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John D. Finerty

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COMMENTS

MUNICIPAL CORPORATIONS: REMEDIES OF THE PRIVATE CONTRACTOR AGAINST A WISCONSIN MUNICIPALITY WHERE THE CONTRACT IS ULTRA VIRES OR DEFECTIVE

While the doctrine is well established in municipal law that municipal contracts possess the same essential elements and are executed, enforced, rescinded, and reformed under the same general doctrines as those governing contracts between private individuals,¹ some aspects of municipal contracts receive different treatment because of the public interest involved. It is the purpose of this article to explain the remedies of the private contractor where the contract is allegedly unenforceable. The Wisconsin holdings and statutes will be examined in the light of generally recognized principles applied by other courts. It will become apparent that remedies which have often been assumed to be universal rules of contract and restitution law will vary in their application when the contract of a municipality becomes the subject of litigation.

RECOVERY ON THE EXPRESS CONTRACT²

It is uniformly conceded that if an enforceable contract has been breached by the municipal corporation, the other party thereto may at once sue to recover damages for its breach or to recover the amount due thereon, just as though the contract had been made with an individual, firm, or private corporation.³ However, recovery on the express contract has been denied against the municipal corporation where the contract is ultra vires;⁴ that is, one not within the power of the municipality to make. The reason for the contract being ultra vires may be that the legislature or the home rule charter does not grant the power to contract as to the particular

¹ 10 McQUILLIN, MUNICIPAL CORPORATIONS §29.05, at 179 (3d ed. 1950).

² This is intended to include, in addition to express contracts, implied contracts or implied in fact contracts, but not an implied in law or quasi-contract. RESTATEMENT, CONTRACTS §5, comment *a* (1932), states that "contracts are often spoken of as express or implied. The distinction involves, however, no difference in legal effect, but lies merely in the mode of manifesting assent."

³ 10 McQUILLIN, *op. cit. supra* note 1, §29.124, at 496.

⁴ That is, a contract totally outside the scope of the corporate powers of the municipal body. "The objection to the contract is not merely that the corporation ought not to have made it, but that it could not make it. The contract cannot be ratified by either party, because it could not have been authorized by either. No performance on either side can give the unlawful contract any validity, or be the foundation of any right of action upon it. . . . In a less strict sense, municipal contracts entered into in a manner and form not prescribed by statute or charter are spoken of as ultra vires. Ultra vires and illegality are not synonymous. A given contract may have both defects, or one without the other, or neither." *Donovan v. City of Kansas City*, 352 Mo. 430, 175 S.W. 2d 874, 879 (1943), *appeal dismissed*, 322 U.S. 707 (1944).

subject matter. Courts generally say that the municipality has only those powers which result (a) from inherent power of a municipality to perform indispensable acts, (b) from express words in a statute or charter, or (c) from what is implied as incident to the powers expressly conferred on the municipality by a statute or the charter.⁵

The municipality may also lack the power because the constitution prohibits it from doing certain things. For example, the Wisconsin case of *City of Kiel v. Frank Shoe Mfg. Co.*⁶ involved an arrangement whereby the city agreed that the plant of a manufacturing company, if moved to the city, should be rent and tax free for a period of five years, and that the city would convey certain real estate to the manufacturer free and clear of incumbrances, in addition to the \$12,000 that the city had promised to pay the company for relocating. Even though the proper procedural formalities were present, the court declared that "the arrangement attempted to be made on behalf of the plaintiff with the company was beyond the power of the city, and for that reason illegal and void, therefore not in any sense a contract."⁷

The sense in which the court used the terms "beyond the power" and "illegal and void" is unclear. The fact is that the contract was ultra vires, not merely because of a lack of the grant of the particular power, but because of a constitutional prohibition.⁸ Hence, it becomes apparent that a person contracting with a municipality does so at his peril and must determine in advance whether or not the corporation has the power to enter into the particular contract in question.

Another elementary consideration in this regard is the fact that in reviewing contracts of public corporations, the courts apply the ultra vires rule with a greater degree of strictness to the municipal contract than to that of the private corporation, since the rights of the citizens of the municipality are involved.⁹ Inherent also in the exercise of municipal power with respect to contracts is the limitation of reasonableness,¹⁰ frequently justified on the theory that it cannot be assumed that the legislature would authorize any unreasonable powers.

Denial of contract recovery in the above circumstances where there has been no grant of power or the attempted contract is expressly prohibited by constitution, statute, or charter is almost with-

⁵ 10 McQUILLIN, *op. cit. supra* note 1, §29.05, at 177.

⁶ 240 Wis. 594, 4 N.W. 2d 117 (1942).

⁷ *Id.* at 597, 4 N.W. 2d at 118.

⁸ "The rule of taxation shall be uniform. . . ." Wis. CONST. art VIII, §1.

⁹ RHYNE, MUNICIPAL LAW §10-3, at 257 (1957).

¹⁰ ANTIEAU, MUNICIPAL CORPORATION LAW §5.11, at 244 (1958).

out exception. However, it must be clearly distinguished from situations where the subject matter of the contract is fully within the scope of the power of the municipality to make, but there has been a failure to comply with some compulsory procedure in the formation of the contract. Typical among the latter are statutory enactments requiring, among other things, that the proper municipal official countersign each contract when the necessary funds have been appropriated,¹¹ or that certain contracts be let only to the "lowest responsible bidder,"¹² or that contracts not be let unless authorized by a majority of the city council,¹³ or unless ayes and noes have been called and recorded in voting on the approval of any contract.¹⁴

The purpose of these acts is to protect public funds from extravagance, favoritism, and corruption; and failure to comply with their letter will render the attempted contract void and unenforceable as a contract, although, as we shall see later, there may be the possibility of recovery apart from the contract. In regard to the bidding requirement, the Wisconsin Supreme Court has stated:

Whenever a city charter requires public work to be let to the lowest bidder, it has been uniformly held that failure to call for bids in the prescribed way . . . is fatal to the proceeding. . . . The law requiring contracts to be let to the lowest bidder is based upon public economy, and originated, perhaps in the distrust of public officers whose duty it is to make contracts. It is of great importance to taxpayers, and ought not to be frittered away by exceptions. . . . The Legislature having seen fit to hedge about municipal action by restrictions so obviously of value to the body politic, it is not for the courts to alter or vary them. Courts have no power to throw the law into a melting pot, and recast it at pleasure. They must enforce plain provisions and restrain palpable evasions. The object of the law being to prevent favoritism, corruption, extravagance, and improvidence in municipal action, any arbitrary decision on their part outside of the

¹¹ WIS. STAT. §62.09(10) (1961): "*Comptroller* . . . (f) He shall countersign all contracts with the city if the necessary funds have been provided to pay the liability that may be incurred thereunder, and no contract shall be valid until so countersigned."

