study dated March 13, 1989.

Hull's proposal to the District's Policy Committee for the establishment of a District surcharge was not part of his rate study and did not relate to or refer to the Agreement. (Dep. Exs. 34 and 35, Supp. 288 and 289.) There is no factual basis for the claim that Hull told the parties that the City could comply with it obligations under the Agreement by collecting the District surcharge. The City characterizes its collection of the District's fees rather than setting aside and paying over a portion of its gate rate to the Fund as its "methodology" for performing the Agreement. Regardless what term the City uses to describe its conduct, the fact remains that the City totally and without question failed to substantially perform its obligations. The trial

court specifically found that *"The fact that the District began to set aside funds to pay for monitoring expenses at the Wapakoneta Landfill and the St. Marys Landfill, the two operating landfills within the District, did not relieve the City of its obligations under the Agreement to set aside funds for environmental monitoring. If the City wished to be relieved from its obligations, it should have requested an amendment to the Agreement. This was never done."* (Appendix 35.) The trial court held that the City's total failure to pay any portion of the City's gate rate into the monitoring fund amounted to a failure to substantially perform the Agreement and precluded the City from recovering any amounts claimed to be owed to it by the County under the Agreement or in *quantum meruit* (Appendix 35, citing *W. Wagner & G. Wagner Co., L.P.A. v. Block* (1995), 107 Ohio App.3d 603, 608, 669 N.E.2d 272).

By holding that the City performed its contractual obligations merely by performing its statutory duty of collecting fees levied by the District, the Court of Appeals rewrote the Agreement and created a new agreement that finds no support in the express language of the Agreement. When the terms of a contract are clear and unambiguous, a court is not permitted to create a new contract by finding an intent not expressed in the clear and unambiguous language of the written contract. *Alexander v. Buckeye Pipe Line Co.* (1978), 53 Ohio St.2d 241, 246, 374 N.E.2d 146.

Proposition of Law No. III: A county's continued performance of a contract after the other party substantially fails to perform its mutual obligations to the county does not waive the county's right to assert the other party's failure to perform as a defense against a claim for breach of contract.

The issue of waiver only becomes relevant to the issues before the Court if the Court does not hold the County's monitoring obligations ended with the expiration of the 12-year term of the Agreement. The County is not trying to abolish the waiver doctrine, as the City asserts. To the contrary, the County's third proposition of law asks the Court to apply the rules regarding

waiver consistent with case law and the Restatement of the Law 2d, Contracts. Under Paragraph 8 of the Agreement, the City was required to establish and set its gate rate for disposal in an amount sufficient to allocate a part of the City's gate rate for the monitoring Fund. Thus, it was the City's money, i.e., the gate rate established and set "**by the City**," that was to be used to create the Fund. Nothing in Paragraphs 8 and 9 allowed the parties to use the District's money (fees levied by the District and collected by the City as a trustee for the District under R.C. 3734.57(B) and (E)), to satisfy the City's obligation to allocate a part of the City's gate rate to the Fund.

Under the last clause of Paragraph 9(a), the County's obligation to bear the costs of monitoring subsequent to closure of the Landfill was expressly conditioned on there being insufficient money in the Fund. The City, by failing to allocate any of the City's gate rate to create the Fund, ignored this condition to the County's obligation. The City argues the County waived the City's failure to perform the condition precedent by failing to object until the Agreement expired. The County's merit brief points out there is ample legal authority, including Restatement of the Law 2d, Contracts (1981), Section 84, which supports the proposition that only procedural, technical or relatively minor conditions may be waived, but a condition that is material to the parties' agreed allocation of risk or the likelihood of a party having to render performance is not subject to waiver. Since the District paid for the City's monitoring expenses during the 12-term, the City's breach did not have a material effect on the County during the term of the Agreement. However, when the City claims the County has the obligation to pay for the City's monitoring expenses for 30 years after the Landfill closes, the City's failure to substantially perform its obligation is unquestionably material to the County's duty to perform its contingent obligation, and is not subject to being waived.

