C
104 Md. 145, 64 A. 716

Court of Appeals of Maryland.
MAYOR, ETC., OF **CITY** OF **BALTIMORE** et al.
v.
GAHAN.
Oct. 4, 1906.

Appeal from Circuit Court of Baltimore City; Henry Stockbridge, Judge.

Suit by William H. Gahan against the mayor and city council of the city of Baltimore and others. From a decree for plaintiff, defendants appeal. Affirmed.

Jones, J., dissenting in part.

West Headnotes

Municipal Corporations 268 ⚿62
268k62 Most Cited Cases
The public powers devolved by law on the council of a city, to be exercised by it when and in such manner as it shall judge best, cannot be delegated.

Municipal Corporations 268 ⚿284(3)
268k284(3) Most Cited Cases
Baltimore City Charter (Laws 1898, p. 260, c. 123) § 6, entitled "Streets, Bridges and Highways, etc.," empowers the mayor and council to provide by ordinance for paving, etc., any street in the city, and to provide by general ordinance for the paving of any street without the passage of a special ordinance in the particular case. The city adopted an ordinance for the paving of streets with sheet asphalt, asphalt blocks, or bitulithic, as might be determined by the board of awards after the bids had been opened. Held that, assuming that the power to determine what material is to be used in paving a street is a legislative power, the ordinance was not invalid as a delegation of legislative authority to the board of awards.

Municipal Corporations 268 ⚿305
268k305 Most Cited Cases
An ordinance of the city of Baltimore providing for the paving of designated streets with one of three kinds of materials, as might be determined by the board of awards after the bids had been opened, and declaring that on the rejection of all the bids the city engineer should pave the streets with vitrified brick, and if the bids for doing the work on streets which were required to be paved with treated wood blocks should be rejected, the city engineer should pave such streets with treated wood blocks by day labor, does not, on the rejection of bids require the city engineer to pave streets with vitrified brick by day labor, contrary to Baltimore City Charter, Laws 1898, pp. 274, 275, c. 123 §§ 14, 15, requiring the letting of contracts for public work to the lowest bidder, etc.

Argued before McSHERRY, C. J., and BRISCOE, BOYD, PEARCE, SCHMUCKER, JONES, and BURKE, JJ.

W. Cabell Bruce and Albert C. Ritchie, for appellants.
R. B. Tippett, for appellee.

McSHERRY, C. J.
On June 15, 1906, Ordinance No. 150 adopted by the mayor and city council of Baltimore was approved. It is known as the "Bruce-Fendall Ordinance." By its first section it provided for the paving of 19 designated streets of the city, no one of which is situated in the annex. Seven were directed to be paved with prepared wood blocks, 2 with asphalt blocks, 1 with Belgian blocks and 9 with sheet asphalt, asphalt blocks, or bitulithic, as, under section 3, might be determined by the mayor, the president of the second branch of the city council, the comptroller, the city register, and the city solicitor after the bids had been submitted and opened. All of this paving was required to be done in accordance with specifications to be prepared by the city engineer, who was directed to advertise for proposals for performing the work

on each of the named streets or parts of streets. By the fourth section it was ordained that if the bids for doing the work on any of the 9 streets for which the paving material is prescribed by the first section in the alternative shall in the judgment of the board of awards be excessive, and if the board shall reject all the alternative bids, the city engineer should do the paving with vitrified bricks; and if the bids for doing the work on the streets required to be paved with treated wood blocks shall in the judgment of the board be excessive and shall be rejected by the board, then the city engineer should pave those streets with treated wood blocks by day labor. By section 5 the whole cost of paving the 19 streets was limited to $214,500. Pursuant to this ordinance the city engineer prepared and issued specifications for the laying of asphalt block, sheet asphalt, and bitulithic pavements on Woodbrook avenue and on each of the other 9 streets required to be paved with one of the 3 materials thus named in the alternative. Each set of those specifications was complete and definite in itself, and each furnished the bidders on the respective materials to be used with a common basis or standard upon which to submit their bids as to each of said kinds of pavements. The specifications are entirely different from each other and call respectively for pavements which are wholly dissimilar, except in so far as they are all composition pavements. On the same day on which the ordinance was approved the city engineer duly advertised that sealed proposals would be received until 11 a. m. of June 27th to grade, curb, and pave with sheet asphalt, asphalt blocks, or bitulithic the 9 streets required by the first section of Ordinance No. 150 to be paved with such one of the three designated materials as the board named in the third section might select. Woodbrook avenue is one of those 9 streets, and when the bids referring to it were opened it was found that there were two bids on asphalt blocks, 4 on sheet asphalt, and 2 on bitulithic. The lowest bid on the first-named article was $2.10, on the second it was $1.84, and on the third it was $2.15 per square yard. The board then selected asphalt blocks as the material with which to pave Woodbrook avenue and awarded the contract to the Maryland Pavement Company; its bid being lower than the only other bid on the same material, but being higher than any of the bids on sheet asphalt. Two days later William H. Gahan, a taxpayer in the city, filed a bill in equity in the circuit court of Baltimore City against the city and the successful bidder, assailing Ordinance No. 150 as null and void, and the proceedings taken thereunder as unlawful, because, first, the ordinance attempts to delegate to the mayor, the president of the second branch of the city council, the city solicitor, the city comptroller, and the city register, or a majority of them, the power to select which one of the alternative kinds of materials specified in the ordinance should be used in the paving of the 9 streets named therein, which power, it is averred, can only be exercised lawfully by the mayor and city council acting in its legislative capacity by an ordinance duly passed and approved specifically prescribing the material with which the streets shall be paved; secondly, because by the process of bidding on alternative materials sections 14 and 15 of the charter (Laws 1898, pp. 274, 275, c. 123) were violated; and, thirdly, because the fourth section of the ordinance requires the city engineer, if all the alternative bids are rejected, to pave the streets with vitrified bricks by day labor, which provision is also alleged to be contrary to the same sections of the charter. An injunction to restrain the execution of the contract and to prohibit the doing of the work was prayed for. The city and the Maryland Pavement Company both demurred to the bill of complaint. The demurrers were overruled, and, the defendants declining to answer, an injunction issued in accordance with the prayer of the bill. From that order ***718** this appeal was taken, and the case was argued on August 8th during a special session of this court convened to hear this and the two preceding paving cases. On the 9th of August a