¹² WIS. STAT. §62.15(1) (1961): "*Contracts; how let*. All public construction, the estimated cost of which shall exceed \$1,000 shall be let by contract to the lowest responsible bidder; all other public construction shall be let as the council may direct. The council may also by a vote of three-fourths of all the members-elect provide by ordinance that any class of public construction or any part thereof may be done directly by the city without submitting the same for bids."

¹³ WIS. STAT. §62.12(6)(c) (1961): "No debt shall be contracted against the city nor evidence thereof given unless authorized by a majority vote of all the members of the council."

¹⁴ WIS. STAT. §62.11(3)(d) (1961): "On the adoption of any measure . . . appropriating or disbursing money, or creating any liability or charge against the city or any fund thereof, the vote shall be by ayes and noes."

prescribed limits will be closely scrutinized and promptly restrained.¹⁵

Similarly, in *Ellerbe & Co. v. City of Hudson*,¹⁶ where no funds were provided by the city council for the purposes of a contract with an architectural firm, the contract was held void, the court saying:

[Section] 62.09(10)(f) . . . provides that the city comptroller shall countersign 'all contracts with the city if the necessary funds have been provided to pay the liability that may be incurred thereunder, *and no contract shall be valid until so countersigned.*' . . . Obviously, the objective of such statute is to protect the taxpayers of a municipality so that no debt will be incurred by a contract before the funds necessary to discharge such liability have been provided. It stands in the same category as does a statutory requirement that certain municipal contracts must be let to the lowest bidder, in that the common council has no power to waive compliance with the same either at the time of the inception of a contract or at the time of a subsequent attempt to ratify the same.¹⁷

To this writer's knowledge, there is no Wisconsin authority and only slight authority elsewhere for the position that if the statutory provision is such a relatively unimportant safeguard that it can be construed as being merely "directory," such a requirement that a formal order be entered in the minutes instead of a memo, there is no objection to allowing recovery on the express contract itself.¹⁸

Most courts have been fairly uniform in enforcing the "lowest responsible bidder" statutes, and a violation of them generally precludes any recovery, particularly on the express contract. But there are interpretations that allow recovery on the contract even for failure to comply technically with the unswerving requirements of the "lowest bidder" statute. Practically speaking, the most common exception seems to be the "extra work contract." Typically, the private contractor will have been engaged by the municipality after the advertising and bidding have been strictly complied with and work begun pursuant to a duly executed and authorized contract. Then some unknown condition in the area requiring extra work, some error in the specifications, or some necessary or desirable improvement involving additional cost will be encountered which is not within the scope of the contract or the original specifications. Additional work will be undertaken to rectify the defect, along with

¹⁵ *Wagner v. City of Milwaukee*, 196 Wis. 328, 331, 220 N.W. 207, 208 (1928).

¹⁶ 1 Wis. 2d 148, 83 N.W. 2d 700 (1956), *rehearing denied*, 85 N.W. 2d 663 (1957).

¹⁷ *Id.* at 157, 83 N.W. 2d at 705.

¹⁸ *COOLEY, MUNICIPAL CORPORATIONS* §73, at 238 (1913).

and in addition to the contracted-for work. Should recovery then be allowed at the contract rate for the "extra work," even though it was performed without submitting bids? A qualified "yes" must be given, since the varying circumstances in each of the cases preclude a uniform answer. For example, the Indiana court allowed recovery on the contract for extra work done pursuant to changes made by an unauthorized city engineer with the knowledge of the city council when hidden sewer pipes were encountered by the contractor.¹⁹ Another court held that recovery will be allowed only where the work was done with the advance permission of the proper authorized officials.²⁰ Still others have allowed payment for extra work done not only at the behest of the municipality's authorized officials, but pursuant to a provision in the contract specifically authorizing payment for extra work.²¹ Akin to these latter holdings, but somewhat modified, is the Wisconsin rule stated by our court in a typical "extra work" fact situation:

However, the past decisions of this court make it clear that changes made after the letting of a public contract, which alter the manner of construction, but do not substantially change the character of the building or unreasonably increase its cost, *and are made pursuant to a provision in the contract permitting such changes*, legally may be made without pursuing the statutory steps required to be taken before the letting of the original contract.²² (Emphasis added.)

In addition to the case law, contracts with municipal corporations in Wisconsin may include a provision for increasing the quantity of construction required in the original contract by an amount not to exceed fifteen per cent of the original contract price.²³

Another area that has traditionally skirted the narrow confines of procedural municipal law has been the so-called "emergency." Despite a statute or charter requiring that the municipal contracts be let under competitive bidding, in case of an emergency where it is essential to the health, safety, or welfare of the people that

¹⁹ "So, in the case at bar, the plans and specifications were defective; conditions developed that were not known at the time the plans and specifications were adopted and could not have been ascertained at the time with any reasonable degree of diligence. To hold that under such circumstances the municipality, or the agents placed in charge of the construction, were without power to correct the mistake would be the height of folly. If then, the power to make necessary changes does exist, and the power is exercised at added cost and expense to the contractor, it would be unjust to deny him compensation therefor." *Michigan City v. Witter*, 218 Ind. 562, 34 N.E. 2d 132, 135 (1941).

²⁰ *East Peoria v. Colianni & Dire Co.*, 334 Ill. App 108, 78 N.E. 2d 806 (1948).

²¹ *RHYNE, op. cit. supra* note 9, §10-14, at 269.

²² *Thomsen-Abbott Constr. Co. v. City of Wausau*, 9 Wis. 2d 225, 232, 100 N.W. 2d 921, 924 (1958), citing *Pung v. Derse*, 165 Wis. 342, 162 N.W. 177 (1917); *First Sav. & Trust Co. v. Milwaukee County*, 158 Wis. 207, 148 N.W. 22, 148 N.W. 1093 (1914); and *Mueller v. Eau Claire County*, 108 Wis. 304, 84 N.W. 430 (1900).