The City's and County's agreed upon allocation of risk under Paragraph 9(a), and the likelihood of the County having to pay for monitoring subsequent to closure of the Landfill, would be fundamentally changed by a waiver of the City's obligation to allocate a portion of its gate rate to create the Fund as a pre-condition to the County's obligation to pay for post-closure monitoring costs to the extent those costs exceeded the amount in the Fund. Therefore, the County could not waive the City's failure to substantially perform its obligation to allocate a portion of the City's gate rate to create the Fund. Restatement of the Law 2d, Contracts (1981), Section 84, comment c. The City's merit brief cites no law that disagrees with this rule. The County's merit brief also points out that allowing a elected or appointed officials to change the material obligations of a county contract, except by a written amendment or waiver adopted at a regular or special meeting, is contrary to statutes that restrict the manner in which a board of commissioners may contractually bind the county. *See, e.g.*, R.C. 305.25.

The County does not suggest the Agreement required the City to guarantee the amount of the City's gate rate allocated to the Fund would cover the cost of post-closure monitoring under any eventuality. The cost of post-closure monitoring can change dramatically over time. It was still incumbent on the City, however, to exercise good faith to allocate a reasonable amount of its gate rate for the Fund. *Littlejohn v. Parrish* (2005), 163 Ohio App. 3d 456, 460-61, 869 N.E.2d 49. The City never allocated any of its gate rate for the Fund.

As to the City's obligation to "ensure continued operation of the City Site," under Paragraph 4(d), the City contends it did not breach this obligation by closing the Landfill in 1998 and, even if the closure was a breach, the County waived the breach by the District's continued payment for monitoring expenses for the closed Landfill until December 2000. The parties anticipated that if the City closed the existing landfill instead of upgrading it to meet the new

BAT regulations, the City would construct a new BAT landfill unit so the City could continue providing disposal capacity for the entire term of the Agreement. *See* p. 3, *supra.* The City itself believed that closing the Landfill before the end of the Agreement without providing alternative disposal capacity for the County's residents was a breach of the Agreement. (Ex. 128, Supp. 472; Ex. 214, Supp. 549.)

The County did not waive the City's breach of Paragraph 4(d), which was a total breach of the Agreement because the City ceased performance of all its obligations when it closed the old landfill in 1998 without opening a new BAT landfill. The waiver of such a breach is governed by different rules than the waiver of a condition precedent. A party's continued performance following a total breach by the other party does not waive the right to assert a total breach unless the other party materially changed its position in reliance on the continuation of the contract. Restatement of the Law (2d) Contracts (1981), Section 378, comment a; *Fredrickson v. Nye* (1924), 110 Ohio St. 459, 144 N.E. 299, syllabus, paragraph 2. The City cites no evidence and does not contend it materially changed position in reliance on the District's continued payment of monitoring expenses for the closed Landfill until December 2000. The City's merit brief fails to address *Fredrickson* and Section 378 of the Restatement, or advance any reason why they should not be applied in this case.

> **Proposition of Law No. IV: A county's obligation to pay a municipality pursuant to a contract made pursuant to R.C. 307.15 is void if the county auditor does not certify the availability of funds pursuant to R.C. 5705.41(D) and no statutory exception to certification applies, or if the contract does not contain the provisions required by R.C. 307.16.**

The City misplaces its reliance on the trial court's opinion that R.C. 5705.41(D)(1) did not apply to the Agreement because of the exception in R.C. 5705.44 for obligations to be paid from the earnings of a public utility. The basis for the trial court's ruling was its determination

that Paragraphs 8 and 9 of the Agreement unambiguously obligated the City to pay the Landfill's environmental monitoring expenses using a part of the gate fee established and collected by the City for use of the Landfill. (Appendix 32.) The trial court held the City never complied with this obligation, but if it had, the cost of environmental monitoring would have been paid from the proceeds of the City's Landfill gate rate, which are the earnings of a public utility for purposes of R.C. 5705.44. (Appendix 38.) The trial court went on to hold that when there is no certification, a claimant's recovery is limited to such earnings. R.C. 5705.44. *"[A]s a result of the City's failure to establish and adequately fund the "Fund" required by the Agreement, there are no earnings from which the City can claim or demand recovery."* (Appendix 39.)

When the Court of Appeals reversed the trial court's decision by holding that Paragraphs 8 and 9 of the Agreement required the County to set aside County funds or District fees to pay for environmental monitoring, the trial court's rationale for applying the public utility exception evaporated too. Although the trial court correctly held the City Landfill gate rate was a charge for services provided by a public utility (i.e., the Landfill), neither the trial court nor the Court of Appeals addressed whether the County's general funds or the fees levied by the District under R.C. 3734.57(B) are earnings of a public utility. Clearly they are not. The County's general funds are proceeds from real property taxes and other general taxes levied by the County. The fees levied by the District under R.C. 3734.57(B) are also taxes levied to pay the cost of running the District, and not a charge for services. *American Landfill, Inc. v. Stark/Tuscarawas/Wayne Joint Solid Waste Mgt. Dist.* (6th Cir. 1999), 166 F.3d 835. The District has never owned or operated a landfill, or provided solid waste disposal services to the public. Accordingly, if the Court adopts the City's position that Paragraphs 8 and 9 obligated the County to pay for monitoring, then the public utility exception to certification does not apply to the Agreement.