decree was signed reversing the decretal order appealed against, and we now proceed to give our reasons in support of that action.

As the second of the three grounds upon which the Bruce-Fendall ordinance is attacked is precisely the same proposition which we have just fully and at length considered in the case of Mayor, etc., Balto. v. Flack et al., 64 Atl. 702, we need say nothing further in regard to it than that for the reasons given in that case it cannot be sustained in this; and we pass at once to the other grounds above indicated; and both of them, it seems to us, are founded upon a misconception of the meaning and effect of the ordinance. Does the Bruce-Fendall ordinance delegate to the board of awards legislative authority, which can only be lawfully exercised directly by the mayor and city council itself by ordinance? Acts 1904, p. 492, c. 274, which was construed in the preceding cases, has nothing to do with the question, since the act relates solely to streets in the annex portion of the city and to the $2,000,000 loan with the avails of which those streets were to be paved, whilst the 9 streets, including Woodbrook avenue, designated in the first section of the ordinance now before us as those in respect to which alternative bids are to be and were asked for, are not within the annex, and the paving of them is to be paid for out of the $214,500 included in the levy of 1906 made for that special purpose. Hence the charter of the city, and not the act of 1904, must be looked to for the data needed to furnish an answer to the question. By section 6 of the city charter, subdivision entitled "Streets, Bridges and Highways" (Laws 1898, p. 260, c. 123), the mayor and city council are empowered "to provide by ordinance for grading, shelling, graveling, paving, and curbing *** of any lane, street, or alley in said city; *** to provide by general ordinance *** for the grading, graveling, shelling, paving, or curbing *** of any street, lane, or alley *** without the passage of a special ordinance in the particular case, whenever the owners of a majority of front feet of property binding on such street, lane or alley *** shall apply for the same, upon terms and under conditions to be prescribed in the same general ordinance," etc. The principle is a plain one, that the public powers or trusts devolved by law or charter upon the council or governing body, to be exercised by it when and in such manner as it shall judge best, cannot be delegated to others. Thus where by charter or statute local improvements, to be assessed upon the adjacent property owners, are to be constructed in "such manner as to the common council shall prescribe" by ordinance, it is not competent for the council to pass an ordinance delegating or leaving to any officer or committee of the corporation the power to determine the mode, manner, or plan of the improvement. 1 Dillon, Mun. Corp. (2d Ed.) § 60. So, in Ruggles v. Collier, 43 Mo. 359, where the charter gave the city power to require streets to be paved "in all cases where the city council shall deem it necessary," it was held that the council could not, by ordinance, make the mayor the judge of the necessity for paving. To the like effect is Hydes v. Joyes, 4 Bush (Ky.) 464, 96 Am. Dec. 311; Birdsall v. Clark, 73 N. Y. 73, 29 Am. Rep. 105; Thompson v. Schermerhorn, 6 N. Y. 92, 55 Am. Dec. 385. In Mayor, etc., v. Scharf, etc., 54 Md. 499, an ordinance relating to paving was held void on two grounds, one of which was that it delegated to the city commissioner authority to prescribe the rule according to which the pro rata proportion of the total cost of repaving a part of Baltimore street was to be assessed upon each abutting proprietor, and the other of which was that no notice was provided to be given to, and no opportunity for a hearing was accorded, the parties to be affected. Upon a rehearing (56 Md. 50) the decree striking down the ordinance on those two grounds was rescinded upon the reasoning in Mayor, etc., v. Hopkins, 56 Md. 1, and the duty assigned to the city commissioner was held to be one involving only measurements and arithmetical calculations. This last-cited case was overruled in Ulman v. Mayor,