²³ WIS. STAT. §62.15(1c) (1961).

immediate action be taken, the requirement may be dispensed with.²⁴

In many jurisdictions, the "emergency" rule has been held to be an "implied exception"²⁵ to the "lowest bidder" statute. In Wisconsin, however, the exception is statutory and arises when an emergency is determined by the proper municipal body.²⁶ The real question is whether or not, in fact, there is or has been an emergency, because the officers of a municipality cannot defeat the provisions of a statute requiring competitive bidding by declaring an emergency where none exists.²⁷

While that which constitutes an emergency may vary from jurisdiction to jurisdiction, all pronouncements directly suggest some degree of expediency and immediacy as the basis for the exception.²⁸ However, in Wisconsin an emergency may simply be disaster caused by man or nature,²⁹ and the exception is made only for "repair and reconstruction," while the "lowest bidder" statute itself comprehends "all public construction."³⁰ The net result is that a later judicial determination that an emergency did not exist will preclude recovery,³¹ at least on the contract.³²

In Wisconsin, application of the bidding requirements has been limited by statute to "public works." Yet, still on the books and apparently good law are *Ozaukee Sand & Gravel Co. v. City of Milwaukee*³³ and *Standard Oil Co. v. City of Clintonville*,³⁴ wherein the Wisconsin court held that the purchase of sand and gravel in

²⁴ 10 McQUILLIN, *op. cit. supra* note 1, §29.38, at 284.

²⁵ *Los Angeles Dredging Co. v. City of Long Beach*, 210 Cal. 348, 291 Pac. 839 (1930), and cases therein.

²⁶ WIS. STAT. §62.15(1b) (1961): "Exception as to public emergency. The provisions of [subsection] (1) and [section] 144.04 are not mandatory for the repair and construction of public facilities when damage or threatened damage thereto creates an emergency, as determined by resolution of the board of public works or board of public utility commissioners, in which the public health or welfare of the city is endangered. Whenever the city council determines by a majority vote at a regular or special meeting that an emergency no longer exists, this subsection no longer applies."

²⁷ 10 McQUILLIN, *op. cit. supra* note 1, §29.38, at 286.

²⁸ *Cf. Annot.*, 71 A.L.R. 161 (1930). "The term 'emergency' as used in a provision dispensing, in case of an emergency, with a requirement of advertising for bids before letting municipal contracts, implies a sudden or unexpected necessity requiring speedy action." *Los Angeles Dredging Co. v. City of Long Beach*, *supra* note 25. "Projects which display so imminent a need that normal procedures may be dispensed with must be of such sudden or unexpected occurrence or exhibit a new condition calling for immediate action." *Board of Education v. Holk*, 38 N.J. 213, 183 A. 2d 633 (1962).

²⁹ 46 OPS. WIS. ATT'Y GEN. 298, 301 (1957).

³⁰ WIS. STAT. §62.15(1), (1c) (1961).

³¹ 10 McQUILLIN, *op. cit. supra* note 1, §29.38, at 286.

³² *Cf. Scatuocho v. Jersey City Incinerator Authority*, 14 N.J. 72, 100 A. 2d 869 (1953), where a judgment on a void contract was modified so as to permit an action to proceed on the basis of quantum meruit.

³³ 243 Wis. 38, 9 N.W. 2d 99 (1943).

³⁴ 240 Wis. 411, 3 N.W. 2d 701 (1942), criticized in *Ellerbe & Co. v. City of Hudson*, *supra* note 16.

the first case and the purchase of road oil in the second case, both of which were to be used by the municipality in road improvement and repair, were mere "purchases of goods" and not the more comprehensive "public works" within the meaning of the provisions of section 62.15 of the Wisconsin statutes. Hence, the city not only did not have to advertise for bids, but could purchase these materials by private negotiation without regard to the amount of the estimated purchase price involved. But as we have seen, the purpose of such statutes has been said to be for the protection of the public from the corruption or extravagance of municipal officers. The narrow construction of the term "public works" overlooks the fact that there may be corruption and extravagance with respect to purchases by a city, as well as with respect to its "public works."

The *Standard Oil Co.* case serves further to illustrate the narrow interpretation our court has given supposedly broad paternalistic statutes. There, the city defended on the basis of a statute similar in purpose to the "lowest bidder" statute and urged that the failure of the comptroller to certify that funds were available, as required by that statute, was a complete defense. The court disregarded the protective purpose of the statute and held that since the city was purchasing on an open account, there was no contract as contemplated by the statute, so that the comptroller's certification was not necessary.³⁵

Still other situations have existed where our court has avoided the strict confines of such statutes by a finding that advertising would be futile or that it would be inherently impossible to promote a competitive price by bid. In one such instance, our court said:

Some claim is made that there was no competitive bidding for the contract. It appears that it was let to the Mineral Point Public Service Company and that it was the only public utility with which connection could be made, and that the electors of the village by resolution directed connection with this utility. Under such circumstances there was no room for competitive bidding, as it is not required.³⁶

In such cases where protective requirements are dispensed with, the only remaining requirements are that the municipal authorities act in good faith and to the best interest of the municipality.³⁷

³⁵ "[Section] 62.09(10) (f) . . . provides that the city comptroller shall countersign 'all contracts with the city if the necessary funds have been provided to pay the liability that may be incurred thereunder, and no contract shall be val'd until so countersigned.' . . . We are confident that *Standard Oil Co. v. Clintonville* . . . would have been decided differently than it was if [section] 62.09(10) (f) had been cited to the attention of the court instead of merely [section] 62.15(12)." *Ellerbe & Co. v. City of Hudson*, *supra* note 16, at 157-58, 83 N.W. 2d at 705-06.

³⁶ *Murphy v. Paull*, 192 Wis. 93, 96, 212 N.W. 402, 403 (1927).

³⁷ 10 McQUILLIN, *op. cit. supra* note 1, §29.31, at 274.

RATIFICATION AND ESTOPPEL

Actually, ratification and estoppel are part of the contract remedy, for when properly invoked they will result in the recovery of contract damages, with the net effect that the contract is actually enforced. Though they are two completely different concepts,³⁸ some courts have confused the two theories to the point that the true basis of a decision cannot be ascertained.³⁹

(a) Estoppel

It has been said that "the doctrine of estoppel is predicated upon common honesty, and municipalities as well as individuals are affected by it";⁴⁰ so that while there may be slight conflict on some cases as to which capacity of the municipality the doctrine may be applied against,⁴¹ it is generally agreed that a municipal corporation may be precluded by an estoppel *in pais* the same as a natural person.⁴² In order that an estoppel *in pais* may arise, there must be (1) inequitable conduct on the part of the city, and (2) irreparable injury to parties honestly and in good faith acting in reliance on the city's conduct.⁴³

³⁸ "Estoppel. A man's own act or acceptance stops or closes his mouth to allege or plead the truth. . . . The substance of 'estoppel' is the inducement of another to act to his prejudice. The substance of 'ratification' is confirmation after conduct." BLACK, LAW DICTIONARY 648, 650 (4th ed. 1957). "Ratification. In a broad sense, the confirmation of a previous act done either by the party himself or by another; confirmation of a voidable act." *Id.* at 1428.