The Ohio Attorney General has for over 50 years consistently held the exception in R.C. 5705.41(D) and 5705.44 for "continuing contracts" that run beyond the end of the fiscal year in which they are made, is limited to divisible contracts and contracts that are expressly designated as continuing contracts by the General Assembly. *See* 2005 Ohio Atty. Gen. Op. No. 2005-007; 1999 Ohio Atty. Gen. Op. No. 99-049; 1987 Ohio Atty. Gen. Op. No. 87-069; 1958 Ohio Atty. Gen. Op. No. 1604, p.22. Neither the City nor *Amicus Curiae* has cited case law that disagrees with the Attorney's General's interpretation, or provided any example where a contract similar to the Agreement herein was held to be a continuing contract that may be certified annually. The Attorney General's longstanding interpretation of a given law, while not conclusive, must be reckoned with most seriously and should not be disregarded and set aside unless judicial construction makes it imperative to do so. *See State ex rel. Schweinhagen v. Underhill* (1943), 141 Ohio St. 128, 132, 46 N.E.2d 861; *State ex rel. Automobile Machine Co. v. Brown* (1929), 121 Ohio St. 73, 76, 166 N.E. 903.

The Attorney General's longstanding interpretation of the continuing contract exemption is well-reasoned and furthers the purpose for requiring an auditor's certification of available funds under R.C. 5705.41(D) by securing with certainty that there are funds in the county treasury to meet the county's obligations. This can only be accomplished if the auditor can certify a specific amount the county will be obligated to pay under the contract. In a continuing contract, this amount will be spelled out as to each year of the obligation; hence the duty to include the amount in the county's annual appropriation measure as a "fixed charge." R.C. 5705.44. In contrast, the Agreement between the County and the City does not set forth any specific amount of money to be paid by the County, or provide any method for determining the

amount the County was obligated to pay.[4] Nor does the Agreement specify when the County's obligation to pay arises. Under the City's interpretation of the Agreement, the County is required to pay an undefined and unlimited amount for environmental monitoring of the Landfill until at least 2031 (Amended Complaint, ¶63, Supp. 19), while the City's obligations under the Agreement ended when the City closed the landfill in 1998. The parties do not have corresponding duties under the Agreement. Accordingly, the Agreement is not a continuing contract. It therefore was necessary for the County Auditor to certify the entire amount of the County's obligation at the time the Agreement was made in 1988. 1987 Ohio Atty. Gen. Op. No. 87-069, syllabus ¶ 11. This did not occur. Therefore the County's obligation is void. R.C. 5705.41(D)(1).

Finally, the City's and Amicus Curiae's suggestion that this Court create a judicial exception to R.C. 5705.41(D)(1) for contracts between political subdivisions is an idea the Court should reject as a radical departure from past precedent and practice, and bad public policy. The provisions of R.C. 5705.41(D)(1) requiring a fiscal officer's certification of available funds to validate a contract involving the expenditure of public funds has existed more or less in the same form since 1876 when the General Assembly enacted the Burns Law. *Emmert v. Elyria* (1906) 74 Ohio St. 185, 193, 78 N.E.269. This Court has consistently explained the purpose of the Burns Law was to control the exercise of discretion by the contracting authorities of local governments when entering into contracts, so that those authorities cannot not enter into reckless or extravagant obligations that exceed the amount of money on hand or in the process of being collected, thereby protecting the government from potential insolvency. *State v. Kuhner & King* (1923), 107 Ohio St. 406, 413, 140 N.E. 344. ("The purpose in requiring such certificate ... is

[4] The City's merit brief at p. 32 argues that Paragraphs 8 and 9 describe a "method for payment," but this falls far short of a method for determining the amount to be paid, as required by R.C. 307.16.

clearly to prevent fraud and the reckless expenditure of public funds, but particularly to preclude the creation of any valid obligation against the county above and beyond the fund previously provided and at hand for such purpose.").

Statutes enacted for the protection of public revenue must be strictly adhered to in the absence of any contrary intent expressed by the Legislature. *L. Hommel & Co. v. Woodsfield* (1930), 122 Ohio St. 148, 155, 171 N.E. 23 ("This court will not relax the protection which such statutes throw around the public treasury."). The General Assembly has not provided an exception for contracts between two political subdivisions, and thus no such exception can be recognized. *Swetland v. Miles* (1920), 101 Ohio St. 501, 506, 130 N.E. 22 (courts cannot create exceptions in addition to those explicitly provided by the General Assembly); *Scheu v. State of Ohio* (1910), 83 Ohio St. 146, 157-58, 93 N.E. 969 ("an exception to the provisions of a statute not suggested by any of its terms should not be introduced by construction from considerations of mere convenience.").

The City contends the safeguards in R.C. 5705.41(D)(1) should not apply to a contract between two political subdivisions even though the General Assembly has not enacted such an exception. The City relies on *Board of Cty. Commrs. of Jefferson Cty. v. Smithfield* (7th App. Dist. Nov. 24, 2006), App. No. 05-JE-38, 2006-Ohio-6242, and *Board of Cty. Commrs. of Jefferson Cty. v. Bd. of Twp. Trustees of Island Creek Twp.* (1981), 3 Ohio App.3d 336, 338, 445 N.E.2d 664. In both cases, there was no express contract between the political subdivisions, but the court of appeals nonetheless required one of the parties to pay the other for utility services under a theory of a quasi-contract despite a failure to comply with mandatory statutory procedures. *Smithfield, supra*, ¶ 22 (failure to adopt ordinance required by R.C. 735.05); *Island Creek, supra*, p. 338 (no fiscal officer's certificate). In the case *sub judice*, the City's claims are

based on an express contract between the City and the County. A party may not rely on a theory of quasi-contract to circumvent the lack of an auditor's certificate when the parties' obligations arise out of an express contract. *Buchanan Bridge Co. v. Campbell* (1899), 60 Ohio St. 406, 426, 54 N.E. 372 ("where there is a subsisting express contract the recovery must be had thereon, and an action cannot be had in such case upon an implied contract.").

The court applied flawed reasoning in *Smithfield* and *Island Creek.* Nothing in R.C. 5705.41(D)(1) or the Supreme Court's jurisprudence indicates the protections of an auditor's certificate was intended to apply only to contracts with private entities. A political subdivision's excessive contractual obligations to another political subdivision, whether due to negligence, recklessness, fraud, or indifference, can lead to deficit spending and an unbalanced budget just as easily as obligations to private entities. *See Cincinnati v. Bd. of Educ.* (1933), 30 Ohio N.P. (n.s.) 595, 599-600. The court in *Smithfield* and *Island Creek* appeared to believe that any statutorily required procedures designed to protect the public treasury may be disregarded with respect to contracts between political subdivisions. It is not the court of appeals' prerogative to create new exceptions to longstanding statutory protections of county funds. If there is to be a policy that contracts between a county and another political subdivision should be exempt from R.C. 5705.41(D)(1), it is for the General Assembly to create. Because such an exception has not been enacted, the Ohio Attorney General has opined that R.C. 5705.41(D)(1) "is applicable also to contracts with other public entities unless specific statutes provide to the contrary." 2005 Ohio Atty. Gen. Op. No. 2005-007. The County respectfully submits the Attorney General's opinion is correct, and the Agreement between the City and County is void because the County Auditor did not certify the County's obligations under the Agreement.

CONCLUSION

For all of the foregoing reasons, Appellant respectfully requests that the Court adopt its Propositions of Law, reverse the judgment of the Court of Appeals and dismiss the City's complaint.

Respectfully submitted,

By: _____
HENRY N. HEUERMAN

By: _____
ALBIN BAUER, II

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PROOF OF SERVICE

I certify that a copy of this Reply Brief of Appellant Auglaize County Board of Commissioners in Support of Jurisdiction was sent by First Class U.S. Mail to counsel for Appellee, Bruce L. Ingram, Esq. and Philip F. Downey, Esq., Vorys, Sater, Seymour and Pease, LLP, 52 East Gay Street, P.O. Box 1008 Columbus, Ohio, 43216-1008 on January 15, 2007.