etc., 72 Md. 587, 20 Atl. 141, 21 Atl. 709, 11 L. R. A. 224, but only in so far as concerned the ruling that the property owner was not entitled to notice of the proceedings affecting him, and also not entitled to an opportunity to be heard; the ordinance having failed to provide for either notice or a hearing.

Now, conceding, as falling within the principle laid down in these cases, and as intimated in Mayor v. Stewart, 92 Md. 551, 48 Atl. 165, that the power to determine what material is to be used in paving a street, is a legislative power, and that it is included under the power to grade and pave, and is to be exercised by the city council, unless validly reposed in some other agency, then that power cannot be transferred by the city council to any one else. The Bruce-Fendall ordinance, however, delegated to the board of awards no such broad and unrestricted power as was attempted to be conferred upon subordinate agencies by the ordinances reviewed in some of the above-cited cases. On the contrary, it limits the materials to be adopted and definitely prescribes that such one of the three thus selected by the city council shall be used for the paving of each of the 9 streets as the board of awards may designate after the bids have been opened, and when that designation has been made the two alternative methods which have not been chosen are eliminated from the ordinance and ***719** the accepted one stands written therein, pursuant to the declared will of the council, as fully and effectively and as precisely as if no other had been conditionally inserted therein. That one, so selected after having been so specified in the ordinance, and after the other two have been excluded in the manner prescribed by the ordinance becomes, by force of the terms of the ordinance and in consequence of having been designated therein, the choice of the city council; and, since each of the named pavements is merely an alternative of the others, each was adopted as suitable, and adopted by the city council by the passage of the ordinance. This is the first ordinance of which we are aware in Maryland that has avowedly attempted to secure bids on alternative materials; and there is, consequently, no binding adjudication by this court directly on the subject. All three of the designated pavements, as we are informed by the testimony contained in the record of the other two cases, are known as "composition" pavements, though the component parts of them are different and the general mode of construction is not identical. There is nothing in the charter provision giving the power "to provide by ordinance" for the paving of streets, which, either in direct terms or by fair implication, prohibits the city council from putting these three composition pavements in competition with each other as alternative methods of paving. In Mayor, etc., v. Stewart, supra, it was insisted that the ordinance there assailed and which directed that a part of St. Paul street should be paved, gave to the city engineer a discretion to use, in doing the paying, either sheet asphalt or vitrified bricks; but this court held otherwise, and, after deciding that the ordinance did no such thing, said: "There is no delegation to the city engineer of a power or discretion to decide 'whether the street shall be paved with sheet asphalt or with vitrified brick.' Undoubtedly the broad and unrestricted delegation of such a power would be unlawful." This observation was wholly unnecessary to the decision of the case. Having decided flatly that no such power had been given to the city engineer by the ordinance, it was entirely apart from the case, and purely an obiter dictum, to add that the thing which had not been done was a thing which could not lawfully be done. The facts were not present for the application of, or to support, that conclusion. But even the obiter dictum was qualified, for it referred, not to every or any delegation of power, but to "the broad and unrestricted delegation of such a power"; and in the ordinance here involved there is no delegation of a broad and unrestricted power to the board of awards. But the ordinance reviewed in 92 Md. and

48 Atl. was upheld, although it was more open, in another particular, to the criticism of delegating a discretionary power than can be predicated of the Bruce-Fendall ordinance. Ordinance No. 50 of 1900, which was the one involved in Mayor, etc., v. Stewart, provided "that the city engineer *** have all that part of St. Paul street *** graded and paved with Trinidad Lake, Aleatraz or Bermudez sheet asphalt, or other sheet asphalt which, in the opinion of the city engineer, is equally as good," etc. Here were three different kinds of asphalt specified, and in addition the city engineer was given the power and discretion to select any other asphalt which might, in his opinion, be equally as good as those named. This was a wide discretion given to him by the city council as to the particular asphalt that he might use, since it is a matter of common knowledge that a large number of asphalts are claimed to be suitable for paving purposes; and yet the ordinance was sustained, and the judgment of the lower court in annulling it on another ground was reversed, though that judgment could not have been reversed if this court had thought the ordinance was void by reason of its improper delegation of a legislative power to the city engineer.