³⁹ "Ratification of an invalid municipal contract, estoppel to deny the validity of a municipal contract, and municipal liability on an implied contract, where there is no express contract, or the express contract is invalid, are often so confused and jumbled together in decisions that the precise ground on which a recovery is allowed or disallowed is uncertain and oftentimes incapable of ascertainment. For instance, where a contract is invalid, but the municipality has accepted benefits thereunder, some decisions treat such acceptance as a ratification, others speak of it as an estoppel to deny the validity of the contract, while still others admit there can be no recovery on the express contract but hold that the acceptance of the benefits raises an implied contract, without referring to any ratification or estoppel. . . . The rules as to ratification of corporate contracts and estoppel to deny the validity of such contracts being so interwoven, and the exact division line between ratification and estoppel in many cases being so shadowy, it is deemed preferable to treat these two together." 10 McQUILLIN, *op. cit. supra* note 1, §29.103, at 415.

⁴⁰ *Id.* at 416.

⁴¹ In *Eau Claire Dells Improvement Co. v. Eau Claire*, 172 Wis. 240, 179 N.W. 2 (1920), where the city leased its water works system to a private firm, the court discussed the application of estoppel against the city as follows: "Bearing this in mind, and bearing in mind that the contractual rights spring from a *proprietary* and not from a *governmental* exercise of municipal power, it follows that estoppel can be urged against the city upon the same grounds and sustained by the same proof that is essential against a private person." (Emphasis added). *Id.* at 258, 179 N.W. at 9. Then, in *L. G. Arnold, Inc. v. Hudson*, 215 Wis. 5, 254 N.W. 108 (1934), the *Eau Claire* case is cited as authority for the following: "[I]n certain situations cities, like *private* individuals, may be estopped, *whether acting in a governmental or proprietary capacity*. . . ." *Id.* at 10, 254 N.W. at 110. (Emphasis added.)

⁴² *Stuart v. City of Neenah*, 215 Wis. 546, 255 N.W. 142 (1934). Cf. *City of Madison v. Frank Lloyd Wright Foundation*, 20 Wis. 2d 361, 372, 122 N.W. 2d 409, 416 (1962).: "The city considered the contract in existence from July 5, 1956, through May 10, 1962, at which time, by resolution it terminated the contract. It would be a serious miscarriage of justice to allow the city at this time to assert the non-validity of the contract."

⁴³ *Stuart v. City of Neenah*, *supra* note 42, at 549, 255 N.W. at 144 (1934).

However, the application of the doctrine is not absolute. Since the doctrine of estoppel is equitable in nature, care must be taken that other rules are not violated. The first important rule relates to ultra vires contracts, which are, as has been stated, contracts beyond the grant of power to the municipality or expressly prohibited by constitution, statute, or charter.⁴⁴ At least one authority states that a city may not be estopped to deny the validity of a contract that is ultra vires in the sense that it is not within the power of the municipality to make, because estoppel or any other equitable principal may not be invoked against a governmental body where it would operate to defeat the effective operation of a policy adopted to protect the public.⁴⁵ In Wisconsin, an ultra vires contract, ultra vires because the municipality lacked power due to a constitutional prohibition, has been described as "illegal and void."⁴⁶ Use of such language indicates that a Wisconsin court would not invoke estoppel to defeat the effective operation of a constitutional provision.

Even where the contract is *intra vires*, or within the scope of the power of the municipality and not expressly prohibited, but defectively executed because of non-compliance with the particular statutory requirement of certain formalities in letting the contracts,⁴⁷ estoppel will not be invoked against the municipal corporation.

Although it has been held that in certain situations cities, like private individuals, may be estopped, whether acting in a governmental or proprietary capacity, we have found no decision of this court in which it has been held that a city may incur municipal liability by estoppel where the applicable *mandatory* statutes have not been complied with. To so hold would operate to nullify the several statutes which have been enacted by the legislature for the purpose of safeguarding the interests of municipalities. The whole tenor of our decisions has been to require municipal corporations implicitly to obey the law in regard to the letting of contracts or the incurring of municipal liability, and to deny to claimants against municipalities recoveries unless the law relating to the making of municipal contracts has been fully complied with.⁴⁸

In the case of *Federal Paving Corp. v. City of Wauwatosa*,⁴⁹ it was further stated:

This principle [*i.e.*, that the laws with respect to the letting of contracts must be complied with] also makes impossible application of the doctrine of estoppel as a means of binding a municipality. Where creation of a contract in any but a specified way

⁴⁴ Cf. note 4 *supra*.

⁴⁵ 10 McQUILLIN, *op. cit. supra* note 1, §29.104, at 424.

⁴⁶ *City of Kiel v. Frank Shoe Mfg. Co.*, *supra* note 6, at 597, 4 N.W. 2d at 119 (1942).

⁴⁷ Cf. statutes cited notes 11-14 *supra*.

⁴⁸ *L. G. Arnold, Inc. v. Hudson*, *supra* note 41, at 10, 254 N.W. at 111 (1934).

⁴⁹ 231 Wis. 655, 286 N.W. 546 (1939).

is prohibited, the city may not by waiver, ratification, or acts ordinarily amounting to an estoppel give vitality to the prohibited contract or become bound upon principles of restitution.⁵⁰

So it appears that the rule in Wisconsin is that failure to comply with a particular statutory formality will preclude recovery even indirectly by an estoppel to deny the validity of the contract. While it appears that it is again important to distinguish between "mandatory" and merely "directory" statutes, it is equally important to recognize that estoppel is an equitable doctrine and all factors should be considered when estoppel is invoked.⁵¹ So while "care must be taken that other principles of law are not violated,"⁵² and while recovery will not be allowed unless the laws relating to municipal contracts have been fully complied with, it is unlikely that anyone would be seeking the aid of equity in the first place if the law had been complied with.

If this be the rule in Wisconsin,⁵³ then certain contracts from their very nature could never be the basis for applying the doctrine of estoppel; *e.g.*, where there has been a violation of the "lowest responsible bidder" statute because it is no longer possible to comply with the requirements of the statute.

It is also interesting to note that while the cases hold that estoppel will not lie, section 62.295 of the Wisconsin statutes, permitting reasonable payment for work done in good faith, has much the same impact as invoking estoppel and is probably directed in part at the harshness of the common law rule in Wisconsin.

(b) Ratification

At the outset, the doctrine of ratification must be distinguished from quasi-contractual recovery, since there is a different legal basis for both and a difference in the measure of recovery; *e.g.*, the contract price in the former and the amount of unjust enrichment in the latter case. Still, many courts use the terms mistakenly, speaking of ratification and then only allowing recovery in quasi-contract. This may be due in part

⁵⁰ *Id.* at 660-61, 286 N.W. at 548.

⁵¹ "The author is inclined to eschew generalizations that recovery is or is not possible in favor of a fuller consideration of the justice and significance of permitting this relief depending upon the particular mandate disregarded and social factors underlying the individual requirement." 1 ANTEAU, *op. cit. supra* note 10, §10.02, at 650.

⁵² 10 McQUILLIN, *op. cit. supra* note 1, §29.104, at 426.

⁵³ Compare with *Eau Claire Dells Improvement Co. v. Eau Claire*, *supra* note 41, at 257, 179 N.W. at 9: "Plaintiffs are not seeking to have their acts legalized by or through the conduct of the city, for this they cannot do. But they are saying to the city that, be our acts lawful or unlawful, you have no right to complain thereof, because you have not only silently acquiesced therein with knowledge of all the facts, but you have actively encouraged and permitted us to make these valuable improvements, and you are therefore estopped to forfeit the contract through conduct permitted and encouraged by you, and resulting indirectly to your benefit through building up your city as a manufacturing center and adding hundreds of thousands of dollars to your tax roll."

to the fact that the amount of recovery may happen to be the same in both instances.⁵⁴

Much the same thinking prevails in Wisconsin with respect to ratification as it does with respect to estoppel. For example, as in the case of estoppel, the doctrine of ratification will not be allowed to validate the contract if the contract is *ultra vires* in the strict sense.⁵⁵ Where, however, it can be demonstrated that the municipality has the power to authorize acts or contracts in the first instance, it can ratify them after they have been entered into defectively.⁵⁶ Also, acts and contracts of its unauthorized agents may be ratified by a municipal corporation with the equivalent effect of "previous authority," but only if the agents acted within the scope of corporate power.⁵⁷

Where a particular statute operates as a prohibition against the creation of a liability in any other than the specified way such as by passage of an ordinance, even if the statutory directions are construed to be "mandatory" and have not been followed, recovery may be had *on the contract*⁵⁸ if the municipality subsequently so conducts itself that it can be deemed to have ratified the contract. Of course, this only holds true if the contract is susceptible to ratification.⁵⁹ As we have seen, this is not the case with estoppel.

How, then, does the municipality "subsequently so conduct itself that it can be deemed to have ratified the contract"? The answer is found in *Ellerbe & Co. v. City of Hudson*,⁶⁰ where Justice Currie states:

[W]hen ratification is relied upon in order to enforce a contract against a municipality, which contract was entered into without authority of the proper municipal officer, board, or gov-

⁵⁴ Compare *City of Texarkana v. Keeney*, 50 S.W. 2d 339 (Tex. Civ. App. 1932), and *Shulse v. City of Mayville*, 223 Wis. 624, 271 N.W. 643 (1937), wherein our supreme court stated: "If the contract made by the mayor with the plaintiff had been in fact ratified, the defendant would be liable at the contract rate if the rate had been fixed. Upon principles of unjust enrichment the defendant is liable only for the amount of the benefits received." *Id.* at 633, 271 N.W. at 647.

⁵⁵ "It is one thing to apply the doctrine of irregular use of a power that exists, and quite another thing to create a forbidden power by a forbidden act. The former is nothing more than a waiver of the regularity of the exercise of a power which the municipality may exercise—a valid ratification of an irregular act because there was the power to exercise it regularly. The latter would be the creation by an unlawful act of a power expressly withheld." *Menasha Wooden Ware Co. v. Winter*, 159 Wis. 437, 440, 150 N.W. 526, 528 (1915).

⁵⁶ *Murphy v. Paull*, *supra* note 36, at 96, 212 N.W. at 404 (1927).

⁵⁷ *Ellerbe & Co. v. City of Hudson*, *supra* note 16, at 155, 83 N.W. 2d at 704.

⁵⁸ See note 54 *supra*.

⁵⁹ As suggested previously, there are some contract situations, such as where there has been a violation of a "lowest bidder" statute, which are inherently incapable of ratification by subsequent corporate action because it is no longer possible to comply with the requirements of the statute. To allow a so-called "ratification" would be circumventing both the statute's formalities and the very purpose for which the statute was passed.

⁶⁰ 1 Wis. 2d 148, 83 N.W. 2d 700 (1956), *rehearing denied*, 85 N.W. 2d 663 (1957).

erning body, the acts relied upon for ratification must be sufficient to have supported a contract originally.⁶¹

With regard to the mode of ratification, the rule is that a municipality may ratify its defective contracts (a) by express act or (b) by conduct.⁶² Both methods imply some active conduct on the part of the municipality. Mere passivity on the part of the municipality, at least in Wisconsin, is not sufficient, for there cannot be ratification by acquiescence.⁶³

For example, to illustrate an *express act* of ratification: if there had not been a valid ordinance passed authorizing the contract, where such an ordinance was required, then it may be ratified only by a subsequent ordinance. Or, under certain circumstances, ratification may be accomplished by a resolution of the common council pursuant to a curative act. Such is the case in Wisconsin, though our statute⁶⁴ only allows recovery for the reasonable value of the "benefits or improvements" and not at the contract rate which is the usual measure in cases of ratification.⁶⁵ Similarly illustrative is the case of *MacLeod v. Washburn*,⁶⁶ which was an action to recover for services of an attorney in litigation connected with assessments for construction of a sewer. Since there was no elected or appointed city attorney, the mayor engaged the plaintiff to defend ten suits against the city. The city council knew of and acquiesced in the employment and the performance of the services, and finally by resolution acknowledged the lawful employment of the attorney and discontinued his services. The court held the resolution to be a ratification by the council of that which it had authority to do in the first place. The court also upheld the plaintiff's action for the *reasonable value* of his services, but apparently only because no contract rate had been set when the plaintiff was engaged.

However, a more difficult problem is presented where, for example,

⁶¹ *Id.* at 156, 83 N.W. 2d at 705.

⁶² 10 McQUILLIN, MUNICIPAL CORPORATIONS §29.103, at 415 (3d ed. 1950).

⁶³ "It must be held that where there is no formal ratification there is no ratification at all. Ratification by acquiescence permits the city to become liable on a contractual basis in a manner other than that specified by statute." *Shulze v. City of Mayville*, *supra* note 54, at 634, 271 N.W. at 649.

⁶⁴ WIS. STAT. §66.295 (1961): "*Authority to pay for public work done in good faith.* (1) Whenever any city, village or county has received and enjoyed or is enjoying any benefits or improvements furnished prior to December 1, 1960, under any contract which was no legal obligation on such city, village or county and which contract was entered into in good faith and has been fully performed and the work has been accepted by the proper officials, so as to impose a moral obligation upon such city, village or county to pay therefore, such city, village or county, by resolution of its governing body and in consideration of the moral obligation, may pay to the person furnishing such benefits or improvements the fair and reasonable value of such benefits and improvements." This statute was held valid in *Leuch v. Egelhoff*, 260 Wis. 356, 51 N.W. 2d 7 (1952).

⁶⁵ *Shulze v. City of Mayville*, *supra* note 54, at 633, 271 N.W. at 647.

⁶⁶ 178 Wis. 379, 190 N.W. 124 (1922).

there has been a failure to advertise for bids⁶⁷ or make a prior appropriation for the contract as required by statute,⁶⁸ and the contract is either (a) incapable of ratification⁶⁹ or (b) there has been no subsequent action on the part of the municipality sufficient to constitute a ratification thereof.

If the requirement that rendered the attempted contract defective is only "directory," then it is likely that the court will waive the defect and no problem of ratification will arise. But if the requirement is so essential to validity of the contract that it is construed to be mandatory, then recovery will always be denied in a case such as one which involved a violation of the "lowest bidder" statute because it is no longer possible to comply with the statute. Hence, such a contract is incapable of ratification no matter what action the municipality takes. In the same way, if a contract is rendered defective because of non-compliance with a statute that affords the same type of protection as the "lowest bidder" statute, and the contract is capable of ratification, recovery will be denied when the attempted ratification is by an act of less dignity than that which would have been sufficient to bind the municipality at the outset. Otherwise, the very purpose for which such statutes were passed would be circumvented.⁷⁰

QUASI-CONTRACTUAL RECOVERY

Once again, the fundamental difference between *ultra vires* and *intra vires*, but improperly entered into, contracts bears on the possibilities of recovery. It can be said as a rule that on a contract that is *ultra vires* because the municipality had no contractual power whatever with regard to the subject matter of a purported contract, there can be no recovery on principles of quasi-contract for the reasonable value of goods or services, even when a benefit has been conferred.⁷¹

However, there is a wide split of authority as to whether quasi-contractual recovery should be allowed when the contract is *intra vires*, or within the general powers of the corporation to make, but there has been a failure to observe the statutory requirements in the formation of the contract.

Quasi-contractual recovery is usually denied where the clear word-

⁶⁷ *Wagner v. City of Milwaukee*, 196 Wis. 328, 220 N.W. 207 (1928).

⁶⁸ *Ellerbe & Co. v. City of Hudson*, note 60 *supra*, at 157, 83 N.W. 2d at 705.

⁶⁹ See note 59 *supra*.

⁷⁰ "The attempt of the city council to ratify the acts of the city officers and to direct them to continue the publication of the proceedings 'without the intervention of a formal contract' was so clearly in contravention of the plain mandate of the charter as to be nugatory and to confer no power upon the city officials to make these payments. To hold that the city can, without compliance with the provisions of its charter as to letting contracts to the lowest bidders, ratify and validate illegal action on the part of city officials, would confer upon the common council of the city the power to nullify the provisions of its fundamental law at will." *Wagner v. City of Milwaukee*, note 67 *supra*, at 332, 220 N.W. at 209 (1928).

⁷¹ 1 ANTIEAU, MUNICIPAL CORPORATION LAW §10.03, at 651 (1958).

ing or the judicial interpretation of a local constitution, statute, or charter prohibits the municipality from contracting in other than a specified way. This is the general rule,⁷² with which Wisconsin is in complete accord.⁷³

The reasoning, as has been stated earlier, is that these statutes have for their purpose the protection of public funds from extravagance, favoritism, and corruption on the part of the municipality and its officials,⁷⁴ and any recovery whatsoever in the face of their violation would render the statute's protection useless.

It may be of interest to note in examining such statutes whether their requirements apply to methods of entering into a "contract" or any method of incurring "liability." If the emphasis in the statute is on "contract" and the alleged agreement is held void for failure to comply with the statute, a strong argument could be made for recovery in quasi-contract. Such recovery would not involve any method of contracting as such, since the quasi-contractual remedy is to prevent unjust enrichment and is imposed by law, not by the intent or conduct of the parties.⁷⁵ The end result is like or merely resembles contractual relief. Other than this resemblance, a quasi-contract really has little to do with contract theory today. One of the reasons for the misapplication is the failure to distinguish between an obligation *implied in fact*, which is a contract, and an obligation *implied in law*, which is a quasi-contract so called, but not really a contract at all.⁷⁶ Hence, it cannot be

⁷² RESTATEMENT, RESTITUTION §62, comment *b* (1937): "The rule may also apply in the protection of the citizens of a community where a contract which is contrary to the provisions of a statute has been made by its officers on its account. Thus where a statute provides that a municipality can contract only after specified precautions have been taken or only with the lowest bidder, a person who renders services to a municipality under a contract violating the terms of such a statute is not entitled to receive either the contract price or the reasonable value of his services. . . ." *Id.*, illustration 2: "In State X a statute provides that no contract for work to be done for a municipality where the contract price exceeds \$10,000 shall be made unless it has been passed upon at the regular session of the municipal council duly called. A contracts with the city of Y for dredging for the price of \$50,000, the contract being approved only by the municipal officers. Upon completion of the work, A is not entitled to reasonable compensation from Y although he believed that the council had approved the contract or although he did not know of the statute."

⁷³ Federal Paving Corp. v. City of Wauwatosa, *supra* note 49; Probst v. City of Menasha, 245 Wis. 90, 13 N.W. 2d 504 (1944), noted in 29 MARQ. L. REV. 70; and Ellerbe & Co. v. City of Hudson, note 60 *supra*.

⁷⁴ See cases and statutes cited notes 11-16 *supra*.

⁷⁵ In Board of Comm'rs v. Greensburg Times, 215 Ind. 471, 19 N.E. 2d 459, 462-63 (1939), the court stated: "The principle upon which this appellee is entitled to recover is known in law as the doctrine of quasi or constructive contracts. Quasi contracts are a class of obligations which are imposed or created by law without regard to the assent of the party bound. They rest solely on a legal fiction and are not contracts at all in the true sense, for there is no agreement. They arise from law or natural equity and are clothed with the semblance of contracts merely for the purposes of the remedy."

⁷⁶ RESTATEMENT, CONTRACTS §5, comment *a* (1932): "Implied contracts must be distinguished from quasi-contracts, which also have often been called implied contracts or contracts implied in law. Quasi-contracts, unlike true contracts,

said that there would be any recovery on the contract held void for non-compliance with the statute in question. But if the interpretation is that the municipality cannot incur "liability" except as authorized by statute, that interpretation would seem broad enough to regulate even liability in quasi-contract. The reasoning is that while the contract and the quasi-contract are distinguishable by definition, they both result in a type of liability⁷⁷ which should be within the contemplation of the statute. This would seem to be more in keeping with the intent of the restrictions and would also encourage greater care in protecting the municipality. In *Probst v. City of Menasha*,⁷⁸ our court reiterated the rule that "a city cannot become *liable* except in some manner authorized by law."⁷⁹

It might be worth noting, however, that the typical municipal situation is one where a contract was attempted, but the attempt failed. Thus, the actual situation is perhaps closer to contract law than the situations involving private quasi-contractual recoveries where there was not even an attempt to enter into a consensual relationship.

In the same way, in the absence of prohibitions by constitution, statute, or charter, quasi-contractual recovery is usually denied where recovery would violate the spirit of a strong public policy⁸⁰ such as the common law and statutory prohibitions against "officer interest" contracts.⁸¹

On the other hand, a number of courts have held that a municipal corporation is bound to the same principles of honesty and fairness as a private corporation or an individual and can thus be relied on to do what it has promised, and that ordinary equity principles should be applied in any event when a municipal corporation is sought to be bound in quasi-contract.⁸²

The general rule in those states where quasi-contractual recovery is permitted is that it will be allowed only (a) when the municipal corporation has received some tangible benefit, either in the form of money, materials, or services, and (b) when to allow recovery would not nullify the safeguards to the taxpayer provided by a statute such as a "lowest bidder" statute or a "prior appropriation" provision.⁸³ The reasoning for these two limitations is that the benefit will be used as

are not based on the apparent intention of the parties to undertake the performance in question, nor are they promises. They are obligations created by law for reasons of justice. Such obligations were ordinarily enforced at common law in the same form of action (assumpsit) that was appropriate to true contracts, and some confusion with reference to the nature of quasi-contracts have been caused thereby."

⁷⁷ But differ as to the measure of recovery; *cf. Shulze v. City of Mayville, supra* note 54.

⁷⁸ 245 Wis. 90, 13 N.W. 2d 504 (1944).

⁷⁹ *Id.* at 94, 13 N.W. 2d at 506.

⁸⁰ RESTATEMENT, RESTITUTION §62 (1937).

⁸¹ RHYNE, MUNICIPAL LAW §10-4, at 260 (1957).

⁸² *Sluder v. City of San Antonio*, 2 S.W. 2d 841 (Tex. Comm. App. 1928).

⁸³ WOODWARD, QUASI-CONTRACTS §161, at 261 (1913).

the measure of recovery if relief is given and that quasi-contract being equitable, it will not apply, as we have seen with equitable remedies, where another law would be violated. Hence, even if it can be shown in a state where quasi-contractual recovery is allowed that no statutory safeguard is being violated, recovery may still be denied because it cannot be shown that the municipal corporation has received any benefit.⁸⁴ In addition, by statute Wisconsin permits cities to pay to persons furnishing benefits or improvements the fair and reasonable value thereof when they were provided under a contract which was not legally binding.⁸⁵ The extent, however, to which the Wisconsin statute goes in curing defects is unclear. Will it cure only defects which a court may have waived in any event; or will it cure a violation of the strong, protective "low bid" statute, which, as we have seen, are mandatory and not susceptible to hindsight correction? The latter is suggested in the case of *Leuch v. Egelhoff*,⁸⁶ where the defendant had rendered tree trimming service without complying with the "lowest bidder" statute, and the court affirmed an order overruling plaintiff's demurrer. The amended answers to which the plaintiff had demurred set forth as a defense the provisions of section 66.295 of the Wisconsin statutes as amended in 1949, and the passage and adoption by the common council of the city of Cedarburg of a resolution enacted January 10, 1950, in conformity with such statute, legally ratifying the payment of the \$5,320 to the defendant and reciting that the work and labor had been performed by the defendant in good faith.

Still, a few jurisdictions always deny quasi-contractual recovery where the attempted contract is invalid for non-compliance with any statutory requirement, even where the requirement is only "directory."⁸⁷ The practice of making the distinction between "mandatory" and "directory" statutes as the basis for allowance or denial of quasi-contractual recovery has been criticized by at least one authority.⁸⁸

⁸⁴ *First Nat'l Bank v. Joint School Dist.*, 187 Wis. 547, 203 N.W. 762 (1925). It may well be that courts are unwilling to find that what the municipal corporation received was a "benefit" for which recovery of its value can be had. 1 ANTIEAU, *op. cit. supra* note 71, §10.01, at 637, citing *Luther v. Wheeler*, 75 S.C. 83, 52 S.E. 874 (1905). However, RESTATEMENT, RESTITUTION §1, comment *b* (1937), states: "The word 'benefit,' therefore, denotes any form of advantage."

⁸⁵ WIS. STAT. §66.295 (1961).

⁸⁶ 260 Wis. 356, 51 N.W. 2d 7 (1952).

⁸⁷ *Louisville Extension Water Dist. v. Sloss*, 314 Ky. 500, 236 S.W. 2d 265 (1951).

⁸⁸ "It is the conclusion of this author that there should be no general position that, regardless of the violation of any particular constitutional, statutory or charter provision, quasi-contract recovery should or should not be granted. Nor is there any merit in the oft-repeated view of some courts and commentators that quasi-contract recovery should be granted if only 'directory' mandates are overlooked but denied when 'mandatory' requirements are disregarded. Not only are there inadequate guides to such dichotomizing, but there is great disagreement and uncertainty between the courts of the various states as to the proper level for a particular requirement. Furthermore, there is no justification and less reason for superficial generalizations from cases in which a relatively insignificant requirement was overlooked, or for trans-

The measure of recovery where quasi-contract relief is granted is the amount of enrichment or the value of benefits received by the municipality, and not the amount fixed by the promise.⁸⁹ While this appears to be the general rule,⁹⁰ there is authority for allowing recovery by the contractor of reasonable value less "unconscionable profits,"⁹¹ and "reasonable expense of the performance of services actually rendered, but not in excess of its actual expenses, and deleting profits."⁹²

An interesting thing often occurs when the situation is carried one step further; that is, when the city pays a private contractor for work performed under a void contract. If the contractor were suing, we have seen that relief, sometimes even in quasi-contract, would most likely be denied. Where, however, the municipality is suing the private contractor for money paid on an allegedly void or defective contract, recovery is generally denied the municipality.⁹³ The net result is that the contractor gets paid the contract price; and the statute or public policy which was designed to protect the taxpayer, and which was probably the sole factor in rendering the contract void or defective in the first instance, is overridden by the municipal error in making the payment.

The rule in Wisconsin denying recovery has been stated as follows: Where a municipality has received money, goods, or services, and accepted the benefits, and it had power had it proceeded in the statutory way to acquire the money, goods, and services *and it has paid therefor, an action will not lie to recover back the money into the city treasury.*⁹⁴ (Emphasis added.)

Can this apparent conflict be reconciled? One view suggests that quasi-contractual principles do not even apply once the city has paid:

Summarizing briefly, it would appear that the reason for the anomalous rule denying quasi-contract recovery from municipalities for goods and services rendered under contracts declared illegal, and at the same time denying recovery to the municipality for payments made therefor, is that in the first case a strong public policy operates to prevent recovery in a case otherwise

posing decisions involving one statutory or charter requirement into situations involving others. There must be an insistence upon a conscious weighing of social utilities by the judiciary when a particular mandate has been overlooked, a consideration of the reasons behind particular rules and whether they can be respected and even attained by quasi-contract relief, a reflection upon the degree of culpability of the private contractor and an appraisal of whether quasi-contractual relief will be an adequate deterrent to the practice in its denial of profits. It should be obvious that the answers when one requirement is overlooked are ordinarily quite inapplicable and irrelevant in a consideration of others." 1 ANTIEAU, *op. cit. supra* note 71, §10.01, at 646.

⁸⁹ Shulse v. City of Mayville, *supra* note 54, at 633, 271 N.W. at 647 (1937).

⁹⁰ 1 ANTIEAU, *op. cit. supra* note 71, §10.01, at 637.

⁹¹ Sluder v. City of San Antonio, *supra* note 82, at 842.

⁹² Hudson City Contracting Co. v. Jersey City Incinerator Authority, 17 N.J. 297, 304, 111 A. 2d 385, 391 (1955).

⁹³ Annot., 140 A.L.R. 550 (1942).

⁹⁴ Federal Paving Corp. v. Wauwatosa, *supra* note 49, at 658, 286 N.W. at 548.

clearly within the principles of such recovery, while the second case is not within principles of quasi-contract recovery. There the defendant has not been unjustly enriched, but has only acquired by the action of the municipality in paying him what is justly due, and the courts consider that to compel him to pay it back would be making the court an 'engine of oppression rather than an instrument of justice.' In other words, the courts seem to have no inclination to make a public policy which defeats recovery in a case otherwise within quasi-contract recovery principles.⁹⁵

Another view suggests that a distinction should be made as to whether the contract is *ultra vires*, or *intra vires* but merely defectively executed. In the latter case, one court held that recovery of sums paid by the municipality should be denied, because the court thought the municipality was in *pari-delicto* with the private party.⁹⁶

The argument could also be made that recovery is denied because the municipality has placed itself in the position of a volunteer⁹⁷ by payment on a contract in which, by definition, it has no interest⁹⁸ whatsoever for the reason that it has no power to so contract or was prohibited from contracting in other than a manner prescribed by statute.

One authority reconciles the divergence by an inquiry into whether a benefit was conferred or not. If no benefit was received by the city, it would seem proper for the city to successfully maintain an action to recover back into the municipal treasury any money so paid out.⁹⁹ Then, the question might turn on what constitutes a benefit.¹⁰⁰ If it should so turn, the more equitable answer may be found because, in most instances, an inquiry beyond a holding of *ultra vires* or *intra vires* will show that a benefit has been conferred for which no compensation has been paid.

In any event, whatever the reasoning, once a municipality has paid the private contractor no relief is given, even by courts which would deny help to the private contractor where he is trying to enforce the attempted contract against the municipality. The results are even more strange when squared against a statute or charter provision which has for its purpose the protection of the municipality financially. It seems that dismissal of the municipal suit to recover money mistakenly paid out will hardly accomplish this purpose.

SUMMARY

A contract which is found to be *ultra vires* will preclude recovery on the express contract, or by estoppel or ratification, and equitable

⁹⁵ Comment, 30 MARQ. L. REV. 278 (1946).

⁹⁶ City of St. Paul v. Parking Meter Co., 229 Minn. 217, 39 N.W. 2d 174 (1949).

⁹⁷ "A person who officiously confers a benefit upon another is not entitled to restitution therefor." RESTATEMENT, RESTITUTION §2 (1937).

⁹⁸ *Id.*, comment a.

⁹⁹ 10 McQUILLIN, *op. cit. supra* note 62, §29.111, at 508.

¹⁰⁰ See note 84 *supra*.

principles will deny recovery in quasi-contract. The so-called *intra vires* contract which has been defectively executed will result in an analysis of that which rendered it defective. If the irregularity of the method of entering into the contract is such as to deprive the municipality of the protection of a safeguard against the extravagance or corruption of its officers, then failure to comply with the statutory mode of entering into the contract or disregard of a strong public policy will render the contract void, and recovery either on the contract or a quasi-contractual principle will be denied.

In some instances, the invocation of the estoppel principle will be allowed if the law that has been disregarded is later complied with. So, too, ratification will work to enforce the contract if the municipality's governing body ratifies by an act of the same dignity and providing the same protection as that necessary to enter the contract in the first instance.

Of course, if the statute not complied with is held merely directory and not mandatory, the courts will usually waive the defect.

However, where the municipality pays the private contractor, generally, with the possible exception of the *ultra vires* contract, an action by the municipality will not lie against the private contractor to recover the money so paid out, even where it operates to deprive the public of a safeguard provided for by statute.

JOHN D. FINERTY