_____
Counsel for Appellant Auglaize County
Board of Commissioners

APPENDIX

LEXSTAT OHIO REV CODE 735.05

* CURRENT THROUGH LEGISLATION PASSED BY THE 126TH OHIO GENERAL ASSEMBLY *
* AND FILED WITH THE SECRETARY OF STATE THROUGH DECEMBER 28, 2006 *
* ANNOTATIONS CURRENT THROUGH OCTOBER 1, 2006 *

TITLE 7. MUNICIPAL CORPORATIONS
CHAPTER 735. PUBLIC SERVICE
PUBLIC CONTRACTS

GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION

ORC Ann. 735.05 (2006)

§ 735.05. Contracts, material, and labor

The director of public service may make any contract, purchase supplies or material, or provide labor for any work under the supervision of the department of public service involving not more than twenty-five thousand dollars. When an expenditure within the department, other than the compensation of persons employed in the department, exceeds twenty-five thousand dollars, the expenditure shall first be authorized and directed by ordinance of the city legislative authority. When so authorized and directed, except where the contract is for equipment, services, materials, or supplies to be purchased under division (D) of *section 713.23* or *section 125.04* or *5513.01 of the Revised Code* or available from a qualified nonprofit agency pursuant to *sections 4115.31* to *4115.35 of the Revised Code*, the director 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.

HISTORY:

RS Bates § 1536-679; 96 v 67, § 143; GC § 4328; 123 v 495; Bureau of Code Revision, 10-1-53; 132 v S 378 (Eff 4-29-68); 136 v H 8 (Eff 8-11-75); 136 v S 430 (Eff 8-13-76); 138 v H 371 (Eff 3-14-80); 140 v H 373 (Eff 7-1-83); 141 v H 100, § 1 (Eff 3-6-86); 141 v H 100, § 3 (Eff 7-1-90); 142 v H 527, § 1 (Eff 3-17-89); 142 v H 527, § 3 (Eff 7-1-90); 143 v S 254 (Eff 4-13-90); 147 v H 204. Eff 3-30-99; 150 v H 95, § 1, eff. 9-26-03.

NOTES:

Section Notes

The effective date is set by section 179 of H.B. 95 (150 v --).

See provisions, §§ 3, 4 of SB 254 (143 v –), following *RC § 713.23*

OPINIONS

OF THE

ATTORNEY GENERAL

OF

OHIO

FOR THE

PERIOD FROM JANUARY 1, 1958
TO JANUARY 12, 1959

PAGES 1-774
INDEX 775-827
OPINIONS 1503-3221

The F. J. Heer Printing Company
Columbus 16, Ohio
1959
Bound by the State of Ohio

the provision of Section 3.30, Revised Code, to be considered as vacant and such vacancy shall be filled by the governor as provided in Section 13, Article IV, Ohio Constitution.

Respectfully,
WILLIAM SAXBE
Attorney General

1604

EDUCATION, BOARDS OF—LEASE OF BUILDINGS FOR SCHOOL PURPOSES—PERIOD OF LEASE LIMITED BY REASONABLENESS—SUCH CONTRACT MAY INCLUDE PURCHASE FEATURES—§§5705.41, 3313.37, R.C.—UNLAWFUL TO APPLY ALL OR A PORTION OF LEASE PAYMENTS TOWARD PURCHASE—LEASE AGREEMENT, NOT A "CONTINUING CONTRACT" WITHIN THE MEANING OF §5705.41 R.C.

SYLLABUS:

1. "Continuing contracts" as provided in Section 5705.41, Revised Code, discussed. discussed.

2. A board of education may, under the provisions of Section 3313.37, Revised Code, lease a suitable building for school purposes and make such lease agreement for a period of years, if reasonable. Such agreement may also include either an option or a firm contract to purchase such property, the former being a "continuing contract" as provided in Section 5705.41, Revised Code. It is unlawful, however, to apply all or a portion of the lease payments against the purchase price of the property.

3. Since a lease agreement coupled with a firm contract to purchase is not a "continuing contract" under Section 5705.41, Revised Code, the funds necessary to cover that portion of the contract representing the purchase price of the property must be appropriated and certified by the fiscal officer as being in the treasury or in the process of collection.

Columbus, Ohio, January 27, 1958

Hon. E. E. Holt, Superintendent of Public Instruction
Department of Education, Columbus, Ohio

Dear Sir:

Your request for my opinion reads as follows:

"We would appreciate your opinion in answer to the following questions:

"1. May a board of education lease a suitable building for school purposes from private owners with or without provisions for subsequent acquisition of title?

"Section 3313.37 of the Revised Code of Ohio does provide that a board of education may rent space or buildings for school purposes. However, we find no authority whatsoever for a board of education to enter into any contract that would provide for subsequent acquisition of title to such property.

"2. If a board of education may rent suitable buildings what would be the maximum length of time for which such a lease could run?

"3. Would the board of education have the right to guarantee the payment of rentals in the case of a long-time lease?"

Section 3313.37, Revised Code, reads as follows:

"The board of education of any school district, except a county school district, may build, enlarge, repair, and furnish the necessary schoolhouses, purchase or lease sites therefor, or rights of way thereto, or purchase or lease real state to be used as playgrounds for children or *rent suitable schoolrooms,* either within or without the district, and provide the necessary apparatus and make all other necessary provisions for schools under its control." (Emphasis added)

There is no longer any question that the authority to rent schoolrooms includes by implication authority to lease. Opinion No. 240, Opinions of the Attorney General for 1919, p. 428. Since Section 3313.37, Revised Code, specifically authorizes a board of education to acquire real estate, it would be unduly strict to hold that the board may not take a lease with either an option or a firm contract to purchase. Since the latter method is not a continuing contract as hereinafter defined, that portion of the contract representing the purchase price of the property must be appropriated and certified as being either in the treasury or in the process of collection in accordance with Section 5705.41, Revised Code. Whichever method is used, such lease agreement must not be construed as applying all or a portion of the lease payments to the purchase price of the property.

I presume that when you ask whether a board of education may guarantee the payments under a long term lease you are actually inquiring as to whether a lease running longer than one year is valid under the current statutes.

Since Section 3313.37, *supra,* sets out no limitations as to the length of time a lease may run, the limitation, if any, must be found in the pro-

visions of Section 5705.41, Revised Code, the applicable portions of which are as follows:

> "No subdivision or taxing unit shall:
>
> "Make any contract or give any order involving the expenditure of money unless there is attached thereto a certificate of the fiscal officer of the subdivision that the amount required to meet the same, or in the case of a continuing contract to be performed in whole, or in part, in an ensuing fiscal year, the amount required to meet the same in the fiscal year in which the contract is made has been lawfully appropriated for such purpose and is in the treasury or in process of collection to the credit of an appropriate fund free from any previous encumbrances. * * *"

This section seemingly would not specifically prohibit a board of education from entering into a lease agreement extending over a period of years. On the contrary, if such lease agreement can be considered a "continuing contract" then there is specific provision for it.

This consideration is important in determining whether the board must presently have available sufficient funds to cover the entire period of the contract, or only sufficient funds to cover the portion coming due in the first fiscal year.

In an effort to determine just what sort of contract is classified as "continuing" under this section it is helpful to trace evolution of said section through various stages of development. Section 5660, General Code (1910), reads as follows:

> "The commissioners of a county, the trustees of a township and the board of education of a school district, shall not enter into any contract, agreement or obligation involving the expenditure of money, or pass any resolution or order for the appropriation or expenditure of money, unless the auditor or clerk thereof, respectively, first certifies that the money required for the payment of such obligation or appropriation is in the treasury to the credit of the fund from which it is to be drawn, or has been levied and placed on the duplicate, and in process of collection and not appropriated for any other purpose; money to be derived from lawfully authorized bonds sold and in process of delivery shall, for the purpose of this section, be deemed in the treasury and in the appropriate fund. Such certificate shall be filed and forthwith recorded, and the sums so certified shall not thereafter be considered unappropriated until the county, township or board of education, is fully discharged from the contract, agreement or obligation, or as long as the order or resolution is in force."

This section was repealed in 1925, 111 Ohio Laws, 371, 375, and replaced with a new Section 5660, General Code, which incorporated the substantial meaning of the earlier statute and added the following significant language:

> "* * * In the case of contracts running *beyond the termination of the fiscal year* in which they are made for salaries of *educational employees of boards of education, or for street lighting, collection or disposal of garbage or other current services for which contracts may lawfully be made extending beyond the end of the fiscal year in which made, or to the making of leases the term of which runs beyond the termination of the fiscal year in which they are made,* the certification of the auditor or chief fiscal officer as to money in the treasury or in process of collection, above required as a condition precedent to the making of such contract or lease *shall be deemed sufficient if such certification cover the money required to meet such contract or lease throughout the fiscal year* in which such contract or lease be made, provided further that in each subsequent fiscal year in which such contract or lease is in effect the auditor or fiscal officer shall make a certification for the amount required to meet the obligation of such contract or lease maturing in such year. In all such contracts or leases, the amount of the obligation remaining unfulfilled at the end of a fiscal year and which will become payable during the next fiscal year shall be included in the appropriations for such next year." (Emphasis added)

It is noteworthy, I think, that this section specifically provides for certain contracts and leases which cover a period longer than one year. Noteworthy, too, is the inclusion of leases in the same category as contracts for educational employees, the latter having always been recognized as contracts of the "continuing" type.

Section 5660, General Code, was repealed in 1927, 112 v. 409, Sec. 40, and was replaced by Section 5625-33, General Code, 112 v. 406, Sec. 33, the part pertinent for the purposes of this case reading as follows:

> "Section 33. No subdivision or taxing unit shall:
>
> "(d) Make any contract or give any order involving the expenditure of money unless there is attached thereto a certificate of the fiscal officer of the subdivision that the amount required to meet the same (or in the case of a *continuing contract* to be performed in whole, or in part, in an ensuing fiscal year, the amount required to meet the same in the fiscal year in which the contract is made), has been lawfully appropriated for such purpose and is in the treasury or in process of collection to the credit of an appropriate fund free from any previous encumbrances. * * * (Emphasis added)

In reading this section it is apparent that the legislature did not specifically provide for the disposition of particular contracts and leases as was done under Section 5660, *supra;* the inference is quite strong, however, that it was the intention of the legislature to include these specific contracts and leases within the meaning of "continuing contract" as used in Section 5625-33, General Code. This inference gains added stature when it is noted that a portion of Section 5660, *supra,* is carried over into Sections 5625-36, General Code, 112 v. 408, Sec. 36, which reads:

> "In the case of *contracts or leases running beyond the termination of the fiscal year in which they are made,* the fiscal officer shall make a certification for the amount required to meet the obligation of such contract or lease maturing in such year. In all such contracts or leases the amount of the obligation remaining unfulfilled at the end of a fiscal year, and which will become payable during the next fiscal year, shall be included in the annual appropriation measure for such next year as a fixed charge. * * * (Emphasis added)

The provision last quoted appears to recognize without explicitly so stating, that leases may run for a considerable number of years and that the sum which may be required to pay the annual rental in future years will have to be appropriated from year to year by the taxing authority in its annual appropriation. Manifestly, when the legislature used the words "continuing contract" in Section 5625-33, General Code, it intended to characterize the type of contracts and leases set forth previously in the old Section 5660, *supra.* It should be noted that Section 5625-33, General Code, is, for the purposes of this case, identical with Section 5705.41, Revised Code. Likewise, Section 5625-36, General Code, is the same as Section 5705.44, Revised Code.

Here it is helpful to note certain opinions of my predecessors in office which give substance to the reasoning set out above.

In Opinion No. 3734, Opinions of the Attorney General for 1941, p. 341, it was held that county commissioners were authorized to enter into a lease for years, with an option of renewal, and even though this question was not considered especially in relation to Section 5623-33, General Code, Section 5705.41, Revised Code, it is inescapably clear that the then Attorney General saw no problem under the above section since he alluded to it expressly in other connections. Likewise, in Opinion No. 1680, Opinions of the Attorney General for 1947, p. 132, it was concluded that the Adjutant General was authorized to enter into leases running longer than

two years, *explicitly finding that this would not violate Section 5625-33, General Code, Section 5705.41, Revised Code.* Although not mentioned, it must be assumed that the Attorney General classified these leases as "continuing contracts," since otherwise no authority would have existed.

Perhaps the only clear reference to "continuing contracts" is to be found in Opinion No. 4006, Opinions of the Attorney General for 1941, p. 585, wherein the question was presented whether a board of county commissioners could enter into a five year agreement to purchase insurance, the premiums being paid annually. After having concluded that the board was not actually entering into a five year agreement because it had retained the right to cancel at the end of any year, the opinion continued on to say at page 587:

> "Whether the commissioners could enter into a contract of insurance for a period of five years and obligate themselves to pay the premiums annually is a question not presented by you and I have therefore given no consideration to it. If they have such power, it would be a *continuing contract within the meaning of the term as used in Section 5625-33,* General Code, and certification could be made by the county auditor during each fiscal year for the amount required to be paid during such year. * * *" (Emphasis added)

Since a lease for a period of years is obviously a "continuing contract" as provided for in Section 5705.41, Revised Code, I find no reason why a board of education may not enter into such lease agreement, provided, of course, said board complies in all other respects with Section 5705.41 (D), *supra,* to wit: that a certificate be obtained stating that the amount necessary to meet such agreement in the year in which made has been appropriated and is in the treasury or in process of collection. It would be impossible to state as a matter of law that a contract for any given number of years would be legal or illegal; therefore, a board of education may lease a suitable building for school purposes for a "reasonable time."

In arriving at this conclusion, I am not unmindful of the opinions repeatedly published by this office in which installment purchases of real estate have been held unlawful. Without attempting an exhaustive survey of the law of contracts, it is reasonably clear that the words "continuing contract" as used by the legislature and as interpreted by numerous of my predecessors, describe what is known as a "divisible contract." As briefly as possible, 3 Williston On Contracts, (Rev. Ed.) defines a divisible contract at page 2408 as:

> "A contract is divisible when by its terms, 1, performance of *each party* is divided into two or more parts, and, 2 the number of parts due from *each party* is the same, and, 3, the performance of *each part* by one party is the agreed exchange for a corresponding part by the other party." (Emphasis added)

There can be no question that a contract for the purchase and sale of real estate does not lend itself to the definition set out above. Delivery of a deed begins and ends with the single act, and even though payments may be spread out over a number of installments there is no corresponding continuing performance on the part of the grantor. His entire duty is either terminated now or postponed until a later date. It is plain, therefore, that a contract for the sale of property is not a divisible contract.

This being true, there is complete harmony between the decisions cited above. Installment purchases of real estate are unlawful because of the lack of statutory provision for them, while leases for a period of years are lawful in as much as they are "continuing contracts" under Section 5705.41, Revised Code. Since the board of education is authorized to enter into this latter type of contract, and since the contract obligates the board to fulfill its terms, any further guarantee outside the contract would be superfluous.

Finding as I do, it is my opinion and you are advised:

1. "Continuing contracts" as provided in Section 5705.41, Revised Code, discussed.

2. A board of education may, under the provisions of Section 3313.37, Revised Code, lease a suitable building for school purposes and make such lease agreement for a period of years, if reasonable. Such agreement may also include either an option or a firm contract to purchase such property, the former being a "continuing contract" as provided in Section 5705.41, Revised Code. It is unlawful, however, to apply all or a portion of the lease payments against the purchase price of the property.

3. Since a lease agreement coupled with a firm contract to purchase is not a "continuing contract" under Section 5705.41, Revised Code, the funds necessary to cover that portion of the contract representing the

purchase price of the property must be appropriated and certified by the fiscal officer as being in the treasury or in the process of collection.

Respectfully,
WILLIAM SAXBE
Attorney General

1605

HIGHWAYS — COUNTY COMMISSIONERS AND DEPARTMENT OF HIGHWAYS MAY AGREE THAT DEPARTMENT ASSUME MAINTENANCE OF BRIDGE OR STRUCTURE CARRYING COUNTY ROAD OVER A FREEWAY—§5501.11 R.C. —AUTHORITY OF EACH PARTY—PRIMARY OBLIGATIONS, §§5501.02(D), 5501.11 R.C.

SYLLABUS:

1. The Department of Highways of the State of Ohio by authority of Section 5501.11, Revised Code, may enter into an agreement with a Board of County Commissioners to assume the maintenance of a bridge or a structure carrying a county road or a city street within a municipality over a limited access highway or freeway.

2. The Department of Highways of the State of Ohio by authority of Section 5501.11, Revised Code, may enter into an agreement with a Board of County Commissioners to assume the maintenance of bridges on state highways within municipalities.

3. Section 5501.02 (D) and Section 5501.11, Revised Code, authorize the Department of Highways of the State of Ohio to enter into an agreement with a Board of County Commissioners to maintain bridges or structures on the state highway system, although the primary obligation of maintenance is imposed upon the county.

Columbus, Ohio, January 27, 1958

Hon. John T. Corrigan, Prosecuting Attorney
Cuyahoga County, Cleveland, Ohio

Dear Sir:

Your request for my opinion reads, in part, as follows:

"The Ohio Department of Highways has submitted a proposed resolution to be adopted by the Board of County Com-