But if it be objected that Ordinance No. 50 of 1900 fixed in definite terms the material to be used on St. Paul street and only left to the discretion of the city engineer the power to select one from three named and a large number of unnamed kinds of that same material, and therefore did not delegate an authority to choose the material to be used, whilst the Bruce-Fendall ordinance did not select any material, but left that to the board of awards, it may be answered that if the selection of the kind of a designated material, when there are divers and dissimilar kinds from which to select, is not, in the circumstances stated, the exercise of a power which cannot be delegated, then neither can the power to choose one thing out of three, which have all been specified alternatively, be an unlawful delegation of a legislative authority, when each of the three things has been decided by the city council to be suitable. And it may be further answered that the assumption that the Bruce-Fendall ordinance does not select the material to be used is not well founded, since the ordinance adopts three, and no other than one of the three can be employed, and the one which is chosen is in fact one which has been antecedently named by the city council. Of course, such a procedure is very far from being tantamount to the adoption of an ordinance which embodies a broad and unrestricted delegation to a subordinate body of a power to select, according to its own judgment, any material it may choose for a pavement. We distinguish between the delegation of a broad power to select any material, and an authorization to choose from alternative and designated materials, when that authorization is confined within reasonable limits. "What the Legislature distinctly says may be done cannot be set aside by the courts because they deem it unreasonable. ***720** But where the power to legislate on a given subject is conferred, but the mode of its exercise is not prescribed, then the ordinance passed in pursuance thereof must be a reasonable exercise of the power, or it will be pronounced invalid." 1 Dillon, Mun. Cor. (2d Ed.) § 263. In view of the benefits which it is supposed the city will secure by inaugurating competition between different paving materials, we are not prepared to say that the mode adopted in this ordinance to effect that end is an unreasonable exercise of the power "to provide by ordinance *** paving *** any street, lane or alley in" the city.

It has been argued, however, that, if the ordinance is valid when naming three alternative pavements, it would be equally valid if, in the same way, it named a very much larger number; and, by pushing the principle one step farther, the ordinance would be likewise valid, although it named no materials, but left the selection of them wholly to the discretion of the board of awards,

without restriction of any sort. This argument is fallacious. It is obvious, at a glance, that the last hypothesis presents a complete departure from the actual situation, and unequivocally involves a total surrender by the city council of all its powers and all its discretion in the premises, and would on that account be void. Nor would the other hypothesis be free from objection, since it would doubtless be an unreasonable exercise of the power to provide by ordinance for paving the streets. The naming of three alternative pavements is a reasonable basis for competition, and when done in the manner prescribed in the Bruce-Fendall ordinance, and when done in good faith, is not open to the objection of being an unlawful delegation of legislative power. This method of prescribing that the selection of one of three specified alternative pavements shall depend on the occurrence of a reasonable contingency is not unlike, though not identical with, legislation which is declared to be effective only upon the happening of a future uncertain event. Thus in Mayor, etc., v. Clunet et al., 23 Md. 449, an ordinance to open a street in continuation of Holliday street was assailed as invalid because it contained in its fifth section a proviso that the ordinance should not take effect until certain mandamus cases pending in the Court of Appeals and removed there by writ of error to the superior court shall have been dismissed, and until certain named individuals shall "have given their written assent to the provisions of the fourth section"; but this court held that section 5 did not delegate to others the discretion vested by law in the mayor and city council, and that a valid ordinance may be passed to take effect upon the happening of a future contingent event, even where the event involves the assent to its provisions by other parties.

The only remaining question arises under the fourth section of the Bruce-Fendall ordinance. That section is as follows: "Sec. 4. And be it further ordained that if the bids for doing the work on any of those streets for which the paving material has been prescribed in the alternative by the first section of this ordinance shall, in the judgment of the board of awards, be excessive, and the said board shall reject all the bids in reference to any one or more of those streets, then the city engineer is hereby authorized and directed to pave said street or streets with vitrified brick; and if the bids for doing the work on any of those streets which are required to be paved with treated wood block by the first section of this ordinance shall, in the judgment of the board of awards, be excessive, and said board shall reject all the bids with reference to any one or more of the streets, then the city engineer is hereby authorized and directed to pave said street or streets with treated wood block by day labor." The objection to this section is that, if all the bids on alternative materials are rejected, the city engineer is required to pave the streets with vitrified brick, by day labor, contrary to sections 14 and 15 of the charter. But the section does not require the streets alluded to to be paved by day labor. The day labor has relation only to the streets which are directed to be paved with treated wood block. If the above nine indicated streets are to be paved with vitrified brick, then the city engineer must proceed to prepare specifications and advertise for bids, and he is not empowered to lay the vitrified brick by day labor. Whether the latter part of the section, which requires treated wood block to be laid by day labor, is valid or not, we do not decide, as that question is not before us and is not involved in these proceedings.

JONES, J., dissents as to the effect to be given to sections 14 and 15 of the city charter.
Md. 1906.